

LAW REVIEW¹ 24027

May 2024

Rudisill v. McDonough: A Great Victory in the Supreme Court.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

10.2—Other Supreme Court cases

11.0—Veterans' claims

***Rudisill v. McDonough*, 144 S. Ct. 945 (April 16, 2024).**

This is a “hot off the press” decision of the United States Supreme Court. Second Lieutenant (now First Lieutenant) Lauren Walker, USMC, discussed this case in detail in Law Review 21062 (October 2021), and we updated that article in May 2022 and again in April 2023 as this case worked its way through the appellate chain. Now, we have the final

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,100 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 48 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the Federal reemployment statute) for 42 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at <mailto:swright@roa.org>.

word from the United States Supreme Court and we are most pleased with the outcome.

In Law Review 21062, Lieutenant Walker wrote:

The GI Bill of Rights was created over 75 years ago to ensure that American veterans are given an opportunity to live the American dream.³ Through the years it has undergone revisions, yet it continues to be a valuable resource for American veterans. This is evidenced by the Department of Veterans Affairs (“VA”) providing educational benefits to nearly 800,000 veterans since the implementation of the Post-9/11 GI Bill.

Though the goal of the GI Bill is to allow veterans to live out the American dream, since 2008, with the enactment of the Post-9/11 GI Bill, the VA has hampered that goal by limiting veterans to benefits from only one GI education program.⁴ However, the United States Court of Appeals for the Federal Circuit corrected this unjust limitation with its ruling in *Rudisill v. McDonough*.⁵ The court held that a veteran who qualifies for both the Montgomery GI Bill and the Post-9/11 GI Bill for multiple periods of military service is allowed to draw benefits from each program, up to the aggregate limit of 48 months.⁶

³See the Servicemen’s Readjustment Act of 1944. Pub. L. 78-346, 58 Stat 284.

⁴See 2009 VA POST-9/11 GI BILL OUTREACH LETTER, http://www.gibill.va.gov/documents/CH33_veteran_outreach_letter.pdf (website last updated Nov. 10, 2009) (“Those individuals transferring to the Post-9/11 GI Bill from the Montgomery GI Bill (chapter 30) will be limited to the amount of their remaining chapter 30 entitlement.”).

⁵*Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021).

⁶*Id.* at 1305.

James R. Rudisill served three periods of military active duty: (1) from January 2000 to June 2002 in the Army; (2) from June 2004 to December 2005 in the Army National Guard; and (3) from November 2007 to August 2011 as a commissioned officer in the Army.⁷ Rudisill wanted use his available GI Bill to further his education and so applied for and received 25 months and 14 days of education under the Montgomery GI Bill.⁸ In 2015, Rudisill wanted to continue his education further by attending the Yale Divinity School graduate program.⁹ He applied for education benefits under the Post-9/11 GI Bill.¹⁰ The VA determined that he was entitled to only 10 months and 16 days of benefits under the Post-9/11 GI Bill.¹¹ This would allow Rudisill to only receive a total 36 months of education benefits.

Rudisill appealed to the Board of Veterans' Appeals ("BVA") requesting to obtain education benefits up to the statutory cap of 48 months for multiple terms of service.¹² The BVA denied Rudisill's request, limiting his education benefits to a total of 36 months because Rudisill made an irrevocable election to use Post-9/11 benefits instead of the Montgomery benefits.¹³

Rudisill appealed the BVA decision to the United States Court of Appeals for Veterans Claims (Veterans Court).¹⁴ The Veterans Court reversed the BVA, holding that Rudisill is entitled to the aggregate

⁷*Id.* at 1299.

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.* at 1300.

cap of 48 months of benefits.¹⁵ The VA appealed, and the Federal Circuit affirmed the decision of the Veterans Court, holding that each period of service earns education benefits, subject to the cap of 48 aggregate months of benefits.¹⁶

The United States has a long history of providing educational benefits to veterans. Since 1944 with the passage of the Servicemen's Readjustment Act, the GI Bill has been a life-changing piece of legislation. The original GI Bill provided education and other benefits to veterans of World War II.¹⁷ Since then, other similar bills have been enacted to continue to provide educational benefits to veterans.¹⁸ Today, many veterans have the option to utilize the Montgomery GI Bill and the Post-9/11 GI Bill.¹⁹

The Montgomery GI Bill's purpose of education benefits for veterans is to "aid in the recruitment and retention of highly qualified personnel ... [and] enhance our Nation's competitiveness through the development of more highly educated and productive work force."²⁰ The Montgomery GI Bill applies to those who become a member of the Armed Forces after June 30, 1985, and serves a set amount of time in the Armed Forces.²¹ If a veteran can meet the qualifications

¹⁵*Id.*

¹⁶*Id.* at 1305.

¹⁷Pub. L. 78-346, 58 Stat 284.

¹⁸*See e.g.*, Veterans' Readjustment Assistance Act of 1952, 66 Stat. 663 ("Korean War GI Bill"); Veterans' Readjustment Benefits Act of 1966, 80 Stat. 12 ("Cold War GI Bill"); the Veterans' Education and Employment Assistance Act of 1976, 90 Stat. 2383 ("Post-Korean Conflict and Vietnam Era GI Bill"); and Veterans' Rehabilitation and Education Amendments of 1980, 94 Stat. 2171 ("Post-Vietnam Era Veterans Educational Assistance Program").

¹⁹38 U.S.C. § 3001 et seq, 3301 et seq.

²⁰*Id.* § 3001.

²¹*Id.* § 3011(a).

he or she is entitled to “36 months of educational assistance and benefits.”²² In line with previous GI Bills, educational benefits are provided as a monthly stipend at a fixed rate and do not include payment for books or living expenses.²³

The Post-9/11 GI Bill’s purpose is to “improve educational assistance for veterans who served in the Armed Forces after September 11, 2001.”²⁴ The Bill applies to veterans who served an aggregate of at least 36 months of active-duty service after September 11, 2001.²⁵ If a veteran can meet the qualifications set out within the statute, he or she may receive up to 36 months of benefits.²⁶ Unlike previous GI Bills, the Post-9/11 GI Bill provides broader benefits, including payment of the actual amount of tuition and fees, a monthly housing stipend, and a lump sum amount for books, supplies, equipment, and other costs.²⁷

The enactment of the Post-9/11 GI Bill did not terminate or expire the Montgomery GI Bill. The two laws co-exist in a broader statutory scheme.²⁸ Thus, both GI Bills are applicable to veterans.²⁹

In Law Review 21062, Lieutenant Walker discussed the decision of a three-judge panel of the United States Court of Appeals for the Federal Circuit.³⁰ The Federal Government applied to the Federal Circuit for

²²*Id.* § 3013(a)(1).

²³*Id.* § 3015.

²⁴124 Stat. 4106 (approved Jan. 4, 2011).

²⁵38 U.S.C. § 3311(b).

²⁶*Id.* § 3312(a).

²⁷*Id.* § 3313(c)(1)(B)(iv).

²⁸*BO v. Wilkie*, 31 Vet.App. 321 (2019).

²⁹ Law Review 21062 (October 2021).

³⁰ *Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021). The Federal Circuit is the specialized federal appellate court that sits in our nation’s capital and has nationwide jurisdiction over certain kinds of cases, including appeals from decisions of the United States Court of Appeals for Veterans’ Claims (COAVC). The COAVC is a

rehearing en banc, and the Federal Circuit granted the application and vacated the decision of the three-judge panel. By a vote of 10-2, the Federal Circuit reversed the panel's decision.³¹ On 6/26/2023, the United States Supreme Court granted certiorari (discretionary review). After new briefs and a new oral argument, the Supreme Court had the last word in this case on 4/16/2024.

In a 7-2 decision written by Justice Ketanji Brown Jackson, joined by Chief Justice John Roberts, Justice Sonia Sotomayor, Justice Elena Kagan, Justice Neil Gorsuch, Justice Brett Kavanaugh, and Justice Amy Coney Barrett, the Supreme Court held:

“The United States has a proud history of offering educational assistance to millions of veterans, as demonstrated by the many ‘G. I. Bills’ enacted since World War II.” Post-9/11 Veterans Educational Assistance Act of 2008, §5002(3), 122 Stat. 2358, 38 U. S. C. §3301 *et seq.* GI bills honor the sacrifices of those who have served in the military, and as such, “ha[ve] a positive effect on recruitment for the Armed Forces.” *Ibid* These education benefits have also helped to “reduce the costs of war, assist veterans in readjusting to civilian life after wartime service, and boost the United States economy.” *Ibid*.

In the more than 75 years since Congress passed the first GI Bill in response to World War II, it has enacted additional GI bills, most of which share two relevant features. First, an individual with the requisite period of military service becomes “entitled to” educational benefits, typically in the form of a stipend or tuition payments, which the VA is then required to provide once the

specialized federal appellate court that was created by Congress in 1988, to review decisions of the Board of Veterans Appeals on claims by veterans to the Veterans Administration, now renamed the Department of Veterans Affairs. In our federal appellate courts, decisions are ordinarily made by a panel of three judges.

³¹ *Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. 2022) (en banc).

veteran enrolls in an eligible education program. Servicemen's Readjustment Act of 1944, 58 Stat. 288, 289; see also, *e.g.*, Veterans' Readjustment Assistance Act of 1952, 66 Stat. 664-666; Veterans' Readjustment Benefits Act of 1966, 80 Stat. 13, 15. Second, with one brief exception, GI bills from the Korean War onward have provided education benefits to fully qualified servicemembers for a fixed duration: 36 months of benefits per GI bill, up to a total of 48 months of benefits for those servicemembers who become eligible for educational benefits under multiple GI bills. See 66 Stat. 665; 82 Stat. 1331; 90 Stat. 2396.

This case relates to the overlap between two recent GI bills. The first is the Montgomery GI Bill Act of 1984, 38 U. S. C. §3001 *et seq.* The Montgomery GI Bill provides "[b]asic educational assistance" to servicemembers who first enter active duty between 1985 and 2030. §3011(a). Montgomery benefits give veterans a "basic educational assistance allowance" that "help[s] meet, in part, the expenses of such individual's subsistence, tuition, fees, supplies, books, equipment, and other educational costs." §3014(a); see also §3015 (setting forth amount of assistance). This limited stipend ordinarily does not pay the full costs of a veteran's education.

As with other GI bills, the Montgomery GI Bill consists of a detailed series of statutory provisions that include an entitlement and also durational limits. To be "entitled to basic educational assistance" under the Montgomery benefits program, a servicemember must satisfy certain military service requirements—typically two or three years of continuous active duty. §3011(a). The servicemember is then "entitled to 36 months" of Montgomery benefits. §§3013(a)(1), (c)(1). An eligible servicemember "may make an election *not* to receive

[Montgomery benefits],” §3011(c)(1) (emphasis added), but unless he opts out, he contributes \$1,200 into the program, usually through a series of pay reductions. §§3011(b)(1)-(2). The Montgomery Bill’s 36-month entitlement is also “[s]ubject to section 3695,” §3013(a)(1), a provision that predates Montgomery and limits “[t]he aggregate period for which any person may receive assistance under two or more [GI bills]” to 48 months, §3695(a).

The second GI bill at issue in this case is the Post-9/11 Veterans Educational Assistance Act of 2008, 122 Stat. 2357, 38 U. S. C. §3301 *et seq.* When it enacted this bill, Congress expressly recognized that “[s]ervice on active duty in the Armed Forces has been especially arduous . . . since September 11, 2001,” and that the Montgomery GI Bill’s modest educational benefits, which were “designed for peacetime service,” had become “outmoded.” §§5002(2), (4), 122 Stat. 2358. Therefore, the Post-9/11 GI Bill gives servicemembers “enhanced educational assistance benefits” that “are commensurate with the educational assistance benefits provided by a grateful Nation to veterans of World War II.” §5002(6), *ibid.* A servicemember entitled to Post-9/11 benefits ordinarily receives the actual net cost of in-state tuition, additional public-private cost sharing to cover the cost at private institutions, a monthly housing stipend, a lump sum for books and supplies, and additional amounts for other specified expenses. 38 U. S. C. §§3313(c), 3315-3318.

As with the Montgomery GI Bill, the Post-9/11 GI Bill establishes an entitlement and also prescribes durational limits. To be entitled to Post-9/11 benefits, servicemembers must typically serve on active duty in the Armed Forces for at least three years starting on or after September 11, 2001. §3311(b). “[A]n individual entitled to educational assistance under [the Post-9/11

GI Bill] is entitled to . . . 36 months” of enhanced educational benefits. §3312(a). And as with Montgomery benefits, this entitlement is “[s]ubject to section 3695,” *ibid.*, meaning that a servicemember’s aggregate benefits from the Post-9/11 GI Bill and other GI bills are capped at 48 months, see §3695(a).

Because the Montgomery and Post-9/11 bills cover overlapping service periods, eligibility for benefits under these two bills overlaps as well. Consequently, the Post-9/11 GI Bill contains a provision titled “[b]ar to duplication of educational assistance benefits.” §3322. This bar clarifies that an individual with entitlements to both Montgomery and Post-9/11 benefits “may not receive assistance under two or more such programs concurrently, but shall elect . . . under which chapter or provisions to receive educational assistance.” §3322(a). A later enacted provision further ensures that an individual may not receive double credit for a single period of service; rather, he “shall elect . . . under which authority such service is to be credited.” §3322(h)(1).

Thus, to summarize: Per §3322, servicemembers who are eligible for educational benefits under either the Montgomery GI Bill or the Post-9/11 GI Bill—from a period of service that could qualify for either program—can opt to credit that service toward one educational benefits program or the other. If servicemembers serve for long enough, they may be entitled to both. But such servicemembers cannot receive disbursements from both entitlement programs at the same time, nor may they receive any combination of benefits for longer than 48 months. Outside of those limitations, their service “entitle[s]” them to the benefits

that they have earned, and the VA “shall pay” them these benefits. §§3011(a), 3014(a), 3311(a), 3313(a).³²

This case is not a class action, but this Supreme Court precedent is binding on the Department of Veterans Affairs (VA), the Board of Veterans Appeals, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Federal Circuit, and we hope that the VA will act promptly to approve and pay claims that were unlawfully denied. Tens of thousands of members and potential members of our organization, the Reserve Organization of America (ROA), will benefit from this precedential decision. Many of our members and potential members have answered the nation’s call (entirely voluntarily since June 1973, when Congress abolished the draft) both before and after that terrible Tuesday morning in September 2001.

Please join or support ROA.

This article is one of 2,100-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members),

³² *Rudisill v. McDonough*, 2024 U.S. LEXIS 1813, at 8-13.

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).³³

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

³³ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight³⁴ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at <https://www.roa.org/page/memberoptions>.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002³⁵

³⁴ Congress recently established the United States Space Force as the eighth uniformed service.

³⁵ You can also contribute on-line at www.roa.org.