

# Important Policy Implications of *Rudisill v. McDonough*

## WRITTEN BY

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## Introduction

In *Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. 2022), the *en banc* U.S. Court of Appeals for the Federal Circuit broke the core promise of “GI Bills” for post-9/11 era veterans by, for the first time in our Nation’s history, depriving veterans who have multiple qualifying periods of service of the full 48 months of educational benefits that they have earned. The Supreme Court of the United States should grant Petitioner James Rudisill’s petition for writ of certiorari and reverse the *en banc* Federal Circuit’s erroneous decision for numerous legal reasons, as Mr. Rudisill details at length in his petition. There also are significant policy implications of the *en banc* Federal Circuit’s decision—and, likewise, of the question to review that decision, now pending before the Supreme Court—that greatly impact our nation’s veterans, particularly those who historically have been disadvantaged by society; the Armed Forces’ efforts to recruit and retain the best and the brightest; and the public’s expectations that the nation will honor its promises to our veterans. We briefly summarize these important issues of public policy below.

## Background

Mr. Rudisill’s case centers on the Department of Veterans Affairs’ (VA) interpretation of certain administrative provisions of the Post-9/11 GI Bill, 38 U.S.C. § 3301 *et seq.* Congress enacted the Post-9/11 GI Bill in 2008 to provide “enhanced educational benefits” far more generous than the then-prevailing peacetime Montgomery GI Bill, 38 U.S.C. § 3001 *et seq.*, in recognition of the “especially arduous” wartime service required of veterans since the September 11, 2001, terrorist attacks. 38 U.S.C. § 3301 note. As then-Senators Jim Webb and Chuck Hagel, bipartisan co-sponsors of the Post-9/11 GI Bill, said prior to its enactment: The Montgomery GI Bill “was a reasonable enlistment incentive for peacetime service, but it is an insufficient reward for wartime service today. It is hardly enough to allow a veteran to attend many community colleges . . . . A G.I. Bill for those who have given so much to our country, often including repeated combat tours, should be viewed as an obligation.”<sup>[1]</sup> Congress meant to reward veterans like Mr. Rudisill, who served combat tours in Iraq and Afghanistan, and, among other things, was awarded a Bronze Star, a Combat Action Badge, an Air Assault Badge, and Afghanistan and Iraq Campaign Medals with multiple campaign stars.

Congress expressly has allowed veterans to earn full benefits under both the Post-9/11 and Montgomery GI Bills,

which each provide 36 months of benefits, subject to a long-standing 48-month aggregate cap on the usage of benefits under multiple programs. Yet, the VA has interpreted an isolated administrative provision of the Post-9/11 GI Bill as requiring veterans with separate and distinct periods of qualifying service, like Mr. Rudisill, to exhaust or forfeit their remaining Montgomery benefits before obtaining the more-generous Post-9/11 benefits. Practically speaking, as the VA's own data reflects, this means that the overwhelming majority of post-9/11 veterans actually receive only 36 rather than 48 months of GI Bill benefits.

By way of further background, in 2008, then-Senator Biden—one of the few members of Congress with a child serving in the War on Terror—vocally supported the creation of the generous Post-9/11 GI Bill.<sup>[2]</sup> This new benefits program was a major improvement on pre-existing veterans' educational benefits, like the Montgomery GI Bill, which Congress simultaneously amended to compliment the Post-9/11 program. *E.g.*, 38 U.S.C. §§ 3033(a), 3695 (permitting concurrent and combined usage of both benefits).

Both a panel of the Federal Circuit and the Court of Appeals for Veterans Claims (Veterans Court) rejected the VA's interpretation of the statutory scheme as requiring all veterans, regardless of how long they served, to exhaust or forfeit their entitlement to other educational benefits before obtaining Post-9/11 benefits. While the Federal Circuit ultimately reversed the Veterans Court's decision when it reheard the case *en banc*, the majority focused narrowly on limited provisions of 38 U.S.C. §§ 3327 and 3322(d), without meaningful consideration of the broader statutory scheme or, as discussed below, the policies underpinning the Post-9/11 and all other GI Bill programs since 1944.

## **Policy Considerations**

Mr. Rudisill's interpretation, as prior appellate decisions have agreed, is the most veteran-friendly. If the Supreme Court grants certiorari and reverses the *en banc* Federal Circuit's decision, thereby adopting Mr. Rudisill's interpretation, it will serve several important policies, including the following:

- **Allow veterans with sufficient qualifying service for only one GI Bill benefit to equitably redirect that service to establish Post-9/11 entitlement.** Congress has never allowed veterans to obtain two veterans educational benefits for the exact same service, or “double dipping” as the Veterans Court called it. Instead, Congress consistently bars duplication of eligibility based on the *same* service by requiring qualifying service to be credited to only one benefit or another. *e.g.*, 38 U.S.C. §§ 3322(c), (h)(1). The Post-9/11 program does not deviate from this GI Bill first principle. *Id.* But because Congress made the Post-9/11 GI Bill retroactively applicable to service that could also be applied towards entitlement to other benefits, like the Montgomery GI Bill (something which had never occurred before), it created a unique mechanism for veterans with limited qualifying service to equitably switch from other programs to the Post-9/11 program. *Id.* §§ 3322(d), 3327. This was particularly necessary considering the countless veterans who had previously applied their limited qualifying service between September 11, 2001, and August 1, 2009 (the effective date of the Post-9/11 program and the date to which both §§ 3322(d) and 3327 are expressly tied), to another program. Under Mr. Rudisill's interpretation, veterans will continue to be barred from duplicating benefits based on the same service, but they may equitably switch qualifying service from another program to the Post-9/11 program subject to § 3327's limitations—exactly as Congress intended.<sup>[3]</sup>
- **Give veterans with the longest service the educational benefits needed to properly readjust to civilian**

**life.** Just as it has always prohibited double dipping based on the same qualifying service, Congress has consistently recognized that long-serving veterans with separately qualifying service may require additional readjustment benefits to make up for missed educational and career opportunities when they reenter civilian life. S. Rep. No. 90-1394 (1968), as reprinted in 1968 USCCAN 4486-87. Congress rewards long-serving veterans who otherwise meet applicable qualifying service criteria with multiple entitlements (e.g., 38 U.S.C. §§ 3011, 3311), subject to an aggregate 48-month cap. 38 U.S.C. § 3695. The Post-9/11 program does not deviate from this GI Bill first principle, either. When it created the Post-9/11 GI Bill, Congress amended § 3695, the provision establishing the 48-month cap, to include the program within its scope, among other corresponding changes to the statutory scheme.

- **Strengthen national security by improving Armed Forces recruitment/retention.** In addition to helping veterans readjust to civilian life after their service, another basic purpose of veterans educational benefits is to improve our all-volunteer military's recruitment and retention efforts. It is obvious that giving additional educational benefits for additional service would provide the military with a powerful recruitment and retention tool. That is why Congress did not eliminate the Montgomery GI Bill, for example, when it created the new, additional Post-9/11 program. The incentive is only further enhanced when considered alongside the transferability provisions of some GI Bill programs (like the Post-9/11 GI Bill), which allow certain veterans who agree to serve more than the minimum necessary to utilize the benefits themselves, to transfer their entitlement to family members. e.g., 38 U.S.C. § 3319. In short, the full panoply of options possible under Mr. Rudisill's interpretation would help ensure our Armed Forces can attract and retain the best and brightest for years to come, which is particularly critical today when “[t]he United States' all-volunteer force has never struggled so much to bring qualified and willing recruits through the door.”<sup>[4]</sup>
- **Be consistent with President Biden's agenda.** As mentioned above, the Biden family is a military family. The President's 2021 Veterans Day Proclamation emphasized ensuring veterans are provided the benefits they have been promised. In particular, he highlighted educational benefits for members and their families.<sup>[5]</sup>
- **Particularly help minority, female, and other historically disadvantaged communities.** Implementing Rudisill's interpretation is consistent with President Biden's commitments to advancing racial equity and supporting diverse and female veterans.<sup>[6]</sup>

By 2040, minorities are projected to make up 35.7 percent of all living veterans.<sup>[7]</sup> As the VA's own data shows, however, a significant portion of these veterans are expected to be at an educational disadvantage to non-minority veterans. Minority groups are projected to increase and make up a larger part of the military and veteran population from 2014 to 2043, with Hispanic and Black Veterans experiencing the largest growth.<sup>[8]</sup> The need for veterans educational benefits to ensure racial equity is very real—77.4% of minority veterans had only a high school diploma (or GED) or “some college.”<sup>[9]</sup> When these benefits are made available, minority veterans will use them—“Native Hawaiian/Pacific Islander, Black (AA), and Hispanic Veterans have a higher utilization rate of VA benefits than any other racial group.”<sup>[10]</sup>

The same is true of female veterans. “The rate of growth in the number of female Veterans who used VA is over 5 times the rate of growth of the overall female Veteran population,” and female veterans are more likely to use the VA's programs than males.<sup>[11]</sup>

- **Hold the VA accountable to its own implementing regulations.** The plain language of the VA’s Post-9/11 GI Bill implementing regulations, promulgated under the Obama-Biden Administration, track and implement many of the foregoing policies—as noted by both the Federal Circuit panel and the Veterans Court. Holding the VA accountable to the plain language of its regulations (as well as the statutory scheme) is something to be encouraged.

The VA noticeably has not relied in any meaningful way on its regulations in the appellate litigation, and that is because they are consistent with Mr. Rudisill and the Veterans Court’s interpretation of the statutes. Its position appears to be based solely on an error in the VA’s educational benefits application form. The form channels long-serving veterans with separately qualifying service into 38 U.S.C. § 3327’s procedures, resulting in them needlessly relinquishing or exhausting their entitlement to other benefits before using Post-9/11 GI Bill benefits. This has made it impossible for veterans with separately qualifying service to obtain, much less utilize, the educational benefits to which they are entitled. That is, the VA implemented a program contrary to the Post-9/11 GI Bill and its own implementing regulations for years. This should not be permitted to continue.

- **Help restore trust in the Government.** Applying the law as interpreted by Mr. Rudisill—that is, to equitably reward voluntary, arduous, lengthy service during the post-9/11 era—will go a long way to restoring veterans’ trust in the Government. The wars that created the need for multiple, simultaneously available educational benefits programs are drawing to a close, leaving many to wonder what is next for them, what their service in Afghanistan or Iraq means to the rest of the country, or worse. Mr. Rudisill presents a readymade opportunity for the Government to show those veterans how much the Nation values their service, and help give them new purpose via higher education, in a way that elected officials and members of the public on both sides of the aisle will support.
- **Help the economy.** Any additional money spent under Mr. Rudisill’s interpretation on veterans utilizing educational benefits will help create meaningful opportunities for them, which benefits the economy. For example, a congressional study found that for every dollar invested in the original World War II GI Bill program, the Nation benefitted “a minimum of 5 to 1 and as high as 12.5 to 1.”<sup>[12]</sup> More, and more highly educated, veterans can get better jobs, start businesses, make investments, etc., all of which is desperately needed as the country continues to emerge from the COVID-19 pandemic.
- **Not necessarily have significant budgetary or other impacts.** Allowing long-serving veterans to take advantage of two or more GI Bill programs, if they meet all applicable qualifying service criteria, does not mean all, or even most, will. VA’s own statistics on utilization from FY 2017 show that of the ~20 million veterans in the United States, less than half (9.8 million) used at least one VA program (of any type), and only 0.6 million used educational benefits under any current GI Bill program.<sup>[13]</sup>

Finally, any administrability concern raised by the VA—which may be significant, given that this issue impacts, as shown by the VA’s own records, more than 2 million veterans—is not a sufficient reason to adopt the VA’s interpretation. VA has made mistakes with far more reaching ramifications that it was forced to fix. It can fix this problem, and we and veterans educational stakeholders (e.g., the amici filing briefs in support of the Supreme Court’s granting Mr. Rudisill’s petition for certiorari) stand ready to help.

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[1] Jim Webb and Chuck Hagel, *A Post-Iraq G.I. Bill*, The New York Times (Nov. 9, 2007).

[2] The Biden family is a military family, and President Biden is committed to caring for veterans and their families. “Joe Biden believes that as a Nation, we have many obligations, but we have only one truly sacred obligation: to properly prepare and equip our troops when we send them into harm’s way, and to care for them and their families—both while they are deployed and after they return home.” Joe Biden, *Veterans and Military Families for Biden*, <https://joebiden.com/veterans/> (all websites last visited Feb. 27, 2023).

[3] In other words, § 3327 is an expansion, not limitation, on veterans’ ability to participate in the Post-9/11 program. Nothing in § 3327 is mandatory for all veterans to receive Post-9/11 GI Bill benefits—it is a voluntary “election” provision. And nothing in § 3327 makes the statute’s entitlement provision (38 U.S.C. § 3311) subject to § 3327.

[4] Hope Hodge Seck, *Facing a ‘Perfect Storm’: The Military Recruiting Crisis* (Dec. 15, 2022), <https://www.moaa.org/content/publications-and-media/news-articles/2022-news-articles/facing-a-perfect-storm-the-military-recruiting-crisis/>.

[5] President Biden, *A Proclamation on Veterans Day, 2021* (Nov. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/09/a-proclamation-on-veterans-day-2021/> (“Fulfilling our Nation’s promise to our veterans and military families, caregivers, and survivors is not only a moral imperative—it is crucial to our national security and to maintaining the finest military the world has ever known. We are a Nation that keeps our promises.”).

[6] See, e.g., President Biden, *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>; President Biden, *Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce* (June 25, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/>; Joe Biden, *The Biden Agenda for Women*, <https://joebiden.com/womens-agenda/>; President Biden, *Executive Order On Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Feb. 16, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

[7] VA, *Minority Veterans Report* at iv (Mar. 2017), [https://www.va.gov/vetdata/docs/SpecialReports/Minority\\_Veterans\\_Report.pdf](https://www.va.gov/vetdata/docs/SpecialReports/Minority_Veterans_Report.pdf).

[8] *Id.* at 23.

[9] *Id.* at 32.

[10] *Id.* at 10.

[11] VA, VA *Utilization Profile FY 2017* at 7-9 (May 2020),  
[https://www.va.gov/vetdata/docs/Quickfacts/VA\\_Utilization\\_Profile\\_2017.pdf](https://www.va.gov/vetdata/docs/Quickfacts/VA_Utilization_Profile_2017.pdf) (“2017 VA Utilization”).

[12] A Cost-Benefit Analysis of Government Investment in Post-Secondary Education Under the World War II GI Bill, Subcommittee on Education and Health of the Joint Economic Committee (Dec. 14, 1988).

[13] 2017 VA Utilization VA at 3-4.

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