

No. 22-888

IN THE
Supreme Court of the United States

JAMES R. RUDISILL,
Petitioner,

v.

DENIS R. McDONOUGH, SECRETARY OF
VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF IRAQ AND AFGHANISTAN
VETERANS OF AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE¹

Iraq and Afghanistan Veterans of America is a nonprofit and nonpartisan organization dedicated to improving the lives of Iraq and Afghanistan veterans and their families. It is the first and largest national veterans service organization dedicated exclusively to current and former volunteer servicemembers. Its membership comprises more than 425,000 active veterans and civilian supporters across all 50 states.

From its founding in 2004, IAVA has worked vigorously to support and expand veterans' benefits and to protect the GI Bills in particular. In 2007 and 2008, IAVA was a leading voice among veterans service organizations in the media and in Congress in support of the Post-9/11 GI Bill then under debate. IAVA's research at the time—which IAVA published among Congressional staffers and the public—indicated that, if enacted, the Post-9/11 GI Bill's enhanced education benefits would provide a critical boost to the military's flagging recruitment efforts. Together with other veterans service organizations and allies in Congress, IAVA helped drive the bipartisan consensus that propelled the Post-9/11 GI Bill into law.

As one of the instigating forces behind passage of the Post-9/11 GI Bill, and as the voice of more than

¹ Pursuant to this Court's Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

3 million post-9/11 veterans, IAVA has a unique interest in the scope of that bill's education benefits—the central issue in this case. As IAVA predicted before its enactment, the Post-9/11 GI Bill has been key to the armed forces' ability to recruit and maintain today's all-volunteer force. Preserving this recruitment asset requires honoring the scope of benefits Congress resolved to award the men and women who volunteer to serve our Nation.

SUMMARY OF ARGUMENT

Volunteers are the lifeblood of the Nation's armed forces. Without a steady stream of eligible and high-quality recruits, the United States military cannot maintain readiness in service of the national defense. Preserving that stream of recruits depends in large measure on the education-benefit incentives provided by the Post-9/11 GI Bill, which represents the greatest education investment in veterans since World War II.

Education benefits are powerful motivation for those considering service. Congress recognized as much in passing the Post-9/11 Bill, which sought not only to reward wartime service following the advent of the War on Terror, but also to provide incentives for enlistment. That bill's benefits are the greatest ever offered to servicemembers, far surpassing predecessor legislation like the Montgomery GI Bill, which was designed for peacetime service.

The importance of strong recruitment—and the generous education benefits that support it—has only grown in recent years. The Nation's armed forces face

the most challenging recruitment landscape in decades. At the same time, education benefits have become more desirable. Today, more Americans seek higher education, yet education costs have skyrocketed. The opportunity to seek such education courtesy of GI Bill benefits, and especially the generous Post-9/11 Bill, thus has become an increasingly powerful motivator to volunteer to serve. It is critical that the generous Post-9/11 program that Congress established be preserved and not contracted.

Importantly, when Congress passed the Post-9/11 Bill in 2008, the Post-9/11 Bill was made retroactive to service after September 11, 2001. This created a class of servicemembers whose service had previously entitled them only to benefits under the Montgomery GI Bill and who, overnight, qualified for Post-9/11 benefits, too. Recognizing that the newer program's benefits were far more generous, Congress crafted an upgrade mechanism that permitted servicemembers to exchange their unused Montgomery benefits to Post-9/11 benefits.

The en banc Federal Circuit decision below transforms that simple upgrade mechanism—plainly designed to permit servicemembers with a single qualifying period of service to shift the benefits received therefor from one program to the other—into a penalty scheme for servicemembers who serve for multiple periods. This punitive reading of the Post-9/11 Bill runs counter to Congress's intent. It penalizes, rather than rewards, those who volunteer to serve, and it materially erodes the “enhanced” benefits Congress provided in this bill specifically to encourage recruitment.

The en banc decision of the Federal Circuit harms veterans, weakens benefits, and damages the military’s key recruitment tool. That decision should be reversed.

ARGUMENT

In 1968, Richard M. Nixon ran for president on the promise to abolish the Selective Service. The draft had become emblematic of inequity—believed to liberally permit deferments only for young men of higher socioeconomic standing—and the deep unpopularity of the Vietnam War worsened public sentiment.²

After he was inaugurated, President Nixon established a commission to study possible transitions to an all-volunteer force.³ That commission recommended an all-volunteer force, “supported by an effective stand-by draft.”⁴ The commission concluded that an all-volunteer force “will strengthen our freedoms, remove an inequity now imposed on the expression of the patriotism that has never been lacking among our youth, promote the efficiency of the armed forces, and enhance their dignity.”⁵ To achieve such a force, the commission recommended improving pay and conditions of service

² *The Military Draft During the Vietnam War*, Mich. in the World, <https://bit.ly/300bxkD> (last visited Aug. 9, 2023).

³ Bernard Rostker, *I Want You!: The Evolution of the All-Volunteer Force*, 76-78 (2006), <https://bit.ly/3qq30vS>.

⁴ Thomas Gates et al., *Report of The President’s Commission on an All-Volunteer Armed Force*, 5-6 (Feb. 1970), <https://bit.ly/45quL6t>.

⁵ *Id.*

sufficiently to encourage the necessary volunteers from among eligible and qualified candidates.⁶

Following these recommendations, President Nixon successfully persuaded Congress to phase out the draft, and induction authority ended on July 1, 1973.⁷ Since then, more than 11 million men and women have voluntarily joined active-duty service,⁸ with more than 1.3 million serving today.⁹

I. EDUCATION BENEFITS ARE CRUCIAL TO TODAY'S ALL-VOLUNTEER ARMED FORCES

Without sufficient, high-quality volunteers, this country's armed forces cannot mount a national defense. Yet maintaining an all-volunteer force has been a near-constant challenge for the Nation. Today, the U.S. military "is facing its most challenging recruitment environment in 50 years."¹⁰ In this historically adverse environment, the incentive provided by the Post-9/11

⁶ *Id.* at 7.

⁷ Rostker, *supra* note 3, at 96. Before that sunset date, Secretary of Defense Melvin Laird announced that "the Armed Forces henceforth will depend exclusively on volunteer soldiers, sailors, airmen and Marines." Amy Zipkin, *The Military Draft Ended 50 Years Ago, Dividing a Generation*, Wash. Post (Jan. 27, 2023), <https://wapo.st/3rZKGdj>.

⁸ C. Todd Lopez, *All-Volunteer Force Proves Successful for U.S. Military*, DOD News (Mar. 2, 2023), <https://bit.ly/47o42Jh>.

⁹ U.S. Gov't Accountability Off., GAO-23-106551, *DOD Active-Duty Recruitment and Retention Challenges* (2023), <https://bit.ly/3KuInW0>.

¹⁰ *Id.*

program is critical. Three quarters of veterans invoke education benefits as an important reason to their decision to enlist.¹¹ If the Federal Circuit’s anti-veteran view is affirmed, the Nation’s largest veterans’ benefits program will be undermined, and its ability to attract qualified personnel will be materially harmed.

A. The Armed Forces Face Historic Challenges With Recruitment

To preserve military capabilities and readiness, the armed forces depend upon a consistent inflow of high-quality volunteers. Yet the population of interested and eligible candidates is shrinking.

According to a Pentagon survey from 2022, only 9% of people ages 16 to 21 would consider military service; this is down from 13% before the pandemic.¹² And less than a quarter of young American adults are both physically fit and lack a disqualifying criminal record.¹³ Those statistics help explain the now decades-long recruitment challenges faced by the Nation’s military. At times, the armed forces have had to take extreme measures.

¹¹ Pew Rsch. Ctr., *The Military-Civilian Gap: War and Sacrifice In The Post-9/11 Era* (Oct. 2011), <https://pewrsr.ch/3qvd6vn>.

¹² Ben Kesling, *The Military Recruiting Crisis: Even Veterans Don’t Want Their Families to Join*, Wall St. J. (June 30, 2023), <https://on.wsj.com/47qWt4W>.

¹³ Dave Philipps, *With Few Able and Fewer Willing, U.S. Military Can’t Find Recruits*, N.Y. Times (July 14, 2022), <https://nyti.ms/3DPb50d>.

At the height of the Iraq War, for example, recruitment and retention rates were so poor the Army imposed a “stop loss” order, requiring personnel to extend their overseas deployments beyond the expiration of their voluntary commitments.¹⁴ And in recent months, the Army, rather than lower its recruitment standards, cut its active-duty end strength by about 10,000 servicemembers.¹⁵

These challenges are not limited to one branch of the armed forces. In April 2023, the Vice Chiefs of the Army, Navy, and Air Force reported that each of their branches expected to fall short of their yearly recruitment targets.¹⁶ The Army and Air Force expect to each fall short by 10,000 enlistees, and the Navy expects to fall short by about 6,000. In the same period, Reserve and National Guard units generally fell even further behind: the Navy Reserve met only 67% of its recruitment target, the Air Guard 57%, the Air Reserve 62%, and the Army Reserve 58%. Only the Army Guard came close to target, with 90%.¹⁷

¹⁴ Tom Squitieri, *Army Expanding ‘Stop Loss’ Order to Keep Soldiers from Leaving*, USA Today (updated Jan. 6, 2004), <https://bit.ly/3Kyomy5>.

¹⁵ Lolita C. Baldor, *Army Cuts Force Size Amid Unprecedented Battle for Recruits*, Associated Press (July 19, 2022), <https://bit.ly/3DNMHMw>.

¹⁶ Jim Garamone, *Vice Chiefs Talk Recruiting Shortfalls, Readiness Issues*, DOD News (Apr. 20, 2023), <https://bit.ly/47l3Har>.

¹⁷ Joe Davidson, *Military Recruitment Lapses Lead to ‘Challenges to National Security’*, Wash. Post (Apr. 21, 2023), <https://wapo.st/3qrsTLG>.

B. Maintaining Robust Education Benefits Is Critical To The Military's Ability To Recruit

Education benefits offered by the GI Bills have long been a core motivator for those volunteering for service. In a 2011 study, 75% of veterans identified education benefits as an “important reason” to volunteer.¹⁸ And education benefits enhance recruitment among highly qualified, education-oriented youth, which are “the target [recruitment] population for the military.”¹⁹

The availability of education benefits also provides volunteers comfort that they will be able to transition successfully back to civilian life when the time comes. In a national survey, 92% of servicemembers agreed or strongly agreed that higher education is central to navigating the transition from military to civilian life.²⁰ In each year between 2012 and 2022, the Post-9/11 program benefitted over 600,000 individuals, with some yearly totals reaching nearly 800,000.²¹ By the

¹⁸ Pew Rsch. Ctr., *supra* note 11.

¹⁹ Barbara A. Bicksler & Lisa G. Nolan, *Recruiting an All-Volunteer Force: The Need for Sustained Investment in Recruiting Resources-An Update*, Strategic Analysis, 30-31 (Dec. 2009), <https://bit.ly/3QqfP3X>.

²⁰ Corri Zoli et al., *Missing Perspectives: Servicemembers' Transition from Service to Civilian Life - Data-Driven Research to Enact the Promise of the Post-9/11 GI Bill*, Syracuse Univ.: Inst. for Veterans & Mil. Fams. (Nov. 2015), <https://bit.ly/3OQ1jkH>.

²¹ Cassandra Dortch, Cong. Rsch. Serv., R42755, *The Post-9/11 GI Bill: A Primer*, 26 (updated Sept. 23, 2021), <https://bit.ly/3Ys5gzl> (2021 and 2022 figures are estimates).

end of 2019, more than 2 million distinct beneficiaries had used that program's education benefits.²²

The primacy of education benefits to the decision to enlist is not surprising. Since the passage of the Montgomery GI Bill in 1984, the number of recent high school graduates seeking four-year college degrees has leapt from 35.8% in 1984 to 43.3% in 2021.²³ With ever-greater numbers of Americans seeking higher education, the price tag for that education has skyrocketed. Students enrolling in a four-year program at a public institution in the 1984–1985 academic year paid, on average, \$3,274 for tuition and fees and a total of \$9,087 for tuition, fees, room, and board.²⁴ By the 2021–2022 academic year, those figures had ballooned to \$9,596 and \$19,920, respectively—increases of about 193% and 119%.²⁵ Students enrolling in private programs have experienced similar dramatic shifts in costs. Enrollment at a four-year program at a private, non-profit institution in the 1999–2000 academic year—the

²² *STUDENT VETERANS: A Valuable Asset to Higher Education*, Syracuse Univ.: Inst. for Veterans & Mil. Fams., 9 (Nov. 2019), <https://bit.ly/3KK70y6>.

²³ *Table 302.10. Recent High School Completers and Their Enrollment in College, by Sex and Level of Institution: 1960 through 2021*, Nat'l Ctr. for Educ. Stat. (Aug. 2022), <https://bit.ly/3QvSTR0>.

²⁴ All amounts in this paragraph are stated in 2021-2022 dollars. *Table 330.10. [CORRECTED] Average Undergraduate Tuition, Fees, Room, and Board Rates Charged for Full-Time Students in Degree-granting Postsecondary Institutions, by Level and Control of Institution: Selected Academic Years, 1963-64 Through 2021-22*, Nat'l Ctr. for Educ. Stat. (Dec. 2022), <https://bit.ly/3YofYH6>.

²⁵ *Id.*

earliest year for which data is available from the National Center for Education Statistics—cost \$25,208 for tuition and fees and \$34,966 including room and board. Just two decades later, students in these programs paid \$37,222 for tuition and fees and \$51,047 including room and board—both increases of over 45%. The costs of graduate school programs have experienced similar increases.²⁶

As more Americans seek an increasingly expensive post-secondary education, the benefits offered by the GI Bills—and particularly the “enhanced ... benefits” available under the Post-9/11 Bill²⁷—have become increasingly meaningful to those considering volunteering for service. Eroding those benefits, which Congress enacted particularly to reward service to this Nation and to encourage volunteers, runs counter to congressional intent and will no doubt harm the critical recruitment efforts on which the U.S. military depends.

²⁶ *Table 330.50. Average and Percentiles of Graduate Tuition and Required Fees in Degree-Granting Postsecondary Institutions, by Control of Institution: 1989–90 Through 2020–21*, Nat’l Ctr. for Educ. Stat. (Feb. 2022), <https://bit.ly/3s8Sp8X> (In 2020–2021 dollars: at a public institution, median of \$5,653 for tuition and fees in the 1999–2000 school year and \$11,666 in 2020–2021; at a private, non-profit institution, average of \$21,953 for tuition and fees in the 1999–2000 school year and \$28,445 in 2020–2021.)

²⁷ 38 U.S.C. § 3301 note.

II. CONGRESS INTENDED THE POST-9/11 GI BILL TO EXPAND, NOT CONTRACT, EDUCATION BENEFITS

“The solicitude of Congress for veterans is of long standing.” *United States v. Oregon*, 366 U.S. 643, 647 (1961). Recognizing the wartime service that followed 9/11, Congress enacted the Post-9/11 GI Bill in 2008, effective retroactively. As with other laws that support the Nation’s veterans, the benefits of the Post-9/11 GI Bill should be “liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Petitioner’s reading of the Post-9/11 GI Bill aligns with this Court’s instruction and with Congress’s goals.

A. The Montgomery GI Bill Provided Limited Education Benefits To Servicemembers

The Montgomery GI Bill program began as a test program in 1984 and was made permanent in June 1987. As a peacetime bill, its core purposes included providing educational assistance to aid in the readjustment of servicemembers to civilian life and providing an incentive for recruitment of qualified personnel for the armed forces.²⁸

That program provides education benefits to servicemembers that can be applied to traditional colleges, as well as to technical and vocational training,

²⁸ 38 U.S.C. § 3001(1), (4).

flight training, and apprenticeship or on-the-job training.²⁹ To qualify for those benefits, servicemembers must meet one of four different categories of criteria. Those criteria generally require the servicemember to have actively and continuously served for two to three years and have a high school diploma, GED, or 12 hours of college credit.³⁰ With rare exception, active-duty personnel also must contribute \$1,200 from their paychecks to the Montgomery program to qualify for any benefits. Reservists can receive reduced benefits without making that contribution.³¹

The amount each beneficiary can receive depends on their length of service, the type of education or training program they select, and under which of the four eligibility categories they qualify.³²

From October 1, 2022, to September 30, 2023, qualifying servicemembers could receive up to \$2,210 per month for up to 36 months for full-time study at colleges, universities, or trade or vocational schools.³³ In total, Montgomery program beneficiaries can receive about \$79,500.

²⁹ Bicksler & Nolan, *supra* note 19, at 30 n.35.

³⁰ *Montgomery GI Bill Active Duty (MGIB-AD)*, U.S. Dep't of Veterans Affairs, <https://bit.ly/3rXeRBT> (last updated July 18, 2023).

³¹ *History of the GI Bill*, MyNavy HR, <https://bit.ly/44QC2wp> (last visited Aug. 7, 2023).

³² *Montgomery GI Bill Active Duty*, *supra* note 30.

³³ *Montgomery GI Bill Active Duty (Chapter 30) Rates*, U.S. Dep't of Veterans Affairs, <https://bit.ly/3OvCbOS> (last updated May 3, 2023).

The Montgomery program also covers training outside of colleges and universities, but at lower rates. Servicemembers can receive \$1,657.50 per month for on-the-job training and apprenticeships (with graduated, lower payments after the first six months); 55% of the cost of lessons completed by mail, online, or by other “correspondence”; and 60% of the approved charges for flight training.³⁴ Servicemembers who served for less than three continuous years and/or enroll less than full time will receive lower monthly payments to cover study at colleges, universities, or trade or vocational schools.³⁵

Eligible servicemembers also can participate in a “Buy-Up” program that allows them to contribute up to an additional \$600 (over and above the \$1,200 generally required to receive any benefits) and receive commensurately higher pay-outs for their education expenses.³⁶

Benefits available under the Montgomery GI Bill generally expire 10 years after the servicemember separates from the military. Extensions are available in limited circumstances, such as if the servicemember reenlists for a later period of active duty of 90 consecutive days or more, experiences an illness or disability that prevented them from attending school, or

³⁴ *Id.*

³⁵ *Id.*

³⁶ \$600 Montgomery GI Bill Buy-Up Program Rates, U.S. Dep’t of Veterans Affairs, <https://bit.ly/3Oyk9vr> (last updated Dec. 1, 2022).

was held by a foreign power after their release from active duty.³⁷

B. The Post-9/11 GI Bill Dramatically Enhanced The Education Benefits Available To Servicemembers

Congress passed the Post-9/11 GI Bill as a reaction to the “especially arduous” service required of enlistees after September 11, 2001, and in recognition of the need for an educational assistance program that provided “enhanced educational assistance benefits . . . worthy of such service.”³⁸ These enhanced benefits were also designed to facilitate military recruitment and retention.³⁹ Indeed, during debate over the Bill, many members of Congress expressed hope that the enhanced benefits available under the Post-9/11 Bill would “ameliorate the [Nation’s] military recruiting challenges” and improve the unemployment rate among younger veterans.⁴⁰

³⁷ *Getting a GI Bill Extension*, U.S. Dep’t of Veterans Affairs, <https://bit.ly/3YpDC5W> (last updated Feb. 14, 2023).

³⁸ Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, § 5002(6), 122 Stat. 2323, 2358.

³⁹ Sec. 5002 of title V of the Supplemental Appropriations Act, 2008, Pub. L. No. 110-252, 122 Stat. 2323, 2358 (GI Bill education benefits have a “positive effect on recruitment”).

⁴⁰ Dortch, *supra* note 21, at 1 (citing *Pending Montgomery GI Bill Legislation: Hearing Before Subcomm. on Econ. Opportunity of the H. Comm. on Veterans’ Affairs*, 110th Cong. 3, 6, 9, 10, 14 (2008); *Hearing on Pending Benefits Legislation: Hearing Before S. Comm. on Veterans’ Affairs*, 110th Cong. 15, 21, 34, 49 (2008)).

The Post-9/11 Veterans Educational Assistance Act of 2008 became effective on August 1, 2009, retroactive to service occurring on or after September 11, 2001, and “approximately double[d] the size of the [education] benefit” available to servicemembers.⁴¹ It represents the “most comprehensive educational benefit package ever offered by the federal government.”⁴²

Beneficiaries are eligible for up to 36 months of postsecondary education, including full tuition and fees at public colleges and universities, or up to \$27,120.05 for tuition and fees for the 2022–2023 academic year at private schools. The Post-9/11 Bill also covers related expenses, like books and supplies, as well as a housing allowance for students attending classes more than half-time.⁴³ Congress later expanded the law to permit application of these benefits to nondegree and apprenticeship programs.⁴⁴

The Post-9/11 Bill thus enhanced the benefits available under the Montgomery Bill in four key respects.

First, the Post-9/11 Bill eliminated the monetary-contribution requirement. So, while participants under

⁴¹ Bicksler & Nolan, *supra* note 19, at 31.

⁴² Cong. Budget Off., CBO55179, *The Post-9/11 GI Bill: Beneficiaries, Choices, and Cost*, 15 (May 2019), <https://bit.ly/3Qq53e0>; *accord id.* at 1 (the Post-9/11 Bill provides “more extensive benefits than have ever been offered” to servicemembers).

⁴³ *Id.* at 4.

⁴⁴ *Id.*

the Montgomery Bill must contribute \$1,200 to be eligible for benefits, Post-9/11 Bill participants do not have to contribute anything.

Second, the Post-9/11 Bill extended the eligibility period for drawing down benefits. Initially, beneficiaries could draw upon Post-9/11 Bill benefits up to 15 years after leaving the service (compared to the 10-year expiration on benefits under the Montgomery Bill). With the passage of the “Forever GI Bill” in August 2017, however, Post-9/11 benefits now no longer expire for servicemembers who leave the military after January 1, 2013.⁴⁵ Those who left the military before that date still can use their benefits within 15 years.

Third, the Post-9/11 Bill allows certain servicemembers—those who have served at least six years and commit to serving an additional four of active duty or in the Selected Reserve—to transfer their benefits in whole or in part to immediate family members.⁴⁶ Qualifying dependents can receive benefits via transfer for up to 36 months, covering tuition, housing, books and supplies, fees for national standardized tests, and fees for licensing and certifications.⁴⁷ This transferability allows

⁴⁵ *Post-9/11 GI Bill (Chapter 33)*, U.S. Dep’t of Veterans Affairs, <https://bit.ly/3s2hthY> (last updated July 18, 2023); Harry W. Colmery Veterans Educational Assistance Act of 2017, Pub. L. No. 115-48, 131 Stat 973.

⁴⁶ *Post-9/11 GI Bill: Transferability*, U.S. Dep’t of Veterans Affairs (updated Mar. 2023), <https://bit.ly/3KuJO6Q>.

⁴⁷ *Transfer Your Post-9/11 GI Bill Benefits*, U.S. Dep’t of Veterans Affairs, <https://bit.ly/3OLGKF5> (last updated Aug. 8, 2023).

servicemembers to use the benefit while on active duty. Montgomery Bill benefits, in contrast, cannot be transferred and are thus typically used by veterans only after they leave the armed forces.

Fourth, the Bill generally eliminates the cap on tuition and fees for programs at public institutions.⁴⁸ For programs at private institutions, the benefit can cover up to \$27,120.05 in tuition and fees in the 2023–2024 academic year.⁴⁹

The wartime benefits Congress set forth in the Post-9/11 Bill are much more generous than the peacetime benefits in the Montgomery Bill.

C. Congress Did Not Intend The Post-9/11 Bill To Penalize Servicemembers Who Volunteer For Multiple Periods of Service

When it comes to providing benefits to servicemembers, Congress has sought to “place a thumb on the scale in the veteran’s favor.” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (internal quotation marks and citation omitted). The Post-9/11 Bill should be no exception.

When a servicemember’s period of service meets the criteria for benefits under a GI Bill program, they must make a “period of service” election to access those

⁴⁸ Cong. Budget Off., CBO55179, *supra* note 42, at 1.

⁴⁹ Increase in Maximum Tuition and Fee Amounts Payable Under the Post-9/11 GI Bill, 88 Fed. Reg. 24,665 (Apr. 21, 2023).

benefits.⁵⁰ In so doing, the servicemember indicates that they want to credit their period of service against that specific GI Bill program.

Sometimes, a single period of service will meet the criteria for benefits under multiple GI Bill programs. Such is the case for the likely thousands of servicemembers that served a qualifying three years between September 11, 2001, and June 30, 2008. Their service initially qualified them for benefits under the Montgomery GI Bill;⁵¹ then, when the Post-9/11 Bill was enacted in 2008 and made retroactive to service after September 11, 2001, their service also qualified them for benefits under the later bill.⁵² Such servicemembers must make an election for their period of service under one bill or the other. They cannot “duplicat[e]”—that is, double dip—their benefit entitlement for their single period of service.⁵³

To address this situation, and recognizing that the Post-9/11 benefits are decidedly more generous (in amount, in time-to-use, and in transferability), Congress crafted an upgrade mechanism. Sections 3322(d) and 3327 provide that servicemembers whose period of service qualified for benefits under both bills can make an “in lieu of election” to upgrade their Montgomery Bill

⁵⁰ Secretary’s M22-4 Manual at Pt. 3, § 3.10, *available at* <https://perma.cc/XUY8-JZSN?type=image>; *accord* 38 C.F.R. § 21.9520(c)(2)(ii).

⁵¹ 38 U.S.C. § 3011.

⁵² 38 U.S.C. § 3311(b).

⁵³ *See* 38 U.S.C. § 3322(h) (imposing “[b]ar to duplication of eligibility based on a single event or period of service”).

benefits to Post-9/11 Bill benefits.⁵⁴ This provision, however, is not an exception to the rule against “duplication,” so servicemembers that make an “in lieu of” election upgrade their *remaining* benefit months under the Montgomery Bill, but they do not receive *additional* benefit months.⁵⁵

The situation is different for servicemembers who have multiple periods of service that independently qualify for benefits under separate (or multiple) programs. For example, an individual who served in the Army from 2000 through 2002 would qualify for full benefits under the Montgomery Bill.⁵⁶ If that individual then re-enlisted for a second period from 2007 to 2011, that second period of service would entitle him to full benefits under the Post-9/11 Bill.⁵⁷ This servicemember

⁵⁴ *Accord* 38 C.F.R. § 21.9520 (“An individual may establish eligibility for educational assistance under [the Post-9/11 Bill] based on active duty service after September 10, 2001, if he or she ... meet[s] minimum service requirements [of that Bill and] ...[makes an] election to receive benefits under [that Bill] in lieu of benefits” under the Montgomery GI Bill); *accord* Secretary’s M22-4 Manual, *supra* note 50, at Pt. 3, § 3.10 (describing “[i]n lieu of” elections); Dortch, *supra* note 21, at 6, 24 (Post-9/11 GI Bill-eligible individuals “with a single qualifying active duty service period” can choose to make an irrevocable election to convert their Montgomery Bill benefits into the more generous Post-9/11 Bill benefits).

⁵⁵ 38 U.S.C. § 3327(d)(2)(A) (“[T]he number of months entitlement of the individual to educational assistance under [the Post-9/11 program] shall be the number of months equal to” “the number of months of unused entitlement of the individual under [Montgomery program].”).

⁵⁶ 38 U.S.C. § 3011(a)(1)(i)(II).

⁵⁷ 38 U.S.C. § 3311(b)(1). These are materially the facts of Petitioner’s service. Petitioner also served an additional period in

could receive benefits under both programs subject only to a longstanding 48-month, aggregate cap.⁵⁸

Thus, the operation of the Post-9/11 Bill aligns with Congress's express intent to recognize and reward service with "enhanced . . . benefits."⁵⁹ A servicemember serving a single period that qualified originally for Montgomery benefits and then retroactively for Post-9/11 benefits can upgrade the former for the latter. And a servicemember serving multiple periods that independently entitle him to benefits under both bills (up to the 48-month cap) can take advantage of both.

The contrary view adopted by the decision below is that no servicemember may access his Post-9/11 benefits without first sacrificing certain benefits in one of two ways. *First*, the veteran could forfeit both his remaining Montgomery benefits and any months of Post-9/11 benefits exceeding his remaining entitlement under the Montgomery program.⁶⁰ *Second*, the veteran could exhaust his Montgomery benefits and then take advantage of the more generous benefits under the other bill.⁶¹ This interpretation of the Post-9/11 program

between the two described here, as an activated member of the Army National Guard deployed to Iraq from June 2004 to December 2005. Pet. App. 81a-82a.

⁵⁸ 38 U.S.C. § 3695(a).

⁵⁹ Pub. L. No. 110-252, § 5002(6), 122 Stat. 2358.

⁶⁰ See Pet. App. 14a-17a.

⁶¹ See Pet. App. 14a-17a. The Federal Circuit's decision shoehorns *all* dually-entitled veterans into the "coordination" provisions of Sections 3322(d) and 3327, despite those provisions' clear design to preclude double-dipping on a single period of service. See 38 U.S.C.

represents a *contraction*, not an *enhancement*, of the benefits Congress made available.

For one, this interpretation needlessly cuts the flexibility afforded to qualifying servicemembers to choose how and when to use the benefits they earn. Petitioner, for example, used only 25 months and 14 days of his 36-month allotment under the Montgomery program to attend college.⁶² He should be permitted to keep the balance of those benefits (earned via a period of service from 2000 to 2002) and use them later if he chooses.⁶³ When Petitioner was admitted to Yale Divinity School in 2015 with plans to become a chaplain in the Army, he sought to draw upon not his leftover Montgomery benefits but his Post-9/11 benefits (earned via a separate period of service, from 2007 to 2011).⁶⁴ In the Federal Circuit’s view, there is no way for Petitioner to attend Yale when he wanted and receive the more generous Post-9/11 benefits to which he was entitled unless he forfeited the Montgomery program benefits that he had earned and that were his to use at a later time, for a later program.

Moreover, the Federal Circuit’s decision robs servicemembers not just of the flexibility regarding how and when to use their Post-9/11 benefits, but of the

§ 3322(h) (imposing “[b]ar to duplication of eligibility based on a single event or period of service”). As Petitioner shows, this crabbed interpretation is contradicted by the text of the statute.

⁶² Pet. App. 82a-83a.

⁶³ Subject only to that program’s 10-year deadline. *Getting a GI Bill Extension*, *supra* note 37.

⁶⁴ Pet. App. 82a-83a.

benefits themselves. In the Federal Circuit’s view, any servicemember that has used some of their Montgomery benefits cannot possibly take advantage of their full 36 months of Post-9/11 benefits. Instead, they must: (a) make an “in lieu of election,” thus capping their Post-9/11 benefits at the number of months—necessarily fewer than the maximum 36—remaining to them under the Montgomery program; or (b) exhaust their Montgomery benefits first, in which case they will be limited to 12 months of Post-9/11 benefits (by effect of the 48-month aggregate cap).

The problems do not end there. The decision below also materially constrains a servicemember’s ability to transfer his Post-9/11 benefits to dependents while still in active service. Congress specifically added this transferability to encourage servicemembers to remain in the service;⁶⁵ else—and as with benefits under the Montgomery Bill—servicemembers generally would have to leave the military and enroll in school to take advantage of benefits. The Federal Circuit’s decision, however, pushes servicemembers out of the military. A servicemember hoping to transfer his Post-9/11 benefits to his dependent must either continue to serve, but forfeit his Montgomery program benefits or else leave the military, attend school and exhaust his Montgomery program benefits and only then—perhaps years later—transfer his Post-9/11 benefits.

⁶⁵ Dortch, *supra* note 21, at 2 (during pre-enactment debate over the Post-9/11 Bill, the Department of Defense “considered the ability to transfer benefits to dependents critical to retention”).

The Federal Circuit’s interpretation of the Post-9/11 Bill thus penalizes servicemembers who invoke the marquee transfer mechanism by cutting down their ability—and, likely in many cases, their entitlement—to use the benefits they have rightly earned. Forcing servicemembers to give up benefits they have earned unless those benefits are accessed in a specific, and often inefficient, sequence (that might not align with the servicemember’s educational goals) renders Post-9/11 benefits needlessly inflexible; it harms retention and undermines the armed force’s mission-critical ability to recruit. Congress could not have intended to so disadvantage those with multiple periods of service.

Construing the Post-9/11 Bill to provide a disadvantage for those with multiple periods of service runs counter to Congress’s purpose to reward service with “*enhanced . . . benefits.*”⁶⁶ Absent some reason to conclude that Congress intended to disadvantage veterans with multiple periods of service—and there would be no reason for Congress to wish to do so—those with multiple periods of service should not be denied the full wartime benefits Congress created specifically for those who served after 9/11. The decision below disregards this Court’s instruction to “liberally construe[]” benefits to servicemembers. *Boone*, 319 U.S. at 575.

* * *

⁶⁶ Pub. L. No. 110-252, § 5002(6), 122 Stat. 2358 (emphasis added).

Few actions convey more about our Nation and its values than the way we treat the men and women who voluntarily risk their lives to protect this country. Those who choose to serve and then serve again should be rewarded, not punished, for multiple periods of service—as Congress intended.

CONCLUSION

The en banc decision of the Federal Circuit should be reversed.

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