

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES R. RUDISILL, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 22-888  
 )  
 DENIS R. McDONOUGH, SECRETARY OF )  
 )  
 VETERANS AFFAIRS, )  
 )  
 Respondent. )  
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Pages: 1 through 79  
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Date: November 8, 2023

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Petitioner, )

v. ) No. 22-888

DENIS R. McDONOUGH, SECRETARY OF )

VETERANS AFFAIRS, )

Respondent. )

- - - - -

Washington, D.C.

Wednesday, November 8, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

MISHA TSEYTLIN, ESQUIRE, Chicago, Illinois; on behalf of the Petitioner.

VIVEK SURI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-888, Rudisill versus McDonough, the Secretary of Veterans Affairs.

Mr. Tseytlin.

ORAL ARGUMENT OF MISHA TSEYTLIN  
ON BEHALF OF THE PETITIONER

MR. TSEYTLIN: Mr. Chief Justice, and may it please the Court:

In Section 3311 of the Post-9/11 GI Bill, Congress awarded veterans who served after the September 11th attacks with an entitlement to wartime benefits befitting their wartime service. In Section 3327 of the same Act, Congress created a generous benefits coordination regime wherein veterans who had earned peacetime Montgomery veteran -- benefits with post-9/11 service could trade the unused portion of those Montgomery benefits for Post-9/11 benefits.

My client has no interest in trading his Montgomery benefits for his Post-9/11 benefits, so he has no use for the three -- 3327

1 election regime. Rather, Petitioner is invoking  
2 his statutory entitlement under 3311 to cash in  
3 his second period of service for Post-9/11  
4 benefits. That second period of service is only  
5 eligible for Post-9/11 benefits. It's not  
6 eligible for Montgomery benefits. So there's  
7 nothing for my client to coordinate.

8 Now the VA concedes that my client  
9 has, in fact, earned a statutory entitlement  
10 under 3311 to cash in his second period of  
11 service for wartime benefits. But he takes the  
12 -- but the VA takes the position that Section  
13 3327's "may elect" clause revoked that  
14 entitlement until he uses up or exhausts the --  
15 the Montgomery benefits he earned from his first  
16 period of service.

17 But, with all respect, a "may elect"  
18 clause is simply now -- not how Congress revokes  
19 clear statutory entitlements and certainly not  
20 in the Byzantine manner that the VA suggests.  
21 Further, the exhaustion requirement that is a  
22 linch -- the linchpin of the VA's interpretation  
23 finds no ground in the statutory text and  
24 produces absurd results, such as punishing  
25 veterans with less wartime benefits for simply

1 having served the nation longer.

2 Finally, the VA's effort to turn a  
3 regime plainly designed to help a category of  
4 veterans into a punitive regime punishing  
5 long-serving veterans has numerous contextual  
6 problems, including making 3322's concurrent --  
7 concurrent usage bar surplusage.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: You make it seem as  
10 though the election mechanism doesn't play much  
11 of a role in -- in determining whether or not  
12 Petitioner is able to get the second set of  
13 benefits under -- the 9/11 benefits. I thought  
14 that the -- 33 -- what is it -- 3327 requires  
15 election, but it also has limitations.

16 You also seem to agree in your brief  
17 that you cannot -- you're limited by the  
18 concurrent -- you could not have the 9/11  
19 benefits and the Montgomery benefits  
20 simultaneously, right?

21 MR. TSEYTLIN: That's correct, Your  
22 Honor.

23 JUSTICE THOMAS: But you also -- you  
24 -- you seem not to think that the coordination  
25 provisions apply. So (a) applies, right?

1 MR. TSEYTLIN: Yeah. So 320 -- 332(a)  
2 applies because it says "shall elect" --

3 JUSTICE THOMAS: Okay.

4 MR. TSEYTLIN: -- it's mandatory.

5 JUSTICE THOMAS: But then you say (d)  
6 doesn't apply.

7 MR. TSEYTLIN: So the (d) says -- (d)  
8 says that coordination shall be governed. And  
9 our submission is that we are not coordinating.  
10 We're --

11 JUSTICE THOMAS: Well, so what are  
12 you? I mean -- -

13 MR. TSEYTLIN: We're --

14 JUSTICE THOMAS: -- you have a second  
15 set of benefits. I thought the whole point was  
16 to have the benefits if you -- if you qualify  
17 for two, it is coordinated.

18 MR. TSEYTLIN: No, Your Honor. We're  
19 just using. And though I think the -- my  
20 friends on the other side say we would not be  
21 coordinating if we first used our Montgomery  
22 benefits and then -- exhausted our Montgomery  
23 benefits and then thereafter used Post-9/11  
24 benefits. I fail to understand how simply using  
25 Post-9/11 benefits is coordination.

1 JUSTICE THOMAS: I know, but you admit  
2 that you can't have them simultaneously. If you  
3 -- if you say you qualify for them and you have  
4 an -- a separate entitlement for them, then why  
5 can't you use them concurrently?

6 MR. TSEYTLIN: Because 3322(a)  
7 specifically says you can't use them  
8 concurrently. That's the --

9 JUSTICE THOMAS: So then why aren't  
10 you limited by 3322(d)?

11 MR. TSEYTLIN: Well, 3322(d) is not a  
12 limitation. All it is is a cross-referenced  
13 coordination provision. And my friend in the V  
14 -- at the VA admit that that provision itself  
15 doesn't act as a limitation.

16 Further, that provision can't possibly  
17 do the work here. I mean, most of the -- most  
18 of the sections listed as needing to be  
19 coordinated under 3322(d) aren't even referenced  
20 in 3327.

21 JUSTICE THOMAS: Let me ask --

22 MR. TSEYTLIN: So it can't be doing --

23 JUSTICE THOMAS: -- one final  
24 question.

25 MR. TSEYTLIN: -- that kind of work.



1 JUSTICE THOMAS: You -- you say that  
2 you are entitled to separate benefits. What if,  
3 rather than Petitioner having separate tours in  
4 the military, he had one continuous tour for a  
5 decade or so? Would you still have the same  
6 argument?

7 MR. TSEYTLIN: Absolutely the same  
8 argument. And when I'm talking about separate  
9 periods of service, I mean a period long enough  
10 to qualify for Montgomery benefits, which --  
11 which is two or three years, and if you have a  
12 -- a period thereafter that's after 9/11, then  
13 that gets you a 3311 entitlement.

14 JUSTICE JACKSON: Mr. Tseytlin, I've  
15 come up with an analogy that I am using in my  
16 own mind to think about your argument and the  
17 way that you're looking at the statute, and I  
18 hope you can tell me whether or not I'm right  
19 about this.

20 All right. So the two benefit -- the  
21 two benefits programs, the Montgomery program  
22 and the Post-9/11 program, are like two  
23 different color baseball caps that service  
24 members can earn. The Montgomery benefits are a  
25 red hat that a service member is entitled to

1 receive for a qualifying period of service, and  
2 when they're ready, they can wear that hat for  
3 up to 36 months to get a certain level of  
4 education benefits.

5 The Post-9/11 benefits are a blue hat  
6 that a qualifying service member is entitled to  
7 receive, and they can wear that hat -- hat to  
8 get a different level of benefits for up to 36  
9 months.

10 The law says that the member can earn  
11 more than one hat -- this is what you were just  
12 talking about with -- with Justice Thomas -- for  
13 separate periods of service, but the two hats  
14 can't be worn at the same time.

15 MR. TSEYTLIN: That's correct.

16 JUSTICE JACKSON: You have to do one  
17 or the other. And no matter how many hats the  
18 member has, he can only wear the hats and  
19 receive the corresponding benefits for a total  
20 of 48 months. Is that --

21 MR. TSEYTLIN: Absolutely.

22 JUSTICE JACKSON: -- so far so good.

23 MR. TSEYTLIN: Everything you said --

24 JUSTICE JACKSON: All right.

25 MR. TSEYTLIN: -- I agree with, Your

1 Honor.

2 JUSTICE JACKSON: So I think you're  
3 arguing that Rudisill is entitled to and has  
4 received both a red hat and a blue hat for the  
5 separate periods of qualifying service that he  
6 has. He had the red hat he earned under 3011 --  
7 that's what you said at the beginning -- and the  
8 blue hat he earns under 3311 for his second or  
9 separate period of service.

10 And so, at this point, he's worn the  
11 red hat for 25 months and 14 days and used those  
12 benefits for his undergraduate degree, and now  
13 what he'd like to do is pick up the blue hat and  
14 wear that for up to the total 48-month cap.

15 MR. TSEYTLIN: Yes.

16 JUSTICE JACKSON: Is that what you're  
17 saying?

18 MR. TSEYTLIN: Absolutely, Your Honor.

19 JUSTICE JACKSON: All right. So  
20 there's no coordination. He's not exchanging --  
21 I mean, it seems to me that the 3322(d) and 3327  
22 scenario is like a different situation. It's  
23 the service member who has a red hat during the  
24 period of time in which he could qualify for a  
25 blue hat and he needs an opportunity to exchange

1 it.

2 MR. TSEYTLIN: Absolutely. I agree  
3 with everything you said, Your Honor. And I  
4 think the fundamental problem with the VA --  
5 what the VA has done here through this form and  
6 now they've defended through the courts is what  
7 you describe is exactly what Congress had in  
8 mind.

9 And what the VA has attempted to do is  
10 they're trying to export this regime which is  
11 plainly designed for what you're talking about  
12 to a completely different scenario which  
13 Congress was not trying to deal with, and --

14 JUSTICE JACKSON: In that scenario,  
15 the -- the scenario comes up, right, because we  
16 have 9/11 happening in September of 2001, but  
17 the effective date for being able to get a blue  
18 hat doesn't happen until 2009.

19 So you have people who are serving in  
20 that period of time who just have access to the  
21 red hat scenario. They don't -- they're not  
22 able to get the blue hat because it isn't  
23 effective yet.

24 MR. TSEYTLIN: Yeah.

25 JUSTICE JACKSON: And if they want to

1 ultimately change over their red hat to the blue  
2 hat, they have to have a mechanism to do it?

3 MR. TSEYTLIN: Absolutely right. And  
4 it -- it's even more than that, Your Honor.  
5 They didn't -- but -- when they were serving and  
6 crediting their service to Montgomery by making  
7 those payments and, like my client, using up  
8 those benefits, the Post-9/11 program didn't  
9 even exist. They had no reason to know that  
10 they should use -- that they should save this  
11 period of service for -- for something else.

12 JUSTICE JACKSON: And 30 -- 3327(d)  
13 and the limitations that -- that Justice Thomas  
14 referenced are just making the common-sense  
15 point that if you're a service member who has  
16 worn the red hat for some period of time and  
17 then you'd like to exchange it, you don't get,  
18 with the new blue hat, a full 36-period --  
19 month period. You just get the residual amount  
20 of time that's left on that red hat period,  
21 correct?

22 MR. TSEYTLIN: That -- that's --  
23 that's exactly right. But it is also  
24 coordination because it's actually the  
25 one-to-one exchange that is laid out in -- in

1 3327(d) seems logical, but you couldn't intuit  
2 that from the regime without the 3327(d) because  
3 the way that Montgomery benefits are earned and  
4 the way that Post-9/11 benefits are earned are  
5 quite different.

6           Montgomery benefits are earned  
7 basically on a per-month basis, which is that  
8 every additional month you serve in that  
9 Montgomery period of service, you get an extra  
10 month of Montgomery.

11           When -- and Post-9/11 doesn't work  
12 like that at -- at all. If you serve at least  
13 90 days post-9/11, you always get only 36  
14 months. And if you serve less than 36 months,  
15 then you just get --

16           JUSTICE KAVANAUGH: Can I --

17           MR. TSEYTLIN: -- less benefits per  
18 month.

19           JUSTICE KAVANAUGH: -- can I take you  
20 back to the text of the statute?

21           MR. TSEYTLIN: Yes.

22           JUSTICE KAVANAUGH: Because the way I  
23 saw the Federal Circuit analyzing this was that  
24 3322 -- let's start with that -- deals with a  
25 situation when you're entitled to benefits under

1 both programs. Is that correct so far?

2 MR. TSEYTLIN: Yes. The -- the -- the  
3 -- the overall regime is a bar on duplication,  
4 and then 3322(a) is -- prohibits one type of  
5 duplication.

6 JUSTICE KAVANAUGH: And then 3322(d),  
7 I think we've got to focus really carefully on  
8 the exact text.

9 MR. TSEYTLIN: Mm-hmm.

10 JUSTICE KAVANAUGH: It doesn't just  
11 say coordination of -- benefits. You've been  
12 really emphasizing a difference between  
13 entitlement and benefits. It says coordination  
14 of entitlement --

15 MR. TSEYTLIN: Mm-hmm.

16 JUSTICE KAVANAUGH: -- to educational  
17 assistance under this chapter on the one hand  
18 and such chapters or provisions on the other,  
19 namely, Montgomery and Post-9/11, shall,  
20 coordination of entitlements shall be governed  
21 by the provisions of 3327.

22 MR. TSEYTLIN: That -- that's right --

23 JUSTICE KAVANAUGH: So --

24 MR. TSEYTLIN: -- Your Honor, but it  
25 doesn't say that you shall coordinate. It says,

1 if you -- it says, if you want to coordinate,  
2 then look at 3327.

3 JUSTICE KAVANAUGH: It says  
4 coordination of the entitlement.

5 MR. TSEYTLIN: Right. But, if you  
6 don't want to coordinate your entitlement, you  
7 just want to use your entitlement. And my  
8 friends would concede that if we just did --

9 JUSTICE KAVANAUGH: Well, I don't  
10 think you can -- because there's a -- a bar on  
11 using both simultaneously, there has to be some  
12 coordination, is what the statute says,  
13 coordination of entitlement shall be governed.

14 MR. TSEYTLIN: Well, that's certainly  
15 not my friend's position. They say that if we  
16 first used our Montgomery benefits and then --  
17 for 36 months and then used our Post-9/11  
18 benefits --

19 JUSTICE KAVANAUGH: Because, at that  
20 point --

21 MR. TSEYTLIN: -- that wouldn't be  
22 coordinated.

23 JUSTICE KAVANAUGH: -- once you've  
24 used up your Montgomery benefits, they're  
25 totally used up, there's nothing to coordinate



1 at that point?

2 MR. TSEYTLIN: But wouldn't you be  
3 coordinating at the first step because, at that  
4 point, you would have been using -- you would  
5 have been using when you have two benefits. But  
6 I --

7 JUSTICE KAVANAUGH: They --

8 MR. TSEYTLIN: -- I also think that --

9 JUSTICE KAVANAUGH: -- they say that  
10 -- so they say you're funneled then into 3327 as  
11 necessarily and that if you get into 3327 and  
12 you still have some Montgomery benefits that are  
13 unused, you are bound by 3327(d)(2)(A) then.

14 MR. TSEYTLIN: Well, what they say is  
15 that the coordination provision is just  
16 suggestive. It just points you to 3327, and  
17 then you have to decide what 3327 means. And I  
18 think that must be right because it's just a  
19 cross-reference.

20 And it also -- it just -- 3327 -- so  
21 3322(d) can't be doing that much work in any  
22 event. I mean, as I mentioned earlier, most of  
23 the provisions mentioned -- and if -- I urge  
24 Your Honors to take a look at 3322(d) -- most of  
25 those provisions stating --

1 JUSTICE KAVANAUGH: Yeah. No, I -- I  
2 looked at it.

3 MR. TSEYTLIN: -- to coordinate it  
4 aren't even mentioned in 3327, so at most, it's  
5 a suggestive cross-reference. And then, when  
6 you get to 3327, if you think the  
7 cross-reference takes you there, all you have is  
8 a "may elect" clause. And the superstructure of  
9 the statute then is you have a clear,  
10 unambiguous, plain-as-day entitlement under  
11 3311.

12 So the question for the Court is  
13 whether a "may elect" clause, which is, at best,  
14 an oblique way to say something --

15 JUSTICE KAVANAUGH: Well, the point is  
16 I think you have Montgomery. You're pointed --  
17 you have entitlement to Montgomery. You have  
18 entitlement to Post-9/11. You're pointed to  
19 3327 by 3322(d). Stay with me so far. I know  
20 you disagree with that.

21 MR. TSEYTLIN: That's fine.

22 JUSTICE KAVANAUGH: But, when you get  
23 to 3327, then you can elect to go Post-9/11, or  
24 you could stick just with your Montgomery.

25 MR. TSEYTLIN: With --

1 JUSTICE KAVANAUGH: Those are your two  
2 options.

3 MR. TSEYTLIN: -- with respect,  
4 nothing in 3327 says that second thing. What it  
5 says is you may elect. And then it doesn't say  
6 any penalty for declining to elect.

7 So what happens when you have a  
8 plain-as-day statutory entitlement under 3311,  
9 plain-as-day, but then you don't make an  
10 election under 3327, they must be saying that  
11 the "may elect" clause is an implicit revocation  
12 of your 3311 entitlement.

13 And I would respectfully suggest that  
14 is just not a linguistically possible and  
15 certainly not -- not a natural way to revoke an  
16 entitlement.

17 If you look at 33 --

18 JUSTICE KAVANAUGH: It's not a  
19 revocation of your entitlement. After you use  
20 up your Montgomery, the thing that caps you is  
21 the -- is the 48-month limit.

22 MR. TSEYTLIN: Right. And so what --  
23 what 33 --

24 JUSTICE KAVANAUGH: Correct? So you  
25 still can get your Post-9/11 after using up

1 Montgomery.

2 MR. TSEYTLIN: What 3311 and 3312,  
3 which is the sister provision, say is that the  
4 entitlement in 3311 is subject to the 48  
5 entitle -- 48-month entitlement. It does not  
6 say that that entitlement is subject to making a  
7 3327 election. And -- and I urge Your Honors to  
8 look at 3312 for that.

9 And so, again, the structure of our  
10 argument is as follows: If you have a  
11 plain-as-day statutory entitlement under 3311  
12 and you have a voluntary "may elect" clause, it  
13 is just not a natural or sensible reading of a  
14 "may elect" clause, which doesn't impose a  
15 penalty for declining to elect, to say that that  
16 implicitly revokes a plain-as-day entitlement.

17 CHIEF JUSTICE ROBERTS: It may make --

18 JUSTICE KAVANAUGH: One -- one --

19 CHIEF JUSTICE ROBERTS: I'm sorry?

20 I was just going to say it may make  
21 some sense into -- in what they probably  
22 envisioned was the normal situation, where you  
23 had the overlapping benefits on the basis of  
24 continuous service. But I'm not sure it makes  
25 much sense in the situation that you have, where

1 they -- the benefits are earned because of  
2 separate periods of service.

3 MR. TSEYTLIN: Because it --

4 CHIEF JUSTICE ROBERTS: In that  
5 situation, I -- I -- I suppose you're saying  
6 you've got two completely distinct benefits and  
7 you can choose whichever one -- you've earned  
8 both of them. You can choose which one you want  
9 to collect benefits under.

10 MR. TSEYTLIN: Absolutely, Your Honor.  
11 It makes absolutely no sense. The -- the  
12 exhaustion requirement that Justice Kavanaugh  
13 was talking about is as absurd a requirement as  
14 you could ever imagine a statutory -- in a  
15 statutory scheme dealing with veterans.

16 Think about it. When my -- when my  
17 client came to the VA and said I want to have  
18 about 23 months of Post-9/11 benefits, they said  
19 you can't have that because you still have a  
20 bunch of Montgomery bene- -- you have basically  
21 10 months of Montgomery benefits left over.

22 JUSTICE KAVANAUGH: Which is what --

23 MR. TSEYTLIN: But --

24 JUSTICE KAVANAUGH: -- the statute  
25 says in 3327.

1 MR. TSEYTLIN: -- what -- but what --

2 JUSTICE JACKSON: Except I don't see  
3 an exhaustion clause in 3327.

4 JUSTICE KAVANAUGH: Yeah.

5 MR. TSEYTLIN: Right. But what if my  
6 client had served shorter in that first period  
7 of service, Your Honor? What if he had served  
8 and had gotten a hardship discharge such that  
9 he'd only earned 25 months of Montgomery, so he  
10 gave less time to the nation?

11 Under the VA's position, we would  
12 be -- my client would be entitled to the whole  
13 23 months of Post-9/11 benefits. It is hard to  
14 imagine a regime more absurd than that than a  
15 veteran --

16 JUSTICE KAVANAUGH: Well, I guess --

17 MR. TSEYTLIN: -- gets less benefits  
18 for serving more.

19 JUSTICE KAVANAUGH: -- let's -- on the  
20 absurdity, the -- the -- the Congress  
21 establishes a generous -- more generous new  
22 program that you can switch into, but it's not  
23 infinitely generous in the sense that you get  
24 more monthly benefits, but if you had unused  
25 Montgomery, that you get more in monthly

1 benefits under the Post-9/11, but if you had  
2 unused Montgomery, you can only use the  
3 Post-9/11 up to the 36 months that you had --

4 MR. TSEYTLIN: But --

5 JUSTICE KAVANAUGH: -- originally.

6 MR. TSEYTLIN: -- but, Your Honor, I  
7 mean, that's just assuming you're always goings  
8 to have 36 months of Montgomery. It's possible  
9 to have 25 months of Montgomery. And the way  
10 their statutory regime works is, if you have  
11 less months of Montgomery because you serve  
12 less, you got a hardship discharge or whatever,  
13 you suddenly are entitled to more wartime  
14 benefits.

15 And so it is a punitive penalty for  
16 giving more time to the nation. That -- I mean,  
17 it's hard to imagine a regime serving veterans  
18 trying to encourage longer service --

19 JUSTICE KAVANAUGH: No, I -- I don't  
20 think I agree with penalty. But let me ask one  
21 question.

22 If we conclude that 3327 is the  
23 exclusive way for someone entitled to Montgomery  
24 to switch over to Post-9/11 benefits, okay, so I  
25 know you disagree with that, but if we conclude

1 that 3327's exclusive, do you then lose?

2 MR. TSEYTLIN: I mean -- I mean, that  
3 assumes the -- the entire argument away.

4 JUSTICE KAVANAUGH: Exactly. I -- I'm  
5 just making sure.

6 MR. TSEYTLIN: That -- that assumes --

7 JUSTICE KAVANAUGH: Okay. I  
8 understand that.

9 MR. TSEYTLIN: -- that a 3327 election  
10 is the only way that one can invoke their  
11 statutory entitlement in 3311, and absolutely  
12 nothing in the statute says that.

13 JUSTICE JACKSON: I mean, there seems  
14 to be an assumption that -- that you would have  
15 to switch in order to be able to get the 3311  
16 benefits that you were separately entitled to  
17 because of your separate period of service.

18 That's the part where I'm getting lost  
19 in the conversation that you had with Justice  
20 Kavanaugh. It seems to me, as I said at the  
21 original -- at the outset, that if you have two  
22 separate periods of service, you are entitled to  
23 two separate benefit packages. Isn't that  
24 historically the way it was in the GI Bill?

25 MR. TSEYTLIN: Absolutely, Your Honor.



1 And --

2 JUSTICE JACKSON: All right. And  
3 there was no historical circumstance that would,  
4 absent any specific language, say that you had  
5 to complete entirely all of one before you  
6 decided to invoke the other. They were  
7 entitlements that you had because of your  
8 service.

9 MR. TSEYTLIN: Absolutely right. And  
10 no -- it has never done that before. It  
11 wouldn't make any sense to. Why would Congress  
12 be enacting a regime where the -- wherein the  
13 statutory findings say those Montgomery  
14 benefits, they're outmoded, we want to reward  
15 wartime service with wartime benefits, and then,  
16 through these implications through a vague  
17 cross-reference to a coordination clause, say  
18 that no, no, what we really meant, in a bait and  
19 switch, is you've got to use up all 36 months of  
20 those benefits that we just said in our  
21 statutory findings are outmoded before you can  
22 get to the benefits that we're really enacting  
23 this bill to -- to -- to --

24 JUSTICE KAGAN: Mr. Tseytlin --

25 JUSTICE ALITO: Counsel --

1 JUSTICE KAGAN: -- is your argument  
2 dependent on the idea that you're not  
3 coordinating entitlement?

4 MR. TSEYTLIN: It -- it is not  
5 dependent on that. All the coordination clause  
6 is is a cross-reference to 3327. Our  
7 superstructure of our argument is, as I've said  
8 a couple times, is that you have a plain-as-day  
9 entitlement under 3311 --

10 JUSTICE KAGAN: Well, I know that you  
11 have a plain-as-day entitlement in 3311, but if  
12 you're coordinating entitlement, I -- I mean, I  
13 guess, you -- you -- you know, at -- at certain  
14 points, I took you to be saying, well, we're  
15 just not coordinating entitlement, but if you  
16 are coordinating entitlement, shall be governed  
17 by 3327, 3327 doesn't make the kind of  
18 distinction that you're making between veterans  
19 with one period of service and veterans with  
20 multiple periods of service.

21 So how do you get out of that if  
22 not by saying what I took you to be saying at  
23 some points but I didn't realize -- I didn't  
24 take this from your brief, that you're not  
25 coordinating entitlement?

1           MR. TSEYTLIN: We are absolutely not  
2     coordinating entitlement. We're just using 30  
3     --

4           JUSTICE KAGAN: Okay. So your  
5     argument does depend on that, the idea that  
6     you're not coordinating entitlement?

7           MR. TSEYTLIN: I do not believe that  
8     either side of this case has said that 3322(d)  
9     resolves this case. Certainly, if we win on the  
10    coordination, we win the case. But, even if  
11    Your Honors think that we lose on coordination,  
12    it's still the case that a "may elect" clause is  
13    not a natural or linguistically, I say, possible  
14    way to revoke a statutory entitlement.

15          JUSTICE KAGAN: I see. So you're  
16    saying that even if 3322 does direct people in  
17    your client's position to 3327, you still win  
18    because this is not a mandatory provision?

19          MR. TSEYTLIN: Yeah, and because it  
20    doesn't say it's revoking an entitlement. And I  
21    also think that --

22          JUSTICE GORSUCH: How does that  
23    compare with other statutory provisions where  
24    Congress did use "shall elect"? And I think  
25    they did that in 3322(a) elsewhere and 3033(a).

1           MR. TSEYTLIN: Yeah, I mean, I think  
2 the difference between "shall" and "may" is --  
3 is critical here. I mean, it's telling the  
4 veteran that you don't have to elect, and it's  
5 not giving any penalty for not electing.

6           JUSTICE GORSUCH: What do you do in  
7 your interpretation with the fact the statute in  
8 -- both places references as of August 1st,  
9 2009, I think?

10          MR. TSEYTLIN: Well, I think ourselves  
11 and the VA agree that that's just the effective  
12 date. It wouldn't --

13          JUSTICE GORSUCH: Is that the  
14 effective date, or does that suggest something  
15 about what's being coordinated here, a single  
16 period of service?

17          MR. TSEYTLIN: Certainly, it could be  
18 suggestive of that. You know, in thinking  
19 through that interpretation, it does lead to  
20 some weird outcomes that are hard to -- hard to  
21 think Congress was intending to do, but,  
22 certainly, if Your Honors read it that way --

23          JUSTICE GORSUCH: Well, it just seems  
24 to me awkward that we would read that out of the  
25 statute altogether rather than perhaps as a clue

1 that what Congress was up to was trying to deal  
2 with, as Justice Jackson said, those members  
3 who, as of that effective date, had some  
4 preexisting Montgomery benefits that they  
5 wished, that they chose to elect, may elect, to  
6 turn into 9/11 benefits.

7 MR. TSEYTLIN: Certainly, that reading  
8 would benefit my client. It is -- it is -- it  
9 is --

10 (Laughter.)

11 MR. TSEYTLIN: And it is a very  
12 sensible reading of the statute. I would be  
13 worried --

14 JUSTICE GORSUCH: Well, of course, it  
15 is.

16 (Laughter.)

17 MR. TSEYTLIN: No, but I would be  
18 worried -- I would be -- I would cautious the  
19 Court if the Court is going to rule for us  
20 invoking that rationale because it would have  
21 unfortunate collateral consequences for veterans  
22 who had those two periods of service after the  
23 effective date of the Post-9/11 --

24 JUSTICE KAVANAUGH: Yeah. That would  
25 be -- that would be --

1 JUSTICE GORSUCH: I -- I understand  
2 that, but --

3 MR. TSEYTLIN: -- that -- that would  
4 put them in quite a tough place.

5 JUSTICE KAVANAUGH: That would create  
6 negative consequences for a lot of people.

7 JUSTICE GORSUCH: I -- I understand  
8 that.

9 MR. TSEYTLIN: It would -- that --  
10 that particular --

11 JUSTICE GORSUCH: My -- my --

12 MR. TSEYTLIN: -- reading would  
13 because of -- because then people would have to  
14 -- have to guess -- in ex-ante --

15 JUSTICE KAVANAUGH: Yeah.

16 JUSTICE GORSUCH: Just one further --

17 MR. TSEYTLIN: -- whether they got --

18 JUSTICE GORSUCH: -- one further  
19 question. There's some debate between the two  
20 of you about what -- what has happened in the  
21 past when there's overlapping periods of  
22 service, two -- two benefits available.

23 Can you speak to that?

24 MR. TSEYTLIN: Yeah. I mean, the way  
25 that the -- the -- the GI Bills have always

1 worked is, when you have two periods of service,  
2 you can't use them at the same time, but you can  
3 credit the same period of service -- you can  
4 credit a single period of service to two types  
5 of benefits.

6 I mean, the clearest way to see that  
7 with regard to the provisions here is -- is the  
8 Montgomery -- the traditional Montgomery program  
9 and the -- Montgomery Selected Reserves program.  
10 Under 3033(c), you can't get credit -- you can't  
11 get the Selected Reserves benefits and the  
12 traditional Montgomery benefits for the same  
13 period of service. So that is a prohibition  
14 against drawing upon a single period of service.

15 JUSTICE GORSUCH: Any exhaustion  
16 requirements previously in history?

17 MR. TSEYTLIN: No, no, and none in --  
18 none in -- in this provision either. It's  
19 entirely a figment of -- of the VA's imagination  
20 I would respectfully submit.

21 JUSTICE ALITO: Is there -- this is --  
22 is there a statutory provision that specifies  
23 when the election under 3327(a) must be made?

24 MR. TSEYTLIN: Well, there -- there --  
25 there is not, but, you know, our position is

1 that if somebody has credited their period of  
2 service -- their -- their period of service to  
3 Montgomery and they want to cash -- cash in that  
4 same period of service for Post-9/11, so then,  
5 when they want to cash in the -- the remaining  
6 Montgomery credits for the more generous  
7 life-changing Post-9/11 credits, then they need  
8 to make that election.

9 JUSTICE ALITO: Does the government  
10 disagree with you on that point as to timing?

11 MR. TSEYTLIN: My understanding is the  
12 government doesn't disagree with us on any way  
13 how the statutory regime works for somebody that  
14 -- for whom it was naturally designed, for  
15 someone who wants to trade their Montgomery for  
16 Post-9/11 benefits. It also doesn't disagree  
17 with us on how the statutory regime works for  
18 someone that's used up all their Montgomery  
19 benefits and just wants to draw on --

20 JUSTICE ALITO: Would the --

21 MR. TSEYTLIN: -- 12 months of  
22 Post-9/11.

23 JUSTICE ALITO: -- would the statute  
24 preclude the Secretary from saying that the  
25 election under 3327(a) must be made at a



1 particular point in time? Because, if you elect  
2 -- an individual may elect to receive Post-9/11  
3 benefits. If the individual elects not to  
4 receive those benefits, that would be  
5 irrevocable, right?

6 MR. TSEYTLIN: Certainly, that --  
7 declining to make the election is not some --

8 JUSTICE ALITO: I thought there's a  
9 provision that says it's irrevocable.

10 MR. TSEYTLIN: Yes. When you make the  
11 election, then you can't -- you can't unwind it.  
12 And our --

13 JUSTICE ALITO: Well, if it says you  
14 have to make the election one way or the other,  
15 then you can't -- if you elect not to get the  
16 9/11 benefits, then you can't get the 9/11  
17 benefits if it's irrevocable.

18 MR. TSEYTLIN: That's certainly not  
19 our position, Your Honor. Our position, Your  
20 Honor, is --

21 JUSTICE ALITO: I -- I know it's not  
22 your position, but why is that wrong?

23 MR. TSEYTLIN: Because the -- the --  
24 -- the -- the provision that says that the  
25 election under (a) is irrevocable, I think, in

1 both sections of that, it's only irrevocable if  
2 you make the affirmative election. If you don't  
3 make an election, I don't think the VA -- and  
4 maybe my friend will correct me -- treats that  
5 as making any sort of election under 3327, but I  
6 could be wrong as to their position.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel. Just a couple questions to clarify my  
9 own understanding.

10 Did I understand you to say that your  
11 position, your analysis of the statute and the  
12 consequence would be the same with respect to  
13 somebody who had no break in service? It was  
14 all continuous service? Or would it be --

15 MR. TSEYTLIN: Yes -- yes, Your Honor.

16 CHIEF JUSTICE ROBERTS: -- or would it  
17 be different?

18 MR. TSEYTLIN: It would be the same.

19 CHIEF JUSTICE ROBERTS: Okay. Thank  
20 you.

21 Justice Thomas?

22 Justice Alito?

23 Justice Sotomayor?

24 Justice Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: Just on the "may  
2 elect" so I understand, when you get to a  
3 educational institution and you have some unused  
4 Montgomery and you're also entitled to  
5 Post-9/11, you presumably have to fill out a  
6 form to tell the educational institution which  
7 you're using, correct?

8 MR. TSEYTLIN: No. What you do is you  
9 fill out a form with the VA. And in -- in our  
10 -- in our circumstance, our client filled out a  
11 form that invoked only his second Post-9/11  
12 eligible only period of service. Then the VA  
13 will issue you a certificate of eligibility, and  
14 you take that into the --

15 JUSTICE KAVANAUGH: Does the form have  
16 a choice between, okay, I'm showing up for  
17 graduate school, I'm going to use either  
18 Montgomery or Post-9/11 or other boxes  
19 potentially?

20 MR. TSEYTLIN: Yeah. I mean, my -- my  
21 client filled it out online, and you've got to  
22 select which -- which benefits.

23 JUSTICE KAVANAUGH: Is one of the  
24 boxes to select Montgomery?

25 MR. TSEYTLIN: Yes.

1 JUSTICE KAVANAUGH: So you may elect  
2 Montgomery?

3 MR. TSEYTLIN: Yeah, and that would be  
4 an election under 3322, which you have -- (a),  
5 which you have to make so that -- pursuant to  
6 the concurrent usage bar.

7 JUSTICE KAVANAUGH: Because, if you're  
8 going to claim veteran benefits, you're going to  
9 have to elect one or the other --

10 MR. TSEYTLIN: Yeah. Under --

11 JUSTICE KAVANAUGH: -- to get the  
12 school -- to get the benefits for the  
13 educational institution?

14 MR. TSEYTLIN: Right, and that  
15 election is mandatory under 3322(a). The 3327  
16 election is not -- (a) is not mandatory.

17 JUSTICE KAVANAUGH: Mm-hmm. Thank  
18 you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Barrett?

21 JUSTICE BARRETT: I just have a  
22 clarifying question. You pointed out that no  
23 prior GI Bills have worked this way. Did any of  
24 the prior GI Bills deal with overlapping periods  
25 of entitlement --

1 MR. TSEYTLIN: Well, certainly --

2 JUSTICE BARRETT: -- as this one does?

3 MR. TSEYTLIN: -- the -- the -- the  
4 Montgomery traditional -- and the Montgomery  
5 Select Reserve overlap, which is why you had  
6 3033(c) that -- and nothing -- there was no  
7 exhaustion requirement or anything like that.

8 There's also not GI Bills, but pre --  
9 pre the original World War II era GI Bill there  
10 were benefits that -- that could be earned  
11 during the same period of service that then made  
12 you eligible for the more generous -- for  
13 original GI Bill benefits, and there was no  
14 exhaustion requirement there, no --

15 JUSTICE BARRETT: But this particular  
16 situation where you have, you know, these two,  
17 like the Montgomery and the Post-9/11, where you  
18 have an entitlement, your client's situation,  
19 are you saying that it arose before on this  
20 other Montgomery --

21 MR. TSEYTLIN: It -- it did not. But  
22 --

23 JUSTICE BARRETT: -- or is this a new  
24 --

25 MR. TSEYTLIN: -- but I would also say

1 that my client's first period of service largely  
2 was before the -- the -- the period after 9/11,  
3 and a lot of folks who are governed by their  
4 regime are --

5 JUSTICE BARRETT: Well, I -- I was  
6 just asking about the history of the way the  
7 prior GI Bills worked. Because you pointed out,  
8 it would be unusual for this one given that  
9 Congress didn't have this exhaust or forfeit  
10 requirement in the other regime. So I was just  
11 wondering how analogous this was, but I think  
12 you answered that.

13 MR. TSEYTLIN: For the main GI Bills,  
14 they're not overlapping, but for the subsidiary  
15 Reserve ones and other programs, certainly,  
16 there are overlapping. And there's never been a  
17 requirement that you use up the -- the meager  
18 benefits to get the good benefits.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21 JUSTICE JACKSON: Yes. So, there were  
22 a couple of questions about coordination, and I  
23 thought the point of coordination was the swap.  
24 And I think that the -- the text sort of bears  
25 that out because, if you look at 3322(d), you're

1 beginning with a person who has Montgomery  
2 benefits or some other types of benefits.

3 And it's as of August 1st, and I think  
4 -- take Justice Gorsuch's point that that might  
5 be relevant to identifying the people in this  
6 particular situation. Coordination of  
7 entitlement to assistance under this chapter,  
8 meaning the Post benefits -- Post-9/11 benefits,  
9 takes place under 32 -- 3322 -- or, sorry, 3327.

10 And as you say, when you get there,  
11 you may elect. But I thought the sort of  
12 critical part was 3327(d)(1), which is where the  
13 swap is effected.

14 MR. TSEYTLIN: Mm-hmm.

15 JUSTICE JACKSON: You -- you -- if  
16 you're making an election under subsection (a),  
17 you shall be entitled to the Post-9/11 benefits  
18 instead of the benefits that you would have  
19 received in Montgomery.

20 So the reason why you're coordinating,  
21 I thought, under the way the -- the statute  
22 reads is to effect the swap of the unused  
23 Montgomery benefits.

24 MR. TSEYTLIN: That's -- that's  
25 obviously what 3327 is designed to do. Every

1 textual indicia in 3327 is a trade-in regime.  
2 The -- the entire argument my friend's come  
3 up -- come up with is -- is fitting a square peg  
4 into a round hole or vice versa. It's a --

5 JUSTICE JACKSON: Because you don't  
6 need this to get your entitlement to the  
7 Post-9/11 benefits because you had those already  
8 at 3311.

9 MR. TSEYTLIN: Exactly right.

10 JUSTICE JACKSON: You're only  
11 coordinating to make a swap, right?

12 MR. TSEYTLIN: Exactly right, Your  
13 Honor.

14 JUSTICE JACKSON: All right.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Mr. Suri.

18 ORAL ARGUMENT OF VIVEK SURI

19 ON BEHALF OF THE RESPONDENT

20 MR. SURI: Mr. Chief Justice, and may  
21 it please the Court:

22 I think the crucial question in this  
23 case is whether Mr. Rudisill was required to  
24 elect Post-9/11 benefits in order to receive  
25 them. So I'd like to begin by discussing who



1 does and doesn't have to make an election in  
2 order to receive Post-9/11 benefits.

3 A person who's entitled to benefits  
4 under only one program doesn't need to make an  
5 election. He can just apply for the benefits  
6 and receive those benefits. An election is a  
7 choice between multiple programs. And if you're  
8 covered only by one program, there's no choice  
9 that needs to be made.

10 A person who is covered by two  
11 programs or more, however, does need to make an  
12 election. This is explicit in the text of  
13 Section 3322(a), which is on page 1A of our  
14 brief. I'll read the relevant portion aloud.

15 "An individual entitled to educational  
16 assistance under this chapter" -- that's  
17 Post-9/11 -- "who is also eligible for  
18 educational assistance under Chapter 30" --  
19 that's Montgomery -- then it goes on, "shall  
20 elect under which chapter or provisions to  
21 receive educational assistance."

22 In other words, if you're eligible for  
23 both Montgomery and Post-9/11 benefits, you must  
24 make a choice. You can elect Post-9/11  
25 benefits, or you can elect Montgomery benefits.

1 And if you elect Post-9/11 benefits, that  
2 election would be made under 3327, triggering  
3 all the consequences that 3327 specifies.

4 3322(d) reinforces that command. It  
5 states that entitlement must be -- shall be --  
6 governed, coordination of entitlement shall be  
7 governed by 3327, and that makes it quite clear  
8 what 3327 is doing.

9 It means that if you're eligible for  
10 both Montgomery benefits and Post-9/11 benefits,  
11 3327 is the provision you go to to combine those  
12 two programs. And that's consistent with how  
13 the Federal Circuit applied this provision, and,  
14 therefore, its judgment should be affirmed.

15 JUSTICE THOMAS: Where do you  
16 statutorily peg the exhaustion requirement?

17 MR. SURI: The exhaustion requirement  
18 arises from the fact that someone who is covered  
19 by only one program doesn't need to make an  
20 election in the first place. So it is a  
21 consequence of 3322(a) and 3322(d).

22 Someone who has exhausted his  
23 Montgomery benefits and has only Post-9/11  
24 benefits remaining is covered by only one  
25 program and, therefore, wouldn't need to make an

1 election in the first place.

2 JUSTICE JACKSON: Mr. Suri, I don't  
3 understand your reading of 3322(a). I mean, it  
4 seems that your argument is turning on the  
5 supposition and the proposition that a person  
6 who has two separate periods of service and is  
7 entitled under the statute -- and I assume you  
8 don't quibble with the entitlement to the  
9 Post-9/11 benefits under 3311, right? So he's  
10 entitled to both Montgomery and -- and  
11 Post-9/11.

12 You say but he has to choose, as  
13 though he's not allowed to cash in or take  
14 advantage of both. So, first of all, is -- is  
15 that reading coming from 3322(a) as you've said?

16 MR. SURI: Yes.

17 JUSTICE JACKSON: All right. But I  
18 didn't hear you necessarily to read the entire  
19 section, which seems to me to cast a different  
20 light. When you say "an individual is entitled  
21 to educational assistance under this chapter" --  
22 this is the beginning of 3322(a) -- it goes on  
23 to say, "may not receive assistance under two or  
24 more such programs concurrently" --

25 MR. SURI: Mm-hmm.

1                   JUSTICE JACKSON: -- comma, "but shall  
2 elect in such form as the Secretary under which  
3 chapters to receive addition" -- "educational  
4 assistance."

5                   It seems to me the prior reference to  
6 "concurrently" is doing a substantial amount of  
7 work to explain that you can't get them at the  
8 same time, but you'll need to elect which one  
9 you want to get at which time. That is  
10 different than suggesting, I think, that you  
11 have to choose between them such that you can  
12 only have one ever.

13                   MR. SURI: I agree with everything you  
14 said --

15                   JUSTICE JACKSON: Great.

16                   MR. SURI: -- Justice Jackson. But  
17 3327 is the mechanism by which you elect, if  
18 you're eligible to vote, that you now want to  
19 receive Post-9/11 benefits.

20                   And we can look at the text of these  
21 two provisions to see why that's so. If you  
22 look at the last words of 3322(a), it says that  
23 you shall elect under which chapter to receive  
24 educational assistance. This is page 1A of our  
25 brief.

1                   And then page 4A of our brief, 3327(a)  
2           states: "An individual may elect to receive  
3           educational assistance under this chapter...".

4                   So there's an exact parallelism.  
5           3322(a) says you shall --

6                   JUSTICE GORSUCH: There's a sort of  
7           parallelism, I'll -- I'll grant you, but, as  
8           Justice Jackson pointed out, (a) on 3322 is  
9           about concurrent. You can't have concurrent.  
10          That's always been the law. No surprise  
11          Congress wants that to be the case here.

12                   "Shall elect." In other  
13          circumstances, Congress has used "shall elect"  
14          as well, 3033(a), I believe.

15                   Here, when we get to -- when you --  
16          and -- and I think you agree in your brief that  
17          3322 doesn't resolve the question presented  
18          before us, right?

19                   MR. SURI: The question presented has  
20          to be resolved by looking at both provisions  
21          together, not by one or the other alone. That's  
22          right.

23                   JUSTICE GORSUCH: Yeah, I -- I -- I  
24          think you said as much on --

25                   MR. SURI: Yes, we did.

1 JUSTICE GORSUCH: -- page 14 of your  
2 brief. "The coordination clause does not  
3 resolve the specific question presented..., "  
4 right?

5 MR. SURI: Points to 3327.

6 JUSTICE GORSUCH: Okay. So we've to  
7 go to 3327. When we get there, we don't have a  
8 "shall," we have a "may."

9 MR. SURI: Absolutely. "May" implies  
10 --

11 JUSTICE GORSUCH: So the parallelism  
12 is sort of parallel but not quite parallel.

13 MR. SURI: "May" implies that you have  
14 multiple options. You can opt to elect  
15 Post-9/11 benefits, or you can opt to elect  
16 Montgomery benefits.

17 JUSTICE GORSUCH: Doesn't it also  
18 possibly imply that you don't have to elect at  
19 all?

20 MR. SURI: No, because 3322(a) says  
21 you shall elect.

22 JUSTICE GORSUCH: Well, it says shall  
23 elect with respect to concurrent benefits. It  
24 doesn't speak to benefits otherwise.

25 MR. SURI: But --

1 JUSTICE GORSUCH: Right?

2 MR. SURI: I --

3 JUSTICE GORSUCH: (a) is about  
4 concurrent benefits?

5 MR. SURI: No. (a) has --

6 JUSTICE GORSUCH: 3322(a) is about  
7 concurrent benefits.

8 MR. SURI: (a) has two distinct  
9 requirements. It first says "may not receive  
10 assistance under two or more such programs  
11 concurrently." And then it also says --

12 JUSTICE GORSUCH: No, no.

13 MR. SURI: -- shall --

14 JUSTICE GORSUCH: It doesn't say also.  
15 It doesn't and also say. It says "but shall."

16 MR. SURI: Yes.

17 JUSTICE GORSUCH: Okay? So, instead  
18 of concurrent, you have to pick one. I get  
19 that. Suppose I'm right about that. Just spot  
20 me that, all right?

21 MR. SURI: Very well.

22 JUSTICE GORSUCH: I've got a "shall"  
23 here. I've got a "shall" in 30 -- 3033(a),  
24 which is again about coordinating between two  
25 different programs. But, when I get to 3327, I

1 have a "may."

2 So why isn't it an option to a veteran  
3 simply not to elect at all?

4 MR. SURI: The reason that doesn't  
5 work --

6 JUSTICE GORSUCH: "May" usually means  
7 "may," doesn't it?

8 MR. SURI: I agree that "may" means  
9 "may."

10 JUSTICE GORSUCH: And "may" -- "may"  
11 implies normally that you don't have an  
12 obligation to do anything, right?

13 MR. SURI: And it implies that here.

14 JUSTICE GORSUCH: Right?

15 MR. SURI: I'm entirely agreeing --

16 JUSTICE GORSUCH: No, it -- it -- it  
17 --

18 MR. SURI: -- with your reading of  
19 "may" in this provision. I'm just suggesting  
20 that the alternative to electing Post-9/11  
21 benefits under this provision is not, as  
22 Petitioner suggests, not electing them but  
23 receiving them anyway.

24 The alternative is electing Montgomery  
25 benefits or continuing with Montgomery benefits,



1 and that's the most natural way to read (a)  
2 itself.

3 CHIEF JUSTICE ROBERTS: Well, I mean,  
4 just to follow up on Justice Gorsuch's point,  
5 the most natural way to read "may" is "may."

6 MR. SURI: Yes.

7 CHIEF JUSTICE ROBERTS: And that's  
8 very much compelled if a couple sections earlier  
9 you have the phrase "shall elect," which  
10 suggests that that's quite a different -- you  
11 don't have a choice there, but when they say  
12 "may elect," you do have a choice.

13 MR. SURI: I agree, Mr. Chief Justice.  
14 And I would reconcile the two provisions in the  
15 following way: The first provision, 3322(a),  
16 says you must make a choice. You must choose  
17 either Montgomery or Post-9/11. And then  
18 3327(a) says you may elect Post-9/11.

19 Now that means the other choice that  
20 you have is you may elect Montgomery. It  
21 doesn't mean that the other choice you have is  
22 receive Post-9/11 anyway without choosing it.

23 JUSTICE KAVANAUGH: So you can't --

24 CHIEF JUSTICE ROBERTS: Well, is -- am  
25 I -- I know there must be something wrong with

1 the way -- at least on -- on this point, because  
2 it -- it doesn't make any sense, but the reason  
3 that the Petitioner here has this particular  
4 difficulty is that he served an additional tour  
5 of duty after 9/11 in addition to what he had  
6 served before 9/11.

7 Now, if you have somebody who just  
8 joined up after 9/11 for the same period as the  
9 Petitioner served, the Petitioner is getting  
10 less -- fewer benefits than the person who only  
11 served one tour of duty for the same length  
12 because, if he served just the -- the -- the  
13 Post-9/11 for, whatever, three years, he would  
14 get three years.

15 But, because this Petitioner had  
16 served additionally beyond his period of  
17 Post-9/11, he gets -- he doesn't get the full  
18 benefit of the Post-9/11 benefits. So I'm --  
19 there must be something wrong there because that  
20 would -- that would not make any sense.

21 MR. SURI: The reason Petitioner isn't  
22 getting as much -- as many months of benefits as  
23 the other veteran in your hypothetical is not  
24 that he is being penalized for serving two tours  
25 of duty. The reason is he has already used 25

1 months of benefits, a different type of  
2 benefits, I grant.

3 CHIEF JUSTICE ROBERTS: The Montgomery  
4 benefits?

5 MR. SURI: The Montgomery benefits,  
6 but a program that is designed to do a similar  
7 thing to the Post-9/11 program.

8 CHIEF JUSTICE ROBERTS: Well, but that  
9 still doesn't make all that much sense because  
10 he's getting those other benefits because he had  
11 an additional -- a couple additional tours of  
12 duty. So maybe, you know, he's entitled to both  
13 of them, but because of this other provision  
14 there, he can't get both at the same time, but  
15 it seems to me to be a pretty raw deal to say  
16 you're going to lose -- you're entitled -- if  
17 you hadn't done anything other than the 9/11,  
18 you would be entitled to this, but because you  
19 served additional period of time, you don't get  
20 the whole 9/11. You've got to exhaust this  
21 other less generous plan first.

22 MR. SURI: Mr. Chief Justice, the  
23 reason he is not getting the additional  
24 benefits, again, is not that he served an  
25 additional period of duty. It's that he already

1 went to college using some benefits that the  
2 government has provided. That makes --

3 CHIEF JUSTICE ROBERTS: Yeah, but he  
4 was fully entitled -- fully entitled to those  
5 benefits because of his additional tour of duty.  
6 Fine.

7 MR. SURI: Yes.

8 CHIEF JUSTICE ROBERTS: But, if you  
9 take him and somebody else that didn't have an  
10 additional tour of duty and that person has the  
11 same length Post-9/11, the person who didn't  
12 serve as long gets the full Post-9/11 benefits,  
13 but the Petitioner does not, which -- and -- and  
14 you say, well, but he's getting other benefits  
15 under another program. Well, that's because he  
16 earned those benefits under -- because of his  
17 other service.

18 MR. SURI: But, Mr. Chief Justice,  
19 everyone who is going to be using this election  
20 provision in 3327 is going to be entitled to  
21 both sets of benefits. And this follows from  
22 the text of 3327(a)(1) and (a)(2). (a)(2)  
23 states that in order to use this election  
24 mechanism, you must meet the requirements for  
25 entitlement to educational assistance under this

1 chapter, that is, under the Post-9/11 Bill.

2 CHIEF JUSTICE ROBERTS: So but now, if  
3 I understand that answer, it's that, look --  
4 look, you can only go to college so -- so many  
5 years, and -- and we're paying for additional --  
6 for -- for years of college for the people who  
7 got Montgomery benefits, and even though you get  
8 additional benefits under Post-9/11, you know,  
9 we're not going to pay for eight years of  
10 college.

11 MR. SURI: Let -- let me try a  
12 different way of explaining why --

13 CHIEF JUSTICE ROBERTS: Well, but is  
14 that -- is that a good, reasonable way of  
15 looking at it?

16 MR. SURI: That is the consequence of  
17 what Congress has wrote. And let me take a stab  
18 at explaining why Congress might have designed  
19 the statute this way.

20 The purpose or one purpose of the GI  
21 Bill is to enable someone who has served in the  
22 military to transition back into civilian life.  
23 That's why the first GI Bill was called the  
24 Servicemen's Readjustment Act. It was about  
25 readjustment. And Congress could conclude that

1 in order to readjust, you need 36 months of  
2 benefits. That's four years of college, nine  
3 months per academic year.

4 And it could say that whether you get  
5 these 36 months through one program or through  
6 two programs is not of much concern to us  
7 because these two programs are close substitutes  
8 for each other.

9 JUSTICE JACKSON: But how do you --

10 CHIEF JUSTICE ROBERTS: And --

11 JUSTICE JACKSON: -- reconcile that  
12 with the 48-month cap? I mean, there's --  
13 there's something in the statute that Congress  
14 has made clear that you get up to 48 months of  
15 benefits. So how -- how -- how is that  
16 consistent with your story about Congress having  
17 a purpose to limit people to 36 months?

18 MR. SURI: In order to answer that  
19 question, I'll need to explain how the overlap  
20 between the Montgomery and Post-9/11 GI Bills  
21 differs from the overlap between previous bills.

22 JUSTICE JACKSON: But are you saying  
23 the 48 months doesn't apply? I mean, I thought  
24 they -- Congress chose a cap, right? Consistent  
25 with your story --

1 MR. SURI: Yes.

2 JUSTICE JACKSON: -- we have to let  
3 this in somewhere. You can't, you know, have  
4 every degree available on the government's dole.  
5 So 48 months.

6 And I understand Mr. Rudisill to be  
7 saying what I'd like to do is take my separate  
8 periods of service and the benefits that I have  
9 accrued and are entitled to as a result of those  
10 and get 48 months' worth of benefits.

11 And I'm not sure it makes sense to say  
12 the government is saying no, you can only have  
13 36 because you used some of them before, which  
14 sounds like what you're saying.

15 MR. SURI: What I'm saying is that he  
16 can only use 36 because the limitation clause,  
17 3327(d), specifically says that. Now I'm trying  
18 to explain why it is that Congress might have  
19 done it that way, but --

20 JUSTICE JACKSON: And your answer is  
21 because they only wanted you to have 36 months,  
22 but then I point to the 48. So that can't be  
23 right. What's the other answer?

24 MR. SURI: The -- the answer is  
25 Congress treated this overlap between these two

1 GI Bills differently from the overlap between  
2 other GI Bills. Other GI Bills apply to  
3 different wars. You could serve in Vietnam and  
4 also serve in Korea and that's how you'd get to  
5 48 months.

6 That's not what happens under  
7 Petitioner's view under this statute. Imagine a  
8 veteran serves six continuous years in one war,  
9 just the Iraq War. What Petitioner would allow  
10 that person to do is say: I'm going to apply  
11 the first three years of my Iraq War duty to the  
12 Montgomery program, apply the second three years  
13 to the -- to the Post-9/11 program, and get more  
14 than 36 months of benefits, even though I've  
15 served only in one war. And that's something  
16 Congress has never previously allowed.

17 CHIEF JUSTICE ROBERTS: But you said  
18 --

19 JUSTICE KAGAN: But, if I --

20 CHIEF JUSTICE ROBERTS: -- earlier  
21 that -- the purpose of this is because you're  
22 transitioning back to civilian life and this  
23 will allow you to get the degrees that you may  
24 have -- but, here, you have a -- a situation  
25 where, instead of transitioning after having



1 served the first time and transitioned, he  
2 doesn't get -- you're saying, well, you don't  
3 get another transition because instead of just,  
4 you know, whatever, you decided to go back to  
5 Iraq and Afghanistan and get a Bronze Star, so  
6 we don't have to worry about you transitioning  
7 to school.

8 MR. SURI: Mr. Chief Justice, this is  
9 the consequence of the statute that Congress has  
10 written. If that statute creates hardship in  
11 particular cases, then Congress is free to amend  
12 the statute as it has done many times before.

13 It is notable, however, that Congress  
14 was aware of the way the VA had been applying  
15 the statute in the 2011 amendments. The Senate  
16 report accompanying that shows that. And it  
17 chose not to change that interpretation.

18 JUSTICE KAGAN: If -- if -- if I  
19 understand the way this statute works -- and  
20 this goes to your explanation of why Congress  
21 could have written it this way -- but if I  
22 understand the way the statute works, suppose a  
23 veteran has 35 months that he's already covered,  
24 so he has one left. You're saying he has this  
25 choice. He can take the -- the 36-month under

1     Montgomery and, if he does that, he gets a full  
2     year extra under 9/11. Or he can swap out the  
3     Montgomery for the 9/11 for the single month  
4     left, and then he forfeits the additional year.

5             So why would that choice be put to the  
6     veteran?

7             MR. SURI: I can explain why Congress  
8     might have decided that those who have already  
9     exhausted their Montgomery benefits should still  
10    have the opportunity to get some additional  
11    Post-9/11 benefits. There are a few different  
12    reasons that might have explained it. We don't  
13    know, in fact, why Congress did it.

14            The first possible reason is that  
15    Congress was creating the Post-9/11 program and  
16    making it retroactive. It knew that there would  
17    be some veterans who had served after 9/11 but  
18    before 2008, when the Post-9/11 bill was  
19    enacted, and who had already used up all of  
20    their Montgomery benefits. And Congress may  
21    have wanted to ensure that those veterans get  
22    something, and so the something it gave them was  
23    to allow them to get 12 additional months after  
24    exhaustion. That's one possibility.

25            A second possibility is this may be an

1 artifact of the fact that the Post-9/11 bill was  
2 originally limited to college education and the  
3 Montgomery bill was designed to focus on  
4 vocational education. Congress may have decided  
5 that if you've used your 36 months of Post-9/11  
6 benefits to go to college, you don't need  
7 additional benefits under the program that's  
8 geared toward vocational training. But, if you  
9 used your 36 months of benefits under the  
10 vocational program, then you might still want to  
11 go to college for a few years and, therefore,  
12 we'll leave open the option of getting the  
13 Post-9/11 college-related benefits.

14 A third possibility is that Congress  
15 said: We're going to be extremely generous for  
16 those who want 36 months of benefits, you'll  
17 have this extremely helpful Post-9/11 program,  
18 but for those who want more than 36 months,  
19 we'll make a tradeoff. You can use the less  
20 expensive program for most of the time when  
21 you're going to college and then you use the  
22 more expensive Post-9/11 program when you're  
23 going to graduate school. This is a perfectly  
24 reasonable trade for Congress to make if it's  
25 trying to limit the overall cost of the program.

1 JUSTICE SOTOMAYOR: I -- the only  
2 problem with that answer, it doesn't really  
3 answer Justice Kagan's question. Her  
4 hypothetical suggested, I think, that it's  
5 irrational to think that Congress would say, if  
6 you wait and take the one month, you'll get 12,  
7 but if you decide to take the one -- not take  
8 the one month and switch over immediately, that  
9 you're going to lose those 12 months. That's  
10 what's basically, I think, the irrationality.

11 Am I assuming --

12 JUSTICE KAGAN: It just seems utterly  
13 arbitrary.

14 MR. SURI: I -- I -- I'll add two  
15 points in response to that. One -- one further  
16 possibility is that that is an unintended  
17 consequence of how these coordination provisions  
18 were written. Coordination of benefits is a  
19 very complicated enterprise, and it may be that  
20 this is just an unintended consequence of what  
21 Congress wrote.

22 A final possibility is that we're  
23 wrong about the exhaustion rule. It may be that  
24 once you've exhausted the Montgomery benefits,  
25 you don't get additional Post-9/11 benefits.

1 But that's not the question before the Court  
2 today. The only question that's presented here  
3 is how many months of benefits Mr. Rudisill is  
4 entitled to.

5 JUSTICE SOTOMAYOR: That -- that --  
6 that seems odd, doesn't it, that Congress is  
7 going to penalize a veteran who, as the other  
8 side pointed out, has served the country for a  
9 longer period of time, put himself at risk in  
10 not one war but two wars, and now we're going to  
11 deprive him of access -- of any access to the  
12 more fulsome benefits.

13 MR. SURI: Justice Sotomayor, no one  
14 is being made worse off. Before Mr. Rudisill  
15 went into his third period of service in 2007,  
16 he had no expectation of receiving Post-9/11  
17 benefits because that program didn't exist yet.

18 JUSTICE SOTOMAYOR: No, but one --  
19 the -- the very purpose of the 9/11 program was  
20 to ensure that he did serve. He could have  
21 retired, but he chose to stay. And there should  
22 be a benefit, which is what Congress made  
23 available to him.

24 MR. SURI: It -- it -- it -- it is not  
25 the statutory scheme that the more periods of

1 service you have, the more benefits you obtain.  
2 Someone could serve three years, five years, or  
3 10 years and still get only 36 months of  
4 Montgomery benefits. Only --

5 JUSTICE SOTOMAYOR: All right. Can I  
6 move on from that answer for a second?  
7 3327(h)(1).

8 MR. SURI: Yes.

9 JUSTICE SOTOMAYOR: It's an amendment  
10 that's happened more recently. Is that  
11 amendment intended to take care of the  
12 hypothetical that Justice Kagan and I are saying  
13 is a bit irrational or suggesting might be  
14 irrational?

15 MR. SURI: No, that takes care of a  
16 different problem. It --

17 JUSTICE SOTOMAYOR: Okay.

18 MR. SURI: And --

19 JUSTICE SOTOMAYOR: Go ahead.

20 MR. SURI: And it is a crucial piece  
21 of context in interpreting 3327 because, on  
22 Petitioner's view, 3327 becomes potentially  
23 rather superfluous.

24 3322(h) states that you can't use the  
25 same period of service to establish entitlement

1 to two different programs. You've got to credit  
2 it to one program or the other.

3 But 3327 says that in order to make an  
4 election, you must be entitled to both  
5 Montgomery benefits and Post-9/11 benefits. So  
6 you have to have eligibility for both programs.  
7 And this provision, (h), is telling you, you  
8 can't be eligible for both programs based on a  
9 single period of service.

10 If you put those two things together,  
11 on Petitioner's view, 3327 does no work at all.  
12 It doesn't apply to people with multiple periods  
13 of service because that's his theory. And it  
14 doesn't apply to people with a single period of  
15 service because (h) says you can't be eligible  
16 for both programs based on a single --

17 JUSTICE SOTOMAYOR: So what --

18 MR. SURI: -- period of service.

19 JUSTICE SOTOMAYOR: -- what does (h)  
20 mean? What can the Secretary waive? Which  
21 election?

22 MR. SURI: I -- I'm sorry, I -- I  
23 thought you were referring to 3322(h).

24 JUSTICE SOTOMAYOR: No.

25 MR. SURI: But you're referring --

1 JUSTICE SOTOMAYOR: I said 3327(h)(1).

2 MR. SURI: 3327(h) states that if a  
3 veteran makes a choice that the Secretary  
4 determines is not in his best interests, the  
5 Secretary --

6 JUSTICE SOTOMAYOR: When would that  
7 occur?

8 MR. SURI: That would occur as soon as  
9 the Secretary receives the election. I will  
10 note that provision does not apply to this case  
11 because it refers to elections made from 2017  
12 onward. And this particular election was made  
13 before 2017.

14 JUSTICE JACKSON: What is your  
15 response to your counterpart's contention that  
16 the work of 3327 is to effect the swap and that  
17 insofar as Mr. Rudisill is not seeking to swap,  
18 it doesn't apply to him?

19 MR. SURI: I appreciate the chance to  
20 answer that question. I -- I'd give a few  
21 answers to that.

22 The first is the text of 3327(a),  
23 again, page 4A of our brief, says an individual  
24 may elect to receive. It's talking about  
25 receiving benefits, not converting benefits or



1 swapping benefits.

2 The second point is a structural one.

3 JUSTICE JACKSON: No, go on to (d).

4 Right, (d), "subject to paragraph 2 and except  
5 as provided in (e), an individual making an  
6 election under (a)," which is what you just  
7 referenced, right, "shall be entitled to  
8 benefits under this chapter instead of." So is  
9 that not doing the work of saying the reason why  
10 you're in 3327 at all is because, if you're an  
11 (a) person who has made an election, you are  
12 seeking to convert?

13 MR. SURI: I -- I appreciate the force  
14 of the point with respect to (d) if you look at  
15 that provision alone, but if you go back up to  
16 (a), it says that in order to make an election,  
17 you have to both be entitled to Montgomery  
18 benefits, that's (a)(1), and be entitled to  
19 Post-9/11 benefits.

20 JUSTICE GORSUCH: Yeah, I --

21 MR. SURI: That's (a)(2).

22 JUSTICE GORSUCH: -- I -- I take that  
23 point. But just to follow up on my colleague's  
24 observation, (d) tells us what the effect of an  
25 election under (a) is, right?

1 MR. SURI: Yes.

2 JUSTICE GORSUCH: And that is swapping  
3 one benefit for the other, right, "instead of"?

4 MR. SURI: (d) says that you will be  
5 eligible for the one and you will no longer be  
6 eligible for the other. I entirely agree with  
7 that.

8 JUSTICE GORSUCH: You swap one for the  
9 other, right?

10 MR. SURI: But --

11 JUSTICE GORSUCH: Right?

12 MR. SURI: Yes, I accept that.

13 JUSTICE GORSUCH: And that's the point  
14 of -- of -- that's the effect of an election  
15 under (a)?

16 MR. SURI: Yes. But we must also look  
17 at who can make an election under (a) in the  
18 first place, and you have to be entitled to  
19 Post-9/11 benefits.

20 JUSTICE GORSUCH: No. I -- I take  
21 your point.

22 JUSTICE JACKSON: And you're entitled  
23 if you serve in the relevant period. I mean,  
24 this is where the overlap is coming that I think  
25 he's identifying. This is a person who has one

1 period of service, but that period of service is  
2 happening at a time in which only Montgomery  
3 benefits are available to him because Post-9/11  
4 has not yet been in effect, but he's earning  
5 Post-9/11 because he's serving after 9/11.

6 And the question is, will he be  
7 relegated to just having Montgomery because that  
8 was all that was available to him during his  
9 period of service, or is there some mechanism  
10 that allows him to get the Post-9/11 benefits  
11 that he's entitled to because of his period of  
12 service? And I read 3327 as doing that.

13 MR. SURI: Exactly right. 3327 is the  
14 mechanism for someone who is entitled to both  
15 programs to start receiving Post-9/11 benefits.

16 JUSTICE JACKSON: Yeah, but not  
17 because of separate periods of service. Mr.  
18 Rudisill says, I'm not entitled in the same way.  
19 I'm entitled to these separately because I have  
20 two periods of service, not the one that is  
21 falling in the overlap. I have two, he says.

22 MR. SURI: And -- and my response to  
23 that is there's no statutory text whatsoever  
24 that draws a distinction between one period of  
25 service and two in 3327 or in 3322(d), the

1 provision that points to 3327.

2 JUSTICE JACKSON: (a), you pointed to  
3 two periods of service in 3322(a).

4 MR. SURI: 3322(a) doesn't say  
5 anything about periods of service either. And  
6 it's notable that Petitioner says that many  
7 provisions in this statute that have -- that say  
8 nothing about periods of service apply to him.  
9 For example, 3322(a) says you can't use two  
10 different programs concurrently. He says that  
11 applies to him. He doesn't say that doesn't  
12 apply to people with multiple periods of  
13 service.

14 So he seems to be reading in a  
15 multiple-period-of-service limitation to 3327  
16 but not to these other provisions, and he  
17 doesn't explain the justification for that,  
18 other than, potentially, it would be a fairer or  
19 more sensible scheme. And he may be right about  
20 that, but this is not the forum for that debate.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Do you know how many

1 veterans are affected by this question?

2 MR. SURI: The -- we don't know  
3 exactly. The best estimate that we have is that  
4 it could be up to 30,000 veterans who  
5 potentially would be affected, that is,  
6 individuals who fall into the same multiple  
7 periods of service and have already used some  
8 Montgomery benefits category.

9 That doesn't mean, however, that all  
10 of them have plans to go to graduate school or  
11 all of them would use the benefits that would be  
12 available.

13 JUSTICE ALITO: When a veteran enrolls  
14 in a college program and fills out the form to  
15 get benefits from the VA, if that veteran asks  
16 for Montgomery benefits, does that constitute an  
17 election not to receive the 9/11 benefits?

18 MR. SURI: That constitutes an  
19 election to receive Montgomery rather than  
20 Post-9/11 benefits. But, to respond to a  
21 question that you posed to Mr. Tseytlin earlier  
22 if I may, that election is not irrevocable. The  
23 only election that's irrevocable is the election  
24 of Post-9/11 benefits, and that follows from the  
25 text of 3327(i).

1 JUSTICE ALITO: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

4 JUSTICE SOTOMAYOR: A follow-on to  
5 that last question. I -- the way I understand  
6 your reading of the statute, someone who  
7 qualifies for Montgomery and Post-9/11 benefits  
8 under separate periods of service could not use  
9 their 36 months of Post-9/11 benefits first and  
10 then get 12 of Montgomery?

11 MR. SURI: That is prevented by a  
12 different provision that we haven't talked about  
13 yet, which is 3327(d)(1), which states that once  
14 you've elected Post-9/11 benefits, you're no  
15 longer eligible for the Montgomery benefits.

16 JUSTICE SOTOMAYOR: That one I'll have  
17 to look at. Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?  
19 Justice Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: I just want to  
22 make sure of one thing first, that you said you  
23 can't receive Post-9/11 benefits unless you  
24 elect to receive them?

25 MR. SURI: For an individual who's

1 covered by multiple programs, that's correct,  
2 Justice Kavanaugh.

3 JUSTICE KAVANAUGH: Okay. So there  
4 has to be an election. And your point is the  
5 only way to make an election is under 3327?

6 MR. SURI: That's correct.

7 JUSTICE KAVANAUGH: Okay. Second, I  
8 think you had been asked about the other side's  
9 point that 3327 is best read as a swap or  
10 trade-in provision, and you said you appreciated  
11 the opportunity to answer the question, but I  
12 don't think you were able to get the answer. So  
13 I'm giving you a full opportunity to answer that  
14 question.

15 MR. SURI: Thank you, Justice  
16 Kavanaugh. The first answer is the textual  
17 point, which is 3327(a) says an individual may  
18 elect to receive educational assistance under  
19 this chapter. That echoes the language of  
20 3322(a), which says "shall elect" under which  
21 chapter to receive educational assistance.

22 That's a clue that this provision is  
23 one of the options that is on the table under  
24 3322(a). 3322(a) is saying you must pick either  
25 Chapter 30, Montgomery, or Chapter 33,

1 Post-9/11. And this provision is saying here's  
2 how you pick Post-9/11. That's one answer.

3 The second answer is the structure of  
4 3327(a). It -- it applies only to individuals  
5 who are eligible for both programs, so that  
6 precludes the idea that it's meant to allow  
7 someone who is eligible for one program to trade  
8 in benefits in order to obtain the other  
9 program. You have to already have Post-9/11  
10 benefits in order to make this election in the  
11 first place. And that's in the text of  
12 3327(a)(2).

13 The third answer is going back to  
14 3322(d), a provision that was discussed earlier  
15 during Mr. Tseytlin's argument. It states that  
16 the -- it -- it tells us what 3327 is designed  
17 to do. It states that an individual must  
18 coordinate entitlement under 3327. It doesn't  
19 say that an individual can convert entitlement  
20 under 3327.

21 It's notable that in Mr. Tseytlin's  
22 brief, he resorts to phrases such as the veteran  
23 has no need to "coordinate" Montgomery benefits  
24 into Post-9/11 benefits. That's not a normal  
25 usage of the word "coordinate." You coordinate



1 one program with another program. You don't  
2 coordinate or convert one program into another  
3 program.

4 So those are the textual reasons that  
5 -- the most important textual reasons that 3327  
6 can't be about swapping.

7 JUSTICE KAVANAUGH: How much  
8 significance, if any, is there that it says  
9 "coordination of entitlement" and not  
10 "coordination of benefits"?

11 MR. SURI: That is a very significant  
12 point, Justice Kavanaugh, because that too  
13 suggests that this provision is meant to address  
14 specifically veterans who are entitled to both  
15 programs. Congress thought about veterans who  
16 have multiple types of entitlement, and it wrote  
17 this provision saying: Go look at 3327 to  
18 determine how to coordinate those programs.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 JUSTICE BARRETT: No.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Jackson?

25 JUSTICE JACKSON: So just on that very

1 last point, you've repeatedly emphasized that  
2 this is about veterans who already have  
3 entitlements to both programs, right?

4 What I don't see in 32 -- 3327(a)(2)  
5 is language that supports that. If you look at  
6 that actual provision, it says -- it's talking  
7 about an individual who may elect to receive if  
8 they are, as of August 1st, under these certain  
9 categories. That's (a)(1).

10 MR. SURI: Yes.

11 JUSTICE JACKSON: And then, as of the  
12 date of the individual's election, meets the  
13 requirements for entitlement to educational  
14 assistance under this chapter.

15 MR. SURI: Yes.

16 JUSTICE JACKSON: That -- so the  
17 language there is not "is entitled" or "already  
18 has been entitled." It seems to be suggesting  
19 that if you're one of these people who meets the  
20 entitlement, then you can go on, as Justice  
21 Gorsuch points out, to (d), which tells us what  
22 happens, that you can exchange -- I mean, do you  
23 -- do you dispute that (d) has sort of an  
24 exchange quality to it?

25 MR. SURI: I -- I don't dispute that.

1 JUSTICE JACKSON: So what's it doing  
2 if -- if not the swap?

3 MR. SURI: I'll -- I'll say a couple  
4 of points in response to that. The first is the  
5 only way to be entitled to Post-9/11 benefits is  
6 to meet the requirements for entitlement.

7 JUSTICE JACKSON: No, I appreciate,  
8 but Congress doesn't use superfluous words.  
9 When we interpret a statute, if it says "meets  
10 the requirements," it's doing something  
11 different, presumably, than "you are entitled,"  
12 which is the way you're reading it.

13 MR. SURI: I think that's giving the  
14 drafters of this statute a little too much  
15 credit, Justice Jackson.

16 JUSTICE JACKSON: All right. So what  
17 is (d) doing if not the swap?

18 MR. SURI: (d) is providing two  
19 things. (d)(1) is stating that you cease to be  
20 entitled to one form of benefit and you -- you  
21 can start using the other form of benefit.

22 JUSTICE JACKSON: But why? I thought  
23 you said they were entitled to both. And what  
24 -- what -- why would a person do this? Or maybe  
25 the --

1           MR. SURI: Because Congress said this  
2 is the provision that must be used to  
3 coordinate.

4           JUSTICE JACKSON: I see. All right.

5           MR. SURI: And -- and one last point  
6 if I may, Justice Jackson. It's notable that  
7 3327(a)(1) also refers to individuals who don't  
8 have any Montgomery benefits in the first place.  
9 So this is in 3327(a)(1)(F), is a member of the  
10 armed forces who is not entitled to Montgomery  
11 benefits. So --

12           JUSTICE JACKSON: Right. Because a  
13 lot of people were -- were shuttled to this,  
14 right, from 3322(d)? There were lots of people,  
15 not only the Montgomery benefit people, but  
16 others get there.

17           MR. SURI: I -- I think that defeats  
18 the conversion idea. These people have no  
19 benefits to convert, and yet they're covered by  
20 3327.

21           JUSTICE JACKSON: Thank you.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           Rebuttal, Mr. Tseytlin?

25

1 REBUTTAL ARGUMENT OF MISHA TSEYTLIN  
2 ON BEHALF OF THE PETITIONER  
3 MR. TSEYTLIN: Thank you, Your Honor.  
4 My friend started with 3322(a). I  
5 think it's pretty remarkable that they appear to  
6 be basing their argument based on this provision  
7 that the -- the election in 3322(a) is a  
8 mandatory election, which is clearly in service  
9 of the concurrent usage bar, is -- doing  
10 completely different work than 3327. It is  
11 identical to the -- to the election mechanism in  
12 33 -- in -- in 3033(a), and my friend doesn't  
13 say that that somehow shuttles somebody into  
14 3327.

15 In fact, the -- that provision  
16 strongly supports our position in two respects.  
17 One is the suggested difference between "may"  
18 and "shall"; and second is that their  
19 interpretation renders 3327 -- 3322(a)'s use of  
20 a mandatory bar on concurrent usage super --  
21 superfluous because, under their reading of --  
22 under -- of 3327, a veteran who's entitled to  
23 Montgomery and Post-9/11 either has to use up  
24 all their Montgomery benefits and -- to get to  
25 Post-9/11 or give up their Montgomery benefits

1 to use Post-9/11. Either way, concurrent usage  
2 would be impossible, which means that this  
3 entire provision would be superfluous.

4 Second, 30 -- 3327 is plainly a  
5 swapping mechanism, and every provision, every  
6 subsection of 3327 points in that direction.

7 We talk about (a). That's the  
8 voluntary election mechanism. My -- I heard my  
9 friend mention (a)(1)(F). That provision serves  
10 absolutely no function under his exhaustion view  
11 because that person has no Montgomery benefits  
12 to exhaust.

13 With regard to (b), that -- that lets  
14 you stop paying. With regard to (c), that lets  
15 you revoke the transfer of Montgomery benefits  
16 because now they're so much more beneficial  
17 because you can trade them for Post-9/11  
18 benefits. (d) is plain as day a swap. (f) lets  
19 you get your Montgomery payments back pro rata.

20 Every single indication is that  
21 Congress was creating a swap mechanism, not an  
22 exclusive mechanism to invoke your 3311  
23 entitlement, unless you've exhausted your --  
24 your Montgomery benefits.

25 Three, the number of veterans

1 impacted, my -- my friend says 30,000. That's  
2 just plain wrong. It's north of a million, and  
3 that's because their interpretation doesn't just  
4 cover those that are on 3327(d)(2), it also  
5 covers those that would be spit into 37 -- 37 --  
6 to 3327(d)(1), which is how you get over -- over  
7 a million.

8           You -- you heard my friend attempt to  
9 do back flips to try to get around how the  
10 exhaustion requirement makes any sense  
11 whatsoever, an unprecedented exhaustion  
12 requirement. And then, when he kind of hit a  
13 brick wall, he said, well, maybe the exhaustion  
14 requirement doesn't -- doesn't have to exist.

15           Well, that just would put the VA into  
16 even more absurd land, where veterans who served  
17 before 9/11 used up all of their benefits,  
18 Montgomery benefits before 9/11, then felt the  
19 call after the September 11th attacks, would be  
20 entitled to no Post-9/11 benefits whatsoever?  
21 That's even more absurd than the absurd  
22 exhaustion concept.

23           And then I will close on the  
24 following. All of these kind of back flips and  
25 whatnot are entirely unnecessary. The statute

1 should be read as what it says: 3311 gives you  
2 a plain-as-day entitlement. 3327 is a voluntary  
3 swap mechanism, does not limit that entitlement  
4 in any way.

5 Read in that way, the statute has no  
6 superfluity, has no problems in it, and it  
7 plainly achieves the pro-veteran purposes for  
8 which Congress enacted the Post-9/11 GI Bill.

9 Thank you, Your Honors.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 The case is submitted.

13 (Whereupon, at 11:14 a.m., the case  
14 was submitted.)

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## Official

<p><b>Bronze</b> <sup>[1]</sup> 56:5  <b>bunch</b> <sup>[1]</sup> 20:20  <b>Byzantine</b> <sup>[1]</sup> 4:20</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>call</b> <sup>[1]</sup> 78:19  <b>called</b> <sup>[1]</sup> 52:23  <b>came</b> <sup>[2]</sup> 1:14 20:17  <b>cannot</b> <sup>[1]</sup> 5:17  <b>cap</b> <sup>[3]</sup> 10:14 53:12,24  <b>caps</b> <sup>[2]</sup> 8:23 18:20  <b>care</b> <sup>[2]</sup> 61:11,15  <b>carefully</b> <sup>[1]</sup> 14:7  <b>Case</b> <sup>[10]</sup> 3:4 26:8,9,10,12 39:23 44:11 63:10 79:12, 13  <b>cases</b> <sup>[1]</sup> 56:11  <b>cash</b> <sup>[6]</sup> 4:2,10 31:3,3,5 42:13  <b>cast</b> <sup>[1]</sup> 42:19  <b>categories</b> <sup>[1]</sup> 73:9  <b>category</b> <sup>[2]</sup> 5:3 68:8  <b>cautious</b> <sup>[1]</sup> 28:18  <b>cease</b> <sup>[1]</sup> 74:19  <b>certain</b> <sup>[3]</sup> 9:3 25:13 73:8  <b>certainly</b> <sup>[1]</sup> 4:19 15:14 18:15 26:9 27:17,22 28:7 32:6,18 36:1 37:15  <b>certificate</b> <sup>[1]</sup> 34:13  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