

COMMENT

BURN PITS OF DESPAIR: HOW THE DEPARTMENT OF VETERANS AFFAIRS CAN IMPROVE THE PRESUMPTION PROCESS FOR VETERANS WHO SERVED IN OIF/OEF

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INTRODUCTION

If another country was doing to our veterans what we allow to be done to our veterans, we'd be at war already . . . It's really easy to beat your chest, rah rah, the drums of war, but all too often they are followed by the bugles of taps

—Isiah James, Army Combat Veteran¹

The mission of the U.S. Department of Veterans Affairs (VA) is to “fulfill President Lincoln’s promise: ‘[t]o care for him who shall have borne the battle, and for his widow, and his orphan’ by serving and honoring the men and women who are America’s Veterans.”² The VA claims its core values, known as “I CARE,” guide all of its interactions.³ The agency provides free health care to veterans for any illness or injury when it is determined to be “service connected,” meaning the condition is related to military service.⁴ Many veterans must make copayments for any conditions treated by a VA health care provider or an approved community health care provider that are deemed unconnected to military service.⁵

The VA may “presume” certain medical conditions were caused by service depending on the specific circumstances of a veteran’s service.⁶ The VA typically recognizes presumptions after periods of war.⁷ Generally, presumptions are linked to specific locations or activities during particular

1. *The Problem with Jon Stewart: Veterans* (Apple TV Sept. 30, 2021) (discussing the challenges faced by veterans returning from deployments). Taps is a bugle call that was arranged in its present form by Union Brigadier General Daniel Butterfield during the Civil War and is often performed at military funerals. *Funeral Elements Taps*, ARLINGTON NAT’L CEMETERY, <https://www.arlingtoncemetery.mil/Funerals/Funeral-Information/Funeral-Elements> (last visited Aug. 16, 2022).

2. *I Care*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/icare/> (Nov. 16, 2021).

3. *See id.* (stating the VA’s core values are “Integrity, Commitment, Advocacy, Respect, and Excellence”).

4. *See Your Health Care Costs*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/health-care/about-va-health-benefits/cost-of-care> (Feb. 7, 2022).

5. *Id.* Veterans are assigned to one of eight priority groups. Copayments are based on the priority group, disability rating, income level, and military service record of each veteran. Veterans with a disability rating greater than 50%, determined unable to work, or who received a Medal of Honor are assigned to priority group one and do not pay copays for any types of care, tests, or medications. *VA Priority Groups*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/health-care/eligibility/priority-groups/> (Mar. 8, 2022).

6. U.S. DEP’T OF VETERANS AFFS., VA PRESUMPTIVE DISABILITY BENEFITS 1 (2021), <https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf>.

7. COMM. ON EVALUATION OF THE PRESUMPTIVE DISABILITY DECISION-MAKING PROCESS FOR VETERANS, INST. OF MED., IMPROVING THE PRESUMPTIVE DISABILITY DECISION-MAKING PROCESS FOR VETERANS 40 (Jonathan M. Samet & Catherine C. Bodurow eds., 2008) [hereinafter IOM IMPROVING PRESUMPTION PROCESS], <https://doi.org/10.17226/11908>.

time periods, but the agency has also recognized certain chronic conditions.⁸ The VA classifies presumptions into specific categories based on these particulars.⁹ Categories include veterans suffering from specific conditions who have been identified as Former Prisoners of War, Vietnam Veterans, Atomic Veterans, and Gulf War Veterans.¹⁰ Further, presumptions may include chronic conditions diagnosed within one year of release from active duty.¹¹ Lastly, veterans who served continuously for at least ninety days before discharge who have been diagnosed with amyotrophic lateral sclerosis (ALS), more commonly known as Lou Gehrig's disease, may claim a presumption of service connection regardless of when the disease presents.¹²

U.S. Army Colonel David McCracken served his country for nearly three decades, a country that promised him free health care for any condition suffered in connection with his service.¹³ He served at Camp Victory in Baghdad, Iraq, where three football field-sized burn pits were located, and developed a consistent cough while deployed; the cough was so common among service members that it is widely known as the "Iraqi-Crud."¹⁴ After returning home from his one-year deployment, he began suffering from severe migraines.¹⁵ Less than two years later, on the very day McCracken was selected for promotion to Colonel, he was diagnosed with aggressive glioblastoma.¹⁶ Beau Biden succumbed to the same brain cancer after spending a year-long deployment on the same base in Iraq.¹⁷ On September 2, 2011, exactly thirty years from the day of Colonel McCracken's

8. *See id.* (adopting presumptions in various service locations).

9. *See id.* Categories of presumptions include "Chronic Diseases, Tropical Diseases, Former Prisoners of War (POWs), Radiation, Herbicide Agents, Mustard Gas/Lewisite, and Persian Gulf War." *Id.*

10. *Id.* (specifying Vietnam veterans exposed to Agent Orange, Atomic veterans exposed to ionizing radiation, and Gulf War veterans suffering from many undiagnosed illnesses).

11. *Id.*

12. *Disability Compensation*, U.S. DEP'T OF VETERANS AFFS. (Feb. 2015), https://www.va.gov/TRIBALGOVERNMENT/docs/Presumption_Fact_Sheet.pdf.

13. Ken Olsen, *Exposure Wars: The Long, Connected and Continuing Fight for Accountability; Part III: The Burn Pit 'Journey of Hell'*, AM. LEGION (Jan. 5, 2022, 6:02 PM), <https://www.legion.org/magazine/242657/exposure-wars-long-connected-and-continuing-fight-accountability-part-iii-burn-pit>.

14. *Id.*

15. *Id.*

16. *Id.*

17. Michael D. Shear, *Beau Biden, Vice President Joe Biden's Son, Dies at 46*, N.Y. TIMES (May 30, 2015), <https://www.nytimes.com/2015/05/31/us/politics/joseph-r-biden-iii-vice-presidents-son-beau-dies-at-46.html>; *see also* Jeremy Redmon, *Georgia Veterans' Families Raising Alarms About Open-Air Burn Pits*, ATLANTA J.-CONST. (Apr. 25, 2019), <https://www.ajc.com/news/breaking-news/georgia-veterans-families-raising-alarms-about-open-air-burn-pits/k0bTEfNwYG3rZOcEl36bjP/>.

commission in the Army, he passed away while eating vanilla ice cream with his spouse and three children in the hospice wing of an Atlanta hospital.¹⁸ It unfortunately took three years post-mortem, an attorney, and numerous private medical experts to convince the VA that McCracken's cancer was linked to his exposure to environmental conditions during his deployment to Iraq.¹⁹ Too often the stories of our service members go untold as they are repeatedly denied benefits after serving their country.²⁰ In 2019, before becoming President, Joe Biden surmised that there was a connection between Beau's time in Iraq and Beau's cancer when he stated, "[b]ecause of [his] exposure to burn pits, in my view, I can't prove it yet, he came back with stage-4 glioblastoma."²¹ One year of treatment for glioblastoma can cost a service member over \$10,000 in out-of-pocket copayments if the VA declines to consider it service-connected.²² Studies show glioblastoma has occurred in post-9/11 veterans who deployed to Iraq and Afghanistan at a rate 26% higher than the general population, yet the VA still refuses to acknowledge that any conditions other than sinusitis, rhinitis, and asthma should be presumed as service-connected for those exposed to burn pits overseas.²³

18. Redmon, *supra* note 17.

19. Olsen, *supra* note 13.

20. Redmon, *supra* note 17.

21. Courtney Kube, *Biden Administration to Increase Support for Veterans Exposed to Toxic Burn Pits While Serving Overseas*, NBC NEWS (Nov. 11, 2021, 7:00 AM), <https://www.nbcnews.com/news/military/biden-administration-increase-support-veterans-exposed-toxic-burn-pits-while-n1283689> ("the issue is personal to President Joe Biden"); *see also* Melissa Quinn, *Biden Uses State of the Union to Call for Focus on "Burn Pits," Which He Believes Affected His Son Beau*, CBS NEWS (Mar. 1, 2022, 11:51 PM), <https://www.cbsnews.com/news/state-of-the-union-biden-burn-pits-beau-biden-cancer/> (noting that burn pits caused veterans to "come home [with] . . . [a] cancer that would put them in a flag-draped coffin").

22. *See* Patricia Kime, *Young and Dying: Veterans Are Getting Brain Cancer and Struggling to Get Benefits*, MILITARY.COM (Jan. 12, 2022), <https://www.military.com/daily-news/2022/01/11/young-and-dying-veterans-are-getting-brain-cancer-and-struggling-get-benefits.html> (stating the Feehan family paid over \$10,000 in medical bills after Noah Feehan was diagnosed with glioblastoma in December of 2020).

23. *Id.*; *see* 86 Fed. Reg. 42,724 (Aug. 5, 2021) (to be codified at 38 C.F.R. pt. 3) (recognizing the presumptions for those who deployed to the Southwest Asia theater of operations, Afghanistan, Syria, Djibouti, or Uzbekistan on or after September 19, 2021, during the Gulf War).

As of 2018, roughly eighteen million veterans served in the U.S. Armed Forces.²⁴ Of those, the Department of Defense estimates 3.5 million veterans may have been exposed to toxins from burn pits in overseas conflict zones.²⁵ Even the Secretary of Veterans Affairs (VA Secretary), Denis McDonough, has expressed his frustration at the Department's slow pace of expanding benefits for military burn pit exposure victims.²⁶ Despite a growing number of complaints related to other serious illnesses, the VA has recognized only three presumptions for veterans exposed to burn pits.²⁷

This Comment discusses the benefits of formalizing the presumption process for veteran health care through the lens of those exposed to burn pits while deployed in military service. Part I of this Comment discusses the history of presumptions and the current determination process. Part II addresses the limited presumptions acknowledged for veterans suffering from burn pit exposure. Part III analyzes the power of the VA Secretary to act and how the current Secretary has acted thus far to address claims of veterans. Finally, Part IV recommends that the VA Secretary adopt a more formalized process of predetermining the rates at which presumptive disabilities are acknowledged.

I. HISTORY OF PRESUMPTIONS

The establishment of presumptions began on August 9, 1921 by recognizing neuropsychiatrist disease and active pulmonary tuberculosis.²⁸ Senator David I. Walsh proposed “that when it is proved by an incapacitated soldier that he has either of these two types of disease he shall immediately be entitled to compensation unless the Government proves . . . that he has contracted the disease since the time of his discharge and [the disease] is not

24. Press Release, U.S. Census Bureau, Census Bureau Releases New Report on Veterans (June 2, 2020), <https://www.census.gov/newsroom/press-releases/2020/veterans-report.html>.

25. Kenzi Abou-Sabe & Didi Martinez, *Veterans Face Uphill Battle to Receive Treatment for ‘Burn Pit’ Exposure*, NBC NEWS (Apr. 12, 2021, 5:23 PM), <https://www.nbcnews.com/news/military/veterans-face-uphill-battle-receive-treatment-burn-pit-exposure-n1263862>.

26. Leo Shane III, *In Interview with Jon Stewart, Veterans Affairs Chief Says He’s ‘Frustrated’ Over Slow Pace of Burn Pit Benefits*, MIL. TIMES (Oct. 4, 2021), <https://www.militarytimes.com/veterans/2021/10/04/secva-says-hes-frustrated-over-slow-pace-of-burn-pit-benefits-in-interview-with-jon-stewart>.

27. See Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter, 86 Fed. Reg. 42,724, 42,729, 42,730 (Aug. 5, 2021) (recognizing asthma, rhinitis, and sinusitis) (to be codified at 38 C.F.R. pt. 3).

28. See Act of Aug. 9, 1921, Pub. L. No. 67-47, sec. 18, § 300, 42 Stat. 147, 154 (recognizing that “an ex-service man who is shown to have an active pulmonary tuberculosis or neuropsychiatric disease . . . developing within two years after separation from the active military or naval service of the United States shall be considered to have acquired his disability in such service, or to have suffered an aggravation of a preexisting pulmonary tuberculosis or neuropsychiatric disease in such service . . .”).

traceable to service in line of duty.”²⁹ Three months later, on November 12, 1921, the Acting Director of the Veterans’ Bureau issued a regulation containing the first list of chronic diseases to be recognized as presumptions.³⁰ This “Chronic Diseases” category was expanded multiple times through the 1920s and 1930s as more conditions were linked to military service.³¹

During the 1940s, veterans returned from World War II suffering from various diseases.³² As a result, a new presumptive category, identified as “Tropical Diseases,” was established.³³ Malaria became the first recognized presumption in the Tropical Diseases category in 1945.³⁴ The Tropical Diseases category, as well as the “Chronic Disabilities” category, continued to add new presumptions throughout the 1940s, but added only one presumption each in the 1950s.³⁵

In 1955, President Eisenhower established the President’s Commission on Veterans’ Pensions, known as the Bradley Commission, which issued a report after reviewing the process of presumptions and decisions.³⁶ In 1956, the Commission’s studies showed inconsistencies with the rating standards,

29. IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 45 (quoting 61 Cong. Rec. 4105 (1921) (statement of Sen. David I. Walsh)).

30. *See id.* (including “anemia (primary), arteriosclerosis beriberi, diabetes insipidus, diabetes mellitus, endocrinopathies, gout, hemochromatosis, hemoglobinuria (paroxysmal), hemophilia, Hodgkin’s disease, leukemia (all types), ochronosis, pellagra, polycythemia (erythremia), purpura, rickets, and scurvy”).

31. *See* H.R. 12,175, 69th Cong. (1st Sess. 1926) (amending the World War Veterans’ Act of 1924, ch. 320, 43 Stat. 607 to include presumptions for “neuropsychiatric disease, an active tuberculosis disease, paralysis agitans, encephalitis lethargica, or amoebic dysentery developing a 10 per centum degree of disability or more in accordance with the provisions of subdivision (4) of section 202 of this Act, shall be presumed to have acquired his disability in such serve between April 6, 1917, and July 2, 1921” or to have suffered an aggravation of one of these disorders).

32. *See* IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 45–46 (discussing the addition of a new category for “Tropical Diseases” and an increase in the number of presumptions in the “Chronic Diseases” category).

33. *Id.*

34. *See id.* at 45 (explaining the disease must have been contracted during active service and reported within one year after service).

35. *See id.* app. at 438–40, 442 (adding various presumptions in 1945, 1947, 1948, and 1948 to both categories, but adding only sarcoidosis to the Chronic Diseases category, and adding amebiasis to the Tropical Diseases category in 1950).

36. *See* Exec. Order No. 10,588, 20 Fed. Reg. 361, 361–62 (Jan. 15, 1955) (authorizing and directing the Commission to “make a comprehensive survey and appraisal of the structure, scope, and administration of the laws of the United States providing pension, compensation, and related nonmedical benefits to veterans and their dependents, and [to] make recommendations to the President regarding policies which . . . should guide the granting of such benefits in the future”).

presumptions, and follow-up procedures used in the presumptions process.³⁷ In 1957, various clarifications were issued regarding dates of service, locations, and presumptive periods to resolve the former discrepancies.³⁸

After the Bradley Commission formed, no new presumptions were created until the 1970s;³⁹ however, a new category was created in 1970 for the physical and mental conditions faced by former Prisoners of War (POWs) who were imprisoned for ninety days or more.⁴⁰ Eventually, this requirement was reduced to thirty days or more in 1981 to recognize the significant hardships faced by soldiers who spent fewer than ninety days as POWs.⁴¹ The guidelines for establishing presumptions for former POWs now outline that even limited or suggestive evidence that an increased risk of a disease associated with service would be enough to establish a service connection.⁴²

The VA added two more categories of presumptions in the 1980s for herbicide agents and radiation when Congress passed the Agent Orange and Atomic Veterans Relief Act, now known as the Veterans' Dioxin and Radiation Exposure Compensation Standards Act.⁴³ In 1985, chloracne became a presumption linked to dioxin exposure, while leukemia and other various cancers were presumed for veterans exposed to ionizing radiation.⁴⁴ However, the Act was passed more than forty years after service members

37. PRESIDENT'S COMM'N ON VETERANS' PENSIONS, REPORT TO THE PRESIDENT: FINDINGS AND RECOMMENDATIONS, VETERANS' BENEFITS IN THE UNITED STATES 13 (1956) (noting the process was not "in line with present-day medical science").

38. See generally Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83 (consolidating and simplifying the laws enforced by the Veterans' Administration (VA)).

39. IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 46.

40. See Act of Aug. 12, 1970, sec. 3, § 312, Pub. L. No. 91-376, 84 Stat. 787, 788-89 (creating presumptions for any veteran held as a POW for no less than six months by the Imperial Japanese Government or the German Government during World War II; by the Government of North Korea during the Korean conflict; or by the Government of North Korea, the Government of North Vietnam or the Viet Cong forces during the Vietnam era).

41. See Former Prisoner of War Benefits Act of 1981, sec. 4, § 312(b), Pub. L. 97-37, 95 Stat. 935, 936.

42. See 38 C.F.R. § 1.18 (2005) (explaining the Veterans Affairs Secretary (VA Secretary) can establish a presumption for POWs when an "association between such detention or internment and the disease is biologically plausible").

43. See Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (passing the act despite "scientific and medical uncertainty regarding such long-term adverse health effects" of exposure to herbicides containing dioxin or to ionizing radiation "unless the disability is found to have resulted from a cause other than the exposure").

44. *Id.* (stating a veteran must have served "in the Republic of Vietnam during the Vietnam era" and been exposed "to a herbicide containing dioxin," or "in connection with such veteran's participation in atmospheric nuclear tests or with the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, to ionizing radiation from the detonation of a nuclear device").

were exposed to radiation in Hiroshima or Nagasaki, twenty years after the completion of nuclear testing between 1945 and 1962, and nearly ten years after the end of the Vietnam War.⁴⁵ Additional exceptions applied to these presumptions where the VA determined that affirmative evidence existed to show veterans suffered such conditions after separation from service.⁴⁶

Congress made a dramatic impact in 1988 when it established a presumptive period of forty years for many of the cancers associated with the nuclear testing in the 1940s, allowing veterans who had been diagnosed with these cancers in the forty years following their exposure to claim the presumption.⁴⁷ The law also introduced the phrases “radiation-exposed veteran” and “radiation-risk activity.”⁴⁸ The term radiation-exposed veteran includes any veteran who, “while serving on active duty, participated in a radiation-risk activity.”⁴⁹ Radiation-risk activities included any of the following:

[o]n-site participation in a test involving the atmospheric detonation of a nuclear device, [t]he occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July 1, 1946, or [i]nternment as prisoner of war in Japan . . . during World War II which . . . resulted in an opportunity for exposure to ionizing radiation . . .⁵⁰

Congress passed the Agent Orange Act in 1991 in response to the Vietnam War even though the war had ended more than fifteen years prior.⁵¹ The Act became a turning point for determining presumptions because it required the VA Secretary to review independent scientific evidence of conditions and their causes.⁵² Following the Agent Orange Act and its new requirements, the VA continued to add presumptions to various categories every year in the 1990s.⁵³ In 1993, the VA added post-

45. *Id.*

46. *See id.* (creating guidelines for the Administrator to consider when determining if there is a service connection).

47. *See* Radiation-Exposed Veterans Compensation Act of 1988, sec. 2, § 312(c), Pub. L. No. 100-321, 102 Stat. 485 (including a presumption of service connection to the veterans who participated in the nuclear weapons testing program).

48. *Id.*

49. *Id.*

50. *Id.*

51. Agent Orange Act of 1991, sec. 2, § 316(a)(1), (2), Pub. L. No. 102-4, 105 Stat. 11 (adding non-Hodgkin’s lymphoma and soft-tissue sarcomas to the presumptive category of herbicide agents).

52. *See id.* (“To provide for the Secretary of Veterans Affairs to obtain independent scientific review of the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides, and for other purposes.”).

53. *See infra* notes 55–57 (adding presumptions for the link between herbicides and

traumatic stress disorder as a presumption for POWs.⁵⁴ The VA expanded the categories for mustard gas and Lewisite, herbicide agents, and radiation in 1994, 1996, and 1997 respectively.⁵⁵ In 1994 and 1995, the VA proposed and finalized the Persian Gulf War undiagnosed illnesses for veterans who had returned from war with medically unexplained chronic symptoms.⁵⁶ In 1998 and 1999, the VA recognized additional presumptions for the radiation category and Gulf War veterans.⁵⁷ The Agent Orange Act played a crucial role in improving the presumptive disability process for service members who had returned from war in the preceding decades.⁵⁸

prostate cancer and subacute peripheral neuropathy, and links between radiation and cancer of the rectum and lymphomas).

54. 38 C.F.R. § 3.304(f) (amended by 58 Fed. Reg. 29,110 (May 19, 1993)).

55. See 38 C.F.R. § 3.316 (Aug. 18, 1994) (presumptions added for World War II experiments); 61 Fed. Reg. 57,586 (Nov. 7, 1996) (amending 38 CFR 3.307(a) and 3.309(e) and establishing presumptions following “a decision of the Secretary of Veterans Affairs . . . that there is a positive association between exposure to herbicides . . . and the subsequent development of prostate cancer and acute and subacute peripheral neuropathy” after only five comments total, including three from private individuals; one from a veterans’ service organization, the Vietnam Veterans of America, Inc.; and one from a United States Senator, the regulation); Veterans’ Radiation Exposure Amendments of 1992, sec. 2, § 112(c)(2), Pub. L. No. 102-578, 106 Stat. 4774 (expanding benefits to include presumptions for cancer of the salivary gland and urinary tract); Veterans’ Benefits Improvements Act of 1994, Pub. L. No. 103-446, 108 Stat. 4645; IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, app. at 462–463–30 (describing the regulatory changes that added additional presumptions in the radiation category for cancer of the rectum and lymphomas (other than Hodgkin’s disease) in 1995 and adding prostate cancer, as well as acute and subacute peripheral neuropathy to the herbicide agent category in 1996).

56. IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 48; see Jim Absher, *Gulf War Syndrome*, MILITARY.COM (Oct. 11, 2021), <https://www.military.com/benefits/veterans-health-care/gulf-war-syndrome.html> (listing the symptoms associated with conditions the VA refers as “chronic multisymptom illness” and “undiagnosed illnesses”).

57. See IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 48 (adding prostate cancer and any other cancer to the radiation category in 1998); Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315, 3317–3321 (authorizing the National Academy of Sciences to research and determine the service connection for diseases associated with exposure to biological, chemical, or toxic agents; environmental or wartime hazards; or preventive medicines or vaccines associated with service in the Southwest Asia theater of operations during the Persian Gulf War); Veterans Millennium Health Care and Benefits Act, sec. 503, § 1112(c)(2), Pub. L. No. 106-117, 113 Stat. 1573, 1575 (1999) (establishing presumption for bronchioloalveolar carcinoma).

58. See IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 12 (noting that Congress

Multiple presumption categories expanded in the 2000s. In 2001, the Congress established a presumption for Type-II Diabetes with veteran herbicide exposure.⁵⁹ Later that year, and in the following year, Congress added additional presumptions to the Radiation Category.⁶⁰ In 2003, the VA issued a final rule recognizing lymphocytic leukemia as a presumptive condition for herbicide exposure.⁶¹ Multiple conditions, including cirrhosis of the liver and heart disease, were added to the presumption list for POWs in 2003–2005.⁶² In 2006, Congress codified every presumption established up to that point, easing the burden for veterans navigating the VA disability processes.⁶³

Over the last decade, the VA has continued to recognize new presumptions. In 2010, the VA added nine presumptive diseases for veterans who served in Southwest Asia during the first Gulf War, in the conflict with Iraq, and in Afghanistan after September 19, 2001.⁶⁴ In 2012, Congress passed the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012.⁶⁵ In 2017, the VA added eight more presumptions for veterans serving at Camp Lejeune.⁶⁶ In 2021, Congress added three new presumptions caused by Agent Orange exposure, and, for the first time, the VA recognized

requires the VA Secretary to review the National Academy of Science Institute of Medicine Report and determine whether a positive association exists between a disease and exposure).

59. Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 201(b), 115 Stat. 976, 988.

60. See IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, app. at 469 (listing the regulatory action that added cancer of the bones, brain, colon, lungs, and ovaries to the radiation category).

61. Disease Associated with Exposure to Certain Herbicide Agents: Chronic Lymphocytic Leukemia, 68 Fed. Reg. 59,540, 59,540 (Oct. 16, 2003) (adding chronic lymphocytic leukemia to the list of diseases subject to presumptive service connection) (codified at 38 C.F.R. § 3.309(e)).

62. Presumptions of Service Connection for Diseases Associated with Service Involving Detention or Internment as a Prisoner of War, 69 Fed. Reg. 60,083, 60,090 (Oct. 7, 2004) (adding cirrhosis of the liver, atherosclerotic heart disease, hypertensive vascular disease, and stroke for former POWs) (codified at 38 C.F.R. § 3.309(c)).

63. See 38 U.S.C. § 1116 (2006).

64. Presumptions of Service Connection for Persian Gulf Service, 75 Fed. Reg. 13,051, 13,053–56 (Mar. 18, 2010) (codified at 38 C.F.R. § 3.317(c)(2)).

65. See Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 102(a), 126 Stat. 1165, 1167 (2012) (providing medical care, but not compensation benefits, “notwithstanding that there is insufficient medical evidence to conclude that such illnesses or conditions are attributable to such service: [e]sophageal cancer, [l]ung cancer, [b]reast cancer, [b]ladder cancer, [k]idney cancer, [l]eukemia, [m]ultiple myeloma, [m]yelodysplastic syndromes, [r]enal toxicity, [h]epatic steatosis, [f]emale infertility, [m]iscarriage, [s]cleroderma, [n]eurobehavioral effects, [n]on-Hodgkin's lymphoma”).

66. See 82 Fed. Reg. 4173 (Mar. 14, 2017) (to be codified at 38 C.F.R. pt.3) (amended by after 290 comments were received during a thirty-day comment period).

three presumptions for veterans exposed to overseas burn pits.⁶⁷ On April 26, 2022, the VA issued an interim final rule to recognize nine rare respiratory cancers as presumptions due to military environmental exposures to fine particulate matter.⁶⁸

On March 3, 2022, the House passed the Honoring Our Pact Act (PACT Act), a bill dedicated to addressing the health concerns of veterans who were exposed to toxins during their service.⁶⁹ On June 16, 2022, the Senate passed the PACT Act with a “Yea-Nay” vote of 84–14.⁷⁰ However, after a “technical error,” a revote was necessary.⁷¹ When the bill went back to the House, it passed with even more support.⁷² But when the bill returned to the Senate, twenty-five Republicans unexpectedly changed their votes and blocked the PACT Act.⁷³ On August 2, 2022, the Senate re-voted to pass the PACT Act and the bill passed with a final vote of 86–11.⁷⁴

67. See 38 U.S.C. § 1116 (adding presumptions for bladder cancer, Parkinson’s, and hypothyroidism relating to Agent Orange Exposure); 38 C.F.R. § 3.320 (recognizing presumptions for rhinitis, sinusitis, and asthma relating to burn pit exposure).

68. Presumptive Service Connection for Rare Respiratory Cancers Due to Exposure to Fine Particulate Matter, 87 Fed. Reg. 24,421, 24427 (Apr. 26, 2022) (adding squamous cell carcinoma (SCC) of the larynx, SCC of the trachea, adenocarcinoma of the trachea, salivary gland-type tumors of the trachea, adenosquamous carcinoma of the lung, large cell carcinoma of the lung, salivary gland-type tumors of the lung, sarcomatoid carcinoma of the lung, and typical and atypical carcinoid of the lung) (to be codified at 38 C.F.R. § 3.320).

69. See Honoring Our PACT Act of 2022, H.R. 3967, 117th Cong. (2022) (passing with a 256–174 vote).

70. *Id.*

71. Rachel Treisman & Quil Lawrence, *The Senate Passed a Bill to Help Sick Veterans. Then 25 Republicans Reversed Course*, NPR (June 29, 2022, 2:58 PM), <https://www.npr.org/2022/07/29/1114417097/veterans-burn-pit-bill-republican-senators>.

72. See Jordan Williams, *House Passes Bill Expanding Care for Vets Exposed to Toxins*, THE HILL, (July 13, 2022, 9:24 PM), <https://thehill.com/policy/defense/3558470-house-passes-bill-expanding-care-for-vets-exposed-to-toxins/> (passing with a 342–88 vote).

73. Republicans explained the nay vote as a reaction to a section they had previously voted through without issue. See Rachel Sharp & Eric Garcia, *Chuck Schumer Says He Will Give ‘Our Republican Friends’ Another Chance to Pass Burn Pits Bill before Recess*, YAHOO! NEWS (July 28, 2022, 5:06 PM), <https://www.yahoo.com/news/chuck-schumer-says-republican-friends-210652464.html> (“The sudden refusal . . . came as a surprise . . .”).

74. See Jessica Dean & Ali Zaslav, *Senate Passes Long Sought Bill to Help Veterans Affected by Burn Pits*, CNN POLITICS (Aug. 2, 2022, 7:36pm), <https://www.cnn.com/2022/08/02/politics/senate-vote-burn-pits/index.html> (passing after Republican Senator Pat Toomey’s amendment “to change a budget component of the legislation” failed).

The issue that many veterans face, however, is that the VA recognizes these presumptions too late.⁷⁵ Soldiers should not be burdened with the task of proving that their service to their country is responsible for their illnesses. Rather, the VA should assume the responsibility of proving the illness was not service-connected.

II. BURN PITS

A burn pit is an area of land or an open-air pit, which served as the designated area for the disposal and destruction of accumulated waste from a military operating base.⁷⁶ The contents of the burn pits often contained items which, when ignited with the assistance of an accelerant, emitted toxic plumes of thick black smoke.⁷⁷ Due to the proximity of the burn pits to the living and working quarters of the men and women living on these bases, the constant inhalation of this smoke was unavoidable.⁷⁸ For the duration of the decades-long conflicts in the Middle East and Southwest Asia, burn pits were employed in varying forms, sizes, and methods; nevertheless, the emission of toxic fumes remained ever-present, exposing the hundreds of thousands of U.S. service members to their harmful effects.⁷⁹

As a result, veterans of these wars have exhibited exponentially higher rates of rare cancers and respiratory diseases.⁸⁰ Due to the delayed onset of these

75. See Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725, 2725, 2728, 2730 (1984). Some veterans receiving a presumption under this Act for radiation exposure were exposed to ionizing radiation before July 1, 1946, nearly forty years prior to the passage of the Act. Others received the presumption for being exposed to nuclear testing that took place between 1945 and 1962, more than twenty years before the passage of the Act. Lastly, those claiming the presumption for exposure to dioxin could not claim a presumption until nearly ten years after the end of the Vietnam War in 1975. *Id.*

76. Health Care for Burn Pit Veterans Act, S. 3541, 117th Cong. § 3(c)(3) (2022).

77. See INST. OF MED., LONG-TERM HEALTH CONSEQUENCES OF EXPOSURE TO BURN PITS IN IRAQ AND AFGHANISTAN 17 (2011) [hereinafter LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011]; Bruce Leshan, *A Deadly Legacy: Vets with Lungs Scarred by Toxic Burn Pits Battle the VA*, WUSA9 (May 1, 2019, 10:23 PM), <https://www.wusa9.com/article/news/a-deadly-legacy-vets-battle-the-va-with-lungs-scarred-by-toxic-burn-pits/65-861d66f9-5dd1-4c87-bbf9-8a4eb62e9d12> (providing photos and video evidence of the smoke).

78. See Meghann Myers, *These Maps Can Help You Figure Out Your Burn Pit Exposure Risk*, MIL. TIMES (Dec. 4, 2019, 6:52 PM), <https://www.militarytimes.com/news/your-military/2019/12/04/these-maps-can-help-you-figure-out-your-burn-pit-exposure-risk/>.

79. Health Care for Burn Pit Veterans Act, S. 3541 § 3.

80. See Kime, *supra* note 22 (stating calculations by the VA and National Institutes of Health Data show glioblastoma occurs at a rate 26% higher among post-September 11 veterans who were deployed to Iraq and Afghanistan than the glioblastoma rate found in the

debilitating and often fatal diseases, those affected have encountered significant resistance from the VA for compensation and insurance coverage while attempting to justify these illnesses as service-connected disabilities.⁸¹ These disputes or outright refusals by the VA have caused the financial burden of expensive treatments and lofty copays to land directly on the affected veterans.⁸²

A. *How Did We Use Burn Pits?*

The U.S. military designated areas nearby and often within overseas bases where all trash was to be burned.⁸³ The stark reality is that the enormous amount and the types of garbage fed into these burn pits created hazardous, volatile, and toxic environmental conditions.⁸⁴ Visualize up to ten acres of land, directly adjacent to or sometimes within operational military bases, covered with hundreds of thousands of pounds of smoldering and burning trash.⁸⁵ Contained in that waste is plastics, batteries, appliances, food waste, hospital waste, and dead animals.⁸⁶ Welcome to “embracing the suck.”⁸⁷

Occasionally, the military disposed of human body parts and raw sewage in the burn pits.⁸⁸ The waste was ignited by jet fuel and burned for twenty-four hours a day, seven days a week.⁸⁹ The U.S. military used burn pits for

general population); SHANNON K. BARTH, ERIN K. DURSA, ROBERT BOSSARTE & AARON SCHNEIDERMAN, LIFETIME PREVALENCE OF RESPIRATORY DISEASES AND EXPOSURES AMONG VETERANS OF OPERATION ENDURING FREEDOM AND OPERATION IRAQI FREEDOM VETERANS 3 (2016), *reprinted in* 58 J. OCCUPATIONAL ENV'T MED. 1175, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5482227/> (finding that service members who deployed during or after Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) were 29% more likely to be diagnosed with sinusitis than those who did not deploy).

81. See 38 C.F.R. § 3.320 (2022) (recognizing only three presumptions for chronic diseases associated with exposure to particulate matter nearly twenty years after the start of OEF).

82. See Kime, *supra* note 22 (stating the Feehan family paid over \$10,000 in medical bills after Noah Feehan was diagnosed with glioblastoma in December of 2020).

83. See Myers, *supra* note 78 (providing maps of locations of burn pits overseas).

84. See LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 15.

85. See *id.* at 16 (describing the size of the burn pits and the frequency with which they were utilized).

86. See James Risen, *Veterans Sound Alarm Over Burn-Pit Exposure*, N.Y. TIMES (Aug. 6, 2010), <https://www.nytimes.com/2010/08/07/us/07burn.html>.

87. See Taylor Baldwin Kiland & Peter Fretwell, *What ‘Embrace the Suck’ Means to the Military*, MILITARY.COM (Sept. 22, 2020), <https://www.military.com/daily-news/opinions/2020/09/22/what-embrace-suck-means-military.html> (explaining the colloquialism to mean “[t]his is really bad, so let’s make the best of it we can”).

88. See LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 15, 17; Risen, *supra* note 86.

89. Aaron Parseghian, *A Battle Back Home: Burn Pits and the Burden of Proof*, FOX 17 W. MICH.

decades to dispose of waste overseas.⁹⁰ The military viewed burn pits as advantageous over incinerators because they were less expensive and could be quickly operational at a new base.⁹¹

B. Where Did We Use Them and Why Does It Matter?

The military relied on burning waste as its primary waste-management solution in Afghanistan and Iraq since the beginning of the conflicts.⁹² Nearly half of all bases in Iraq and over 80% of bases in Afghanistan utilized burn pits.⁹³

Joint Base Balad (JBB), located north of Baghdad, Iraq, contained one of the most infamous burn pits in history.⁹⁴ At its height, an estimated 200 tons of waste burned in the pit per day, and even at its low, as many as ten tons of waste burned in the pit per day.⁹⁵ Department of Defense studies indicated that human waste, shipping and packing materials, paints and solvents (among other chemicals), metal and aluminum, and petroleum were all burned in the pit at JBB.⁹⁶ Congressional testimony by those present at JBB confirmed that medical waste, “including needles, gloves, bandages,

(Apr. 12, 2021), <https://www.fox17online.com/news/politics/a-battle-back-home-burn-pits-and-the-burden-of-proof> (interviewing servicemember Kevin Henley who stated, “[t]here was [sic] bullets, body parts, medical waste, lead, tires, feces, you name it and it was all ignited by jet fuel. And these things would run [twenty-four] hours a day, seven days a week.”).

90. LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 15–16; *see also* Steve Carmody, *Two Michigan Representatives Push Relief for Veterans Suffering from ‘Burn Pit’ Illnesses*, MICH. RADIO (Apr. 29, 2021, 2:30 PM), <https://www.michiganradio.org/health/2021-04-29/two-michigan-representatives-push-relief-for-veterans-suffering-from-burn-pit-illnesses>.

91. LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 16.

92. *Id.*

93. *Id.* “In Iraq burn pits were operating at 14 out of the 41 existing small military sites (defined as housing less than 100 U.S. service members), 30 of the 49 medium-size sites (between 100 and 1,000 service members), and 19 of the 25 large sites (more than 1,000 service members); and in Afghanistan, burn pits operated in “126 out of the 137 small sites, 64 of the 87 medium-size sites, and 7 of the 18 large military installation sites.” *Id.*

94. *See* Guy Raz, *U.S. Builds Air Base in Iraq for the Long Haul*, NPR (Oct. 12, 2007), <https://www.npr.org/2007/10/12/15184773/u-s-builds-air-base-in-iraq-for-the-long-haul>; *see also* Leo Shane III, *Study: Respiratory Illnesses Higher Near Infamous Balad Burn Pit*, STARS & STRIPES (July 1, 2010), https://www.stripes.com/theaters/middle_east/study-respiratory-illnesses-higher-near-infamous-balad-burn-pit-1.109538 (citing a study that found almost 7% of 920 troops surveyed who had served at Joint Base Balad returned with a respiratory illness).

95. LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 12 (estimating the amount of waste burned “rang[ed] from about [two] tons per day early in its operation in 2003 to 200 tons of waste being burned daily in 2007”).

96. *Id.* at 17.

body fluids, and expired pharmaceuticals,” was also burned.⁹⁷ While the JBB pit was shut down in 2009, lingering effects from exposure continue to plague those who were exposed.⁹⁸

To claim many of the presumptions recognized by the VA, a soldier must often prove they were serving in a specific location during a specific time period.⁹⁹ To be eligible for any of the three presumptions currently recognized for burn pit exposure, a soldier must have served in Afghanistan, Djibouti, Syria, or Uzbekistan during the Persian Gulf War, or the Southwest Asian theater of operations any time after August 2, 1990.¹⁰⁰ Further, a service member must have exhibited the condition within ten years of separation from active service.¹⁰¹ While a soldier’s record of time and location of deployment is a relatively easy hurdle, the VA further expects the soldier to prove the illness arose from exposure to military sanctioned burn pits.¹⁰² Simultaneously, the VA claims there is insufficient evidence collected over the last decade to show causation between burn pits and cancer, despite the overwhelming presentation and increased occurrences of rare cancers in combat veterans.¹⁰³

C. *The Different Conditions Claimed By Veterans Exposed to Burn Pits*

VA officials estimate that overseas deployments exposed more than 3.5 million troops to smoke from burn pits over the last twenty years.¹⁰⁴ Many troops returning from these areas claim that exposure to burn pits caused

97. *Id.*

98. *Id.*; see also On Point, *Burn Pits: Behind the ‘Silent Killer’ Ignored by the U.S. Government for Years*, WBUR, at 5:32 (Mar. 10, 2022), <https://www.wbur.org/onpoint/2022/03/10/burn-pits-iraq-vets-military-waste-toxic> (describing severe health problems reported by soldiers exposed to burn pits).

99. See Jim Absher, *Disability Compensation for Presumptive Conditions*, MILITARY.COM (Oct. 28, 2021), <https://www.military.com/benefits/veterans-health-care/disability-compensation-for-presumptive-conditions.html> (explaining that a veteran must fall in a specific group to presume the condition was caused by service).

100. *Airborne Hazards and Burn Pit Exposures*, U.S. DEPT OF VETERANS AFFS., <https://www.publichealth.va.gov/exposures/burnpits/> (Aug. 4, 2022).

101. *Id.*

102. Chris Attig, *Quick Guide: 5 Ways to Prove VA Service Connection*, VETERANS L. BLOG, <https://www.veteranslawblog.org/how-to-prove-va-service-connection/> (last visited Aug. 16, 2022) (noting “[w]here most veterans run into trouble with the VA is when they try to show the relationship between the current disability and what happened to them in service.”).

103. See Kime, *supra* note 22 (noting that “among post-9/11 veterans who deployed to Iraq, Afghanistan and elsewhere, glioblastoma occurs at a rate 26% higher than that found in the general population”).

104. Megan Stack, *The Soldiers Came Home Sick. The Government Denied It Was Responsible*, N.Y. TIMES (Jan. 16, 2022), <https://www.nytimes.com/2022/01/11/magazine/military-burn-pits.html>.

serious illnesses.¹⁰⁵ However, despite the growing complaints, the VA has denied roughly 75% of burn pit claims alleging an insufficient link between the claims and available evidence.¹⁰⁶ When the VA refuses to recognize a medical connection as being service-connected, veterans incur the cost of copayments for medications, outpatient, and inpatient care.¹⁰⁷ The current standard becomes unacceptable when it forces veterans to foot the bill until the VA recognizes their condition as service-connected.

Veterans who served in Operation Enduring Freedom and Operation Iraqi Freedom report more than forty different types of cancer.¹⁰⁸ However, troops find it increasingly difficult to prove a link between the toxic smoke they inhaled and their health issues because few overseas sites routinely monitored air quality and chemical exposure.¹⁰⁹

In response to concerns expressed by military personnel and veterans, their families, and Congress, the VA asked the Institute of Medicine (IOM) to investigate the use of burn pits to “determine the long-term health effects of exposure.”¹¹⁰ However, the VA concluded it had insufficient evidence to show positive causation between many of the conditions claimed by service members.¹¹¹

III. PRELIMINARY LEGAL ANALYSIS

The VA Secretary has the duty to oversee the complicated nature of veterans’ health issues and benefits.¹¹² The Secretary may authorize studies to evaluate those health issues that arise during and after a veteran’s service to our country.¹¹³ After commissioning the IOM to investigate the health issues associated with burn pits, the VA Secretary

105. See *Burn Pits 360 Registry Self-Reported Symptoms & Illnesses*, BURN PITS 360 (2020), https://burnpits360.org/wp-content/uploads/2021/03/Symptoms-and-Diseases_20201.pdf (listing symptoms reported); Stack, *supra* note 104.

106. Abou-Sabe & Martinez, *supra* note 25.

107. *VA Health Care: Cost and Co-payments*, MILITARY.COM, <https://www.military.com/benefits/veterans-health-care/va-health-care-cost-and-copayments.html> (last visited Aug. 16, 2022).

108. *Burn Pits 360 Registry Self-Reported Symptoms & Illnesses*, *supra* note 105. The top ten types of cancers reported were skin, brain, esophageal, leukemia, lymphoma, lung, soft tissue sarcoma, testicular, prostate, and blood. *Id.*

109. See LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 15; see also discussion *infra* Part III.B.

110. INST. OF MED., LONG-TERM HEALTH CONSEQUENCES OF EXPOSURE TO BURN PITS IN IRAQ AND AFGHANISTAN 601 (2015) [hereinafter LONG-TERM HEALTH CONSEQUENCES STUDY OF 2015].

111. *Id.* at 602; *What the VA Says About Burn Pits*, VETS HQ, <https://www.vetshq.com/va-says-burn-pits/> (last visited Aug 16., 2022).

112. IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 54.

113. Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11.

has still failed to provide an adequate plan of action to address the ongoing crisis faced by the veterans exposed.¹¹⁴

A. *What the Secretary Has the Power to Do*

The VA Secretary “has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws”¹¹⁵ As such, the Secretary can decide to grant presumptions for specific health conditions when “unavailable or incomplete information on exposure or gaps in the evidence as to whether the exposure increases risk for the health condition.”¹¹⁶

The Agent Orange Act prescribed a model for the decisionmaking process used by the VA today.¹¹⁷ The VA contracts with an independent third party to evaluate evidence of veterans’ conditions and any correlation to their service.¹¹⁸ Once the third party has completed the review, the third party reports back to the VA Secretary.¹¹⁹ The general practice of the VA, although not required, involves an internal review process.¹²⁰ This internal review is completed by a Working Group, Task Force, and the VA Secretary.¹²¹

The Working Group members include internal VA staffers who meet once the third-party report is returned to the VA.¹²² A representative from the Office of General Counsel briefs the group on the legal standard of the VA Secretary’s decision.¹²³ The group considers diseases that appear to be “potentially

114. *Sen. Moran Calls for VA to Take Action on President Biden’s State of the Union Remarks on Toxic Exposures*, U.S. SENATE COMM. ON VETERANS’ AFFS. (Mar. 1, 2022), <https://www.veterans.senate.gov/2022/3/sen-moran-calls-for-va-to-take-action-on-president-biden-s-state-of-the-union-remarks-on-toxic-exposures> (highlighting Secretary McDonough’s conflicting comments about his authority to grant presumptions and his lack of action since President Biden’s State of the Union address).

115. 38 U.S.C. § 501.

116. IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at xi.

117. *See generally* Agent Orange Act of 1991, 105 Stat. at 11–20 (laying out the process to be used to determine presumptions for servicemembers exposed to dioxide chemical compounds in herbicides).

118. *See id.* (contracting with the National Academy of Sciences).

119. *Id.*

120. SIDATH VIRANGA PANANGALA, DANIEL T. SHEDD & UMAR MOULTA-ALI, CONG. RSCH. SERV., R41405, VETERANS AFFAIRS: PRESUMPTIVE SERVICE CONNECTION AND DISABILITY COMPENSATION 19 (2014).

121. *Id.*

122. *See id.* at 19–20 (stating that outside experts may be used as necessary, and the group has the option of seeking input from veteran service organizations, Congress, and veterans themselves).

123. *See id.* at 29 (supplying the group with additional information, such as copies of any “significant scientific studies identified in the IOM report and other information”).

significant” and then attempts to determine “whether a presumption of service connection is warranted for any disease.”¹²⁴ The Working Group then prepares a written report, but generally does not obtain a cost estimate.¹²⁵

The Task Force consists of the Under Secretary for Health, Under Secretary for Benefits, General Counsel, and Assistant Secretary for Policy and Planning.¹²⁶ This group reviews the report prepared by the Working Group and may provide its own report to the VA Secretary.¹²⁷

Based on these reports, the VA Secretary determines whether to establish any presumptions.¹²⁸ If no presumption is established, the Veterans Bureau Administration issues a notice, which the VA then publishes in the Federal Register.¹²⁹ Should the Secretary determine that presumptions are necessary, rulemaking ensues in accordance with to the Administrative Procedure Act.¹³⁰

If the VA Secretary determines a presumption is warranted, the Veterans Benefits Association submits a cost estimate to prepare presumption regulations to be reviewed by the Office of Management and Budget (OMB).¹³¹ If the OMB approves the proposed rule, the rule is submitted to the Federal Register for a public comment period.¹³² After public comment, amendments are made and resubmitted, or the rule is submitted to the Federal Register for publication.¹³³ If the VA determines a presumption is not warranted, a notice is prepared to explain the basis for that decision.¹³⁴

B. *What the Current Secretary Has Done Thus Far*

“Veterans Affairs Secretary Denis McDonough said he is frustrated by his department’s slow pace of expanding benefits for military burn pit victims.”¹³⁵ Secretary McDonough said he wants to expand the list of burn pit-related illnesses eligible for presumptive benefits, but “[t]he biggest hurdle is establishing a scientific link, and I will be damned if I [do not] establish

124. *Id.*

125. *See id.* at 30 (reporting on a summary of the issues, findings, legal standard, analysis, options, and recommendations).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 19.

130. IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 60.

131. PANANGALA, SHEDD & MOULTA-ALI, *supra* note 120, at 19.

132. *Id.*

133. *Id.*

134. Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11.

135. Shane, *supra* note 35 (internal quotations omitted); *see also* Interview by Jon Stewart with Denis R. McDonough, VA Secretary, in Wash., D.C. (Sept. 1, 2021).

that[.]”¹³⁶ The Secretary engaged in an informal procedure by contracting with a third party to study the effects of burn pits, but barely scratched the surface of addressing veterans’ medical concerns.¹³⁷

The Secretary contracted with the IOM to conduct a study of the effects of burn pits on veterans serving in Iraq and Afghanistan.¹³⁸ The IOM Committee reviewed “the toxicity and long-term health effects of [fifty-one] pollutants identified in the air sampling at JBB, regardless of exposure level and pathway.”¹³⁹ Although the study was not focused on veterans exposed to these pollutants, a “wide array of health effects [were] observed in humans and animals after exposure to the specific air pollutants detected at JBB.”¹⁴⁰

Due to the low level of data available on veterans exposed to the burn pits in Iraq and Afghanistan, the committee instead reviewed firefighters and incinerator workers.¹⁴¹ The committee reasoned that these two occupations were likely to have “exposures most similar to military personnel.”¹⁴² Not at all surprisingly, “the committee concluded there is inadequate [or] insufficient evidence of an association between exposure to combustion products and cancer, respiratory disease, circulatory disease, neurologic disease, and adverse reproductive and developmental outcomes in the populations studied.”¹⁴³ The IOM Committee, however, suggested “there is limited/suggestive evidence of an association between exposure to combustion products and reduced pulmonary function in the populations studied.”¹⁴⁴ Further, it “concluded that additional study of health effects, specifically in veterans

136. Shane, *supra* note 26 (claiming that establishing a scientific link is the VA’s greatest “hurdle,” while unable to articulate what metrics or authority set this “hurdle”).

137. LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 16; *see* 86 Fed. Reg. 42,725.

138. LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77, at 16.

139. LONG-TERM HEALTH CONSEQUENCES STUDY OF 2015, *supra* note 110, at 602.

140. *Id.* (including among those effects: “eye and throat irritation, organ weight changes, histopathologic changes (e.g., lesions and hyperplasia), inflammation, and reduced or impaired function. The effects have been found in many organs and systems, including adrenal glands, blood, lungs, liver, kidneys, stomach, spleen, and cardiovascular, respiratory, reproductive, and central nervous system.”).

141. *Id.*

142. *Id.* (failing to recognize the differences in the equipment used and available to each profession, the continuous exposure time of veterans, and the inordinate conglomerate of dangerous and harmful materials burned in the pits).

143. *Id.*

144. *Id.*

who served in Afghanistan and Iraq, is necessary.”¹⁴⁵ This statement seems to directly conflict with the IOM Committee’s claim that a “wide array of health effects” had been observed in humans and animals who were exposed to the same air pollutants at JBB.¹⁴⁶ Service members are not somehow more immune than the average human to these health effects when serving in Afghanistan or Iraq.

In 2014, the VA established the Airborne Hazards and Open Burn Pit Registry.¹⁴⁷ The VA claimed the registry was created to “help put data to work for Veterans through research about potential health effects of airborne hazard exposures.”¹⁴⁸ The registry is voluntary, cumbersome, and time consuming to complete, and does not guarantee any action will be taken on the part of the VA.¹⁴⁹ As of August 2021, only 241,000 veterans had registered.¹⁵⁰ This registry only serves as a hoop a veteran can elect to jump through, but ultimately it only represents a snapshot of data that is unlikely to provide the VA with the ill-defined evidence it seeks.

In August 2021, eight years after the Airborne Hazards and Open Burn Pit Registry was established, VA officials announced an interim final rule, allowing the agency to bypass first publishing a proposed rule.¹⁵¹ The interim final rule stated that veterans suffering from asthma, rhinitis, and sinusitis who were exposed to toxic smoke while serving in Iraq, Afghanistan, and other recent conflict locations would be granted presumptive benefit

145. *Id.*

146. *Id.* (including “eye and throat irritation, organ weight changes, histopathologic changes (e.g., lesions and hyperplasia), inflammation, and reduced or impaired function”). Effects have also been found in many organs and systems, including adrenal glands, blood, lungs, liver, kidneys, stomach, spleen, and cardiovascular, respiratory, reproductive, and central nervous system. *Id.*

147. *VA Airborne Hazards and Open Burn Pit Registry*, U.S. DEP’T OF VETERANS AFFS. (June 3, 2021), <https://www.publichealth.va.gov/exposures/burnpits/registry.asp>.

148. *Id.*

149. *See id.* A service member must first create a VA account and then can fill out the health questionnaire, which can take up to an hour to complete; an optional health evaluation can be completed by the VA or military health provider. *Id.*

150. Leo Shane III, *For First Time, Some Burn Pit Victims Will Get Presumptive Status for Disability Benefits*, MIL. TIMES (Aug. 2, 2021), <https://www.militarytimes.com/veterans/2021/08/02/for-first-time-some-burn-pit-victims-will-get-presumptive-status-for-disability-benefits/>.

151. Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter, 86 Fed. Reg. 42,724 (Aug. 5, 2021) (to be codified at 38 C.F.R. pt. 3); *see A Guide to the Rulemaking Process*, OFF. OF THE FED. REGISTER (Jan. 6, 2022), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (explaining that an interim final rule may bypass first publishing a proposed rule when an agency has good cause to do so).

status.¹⁵² However, the presumptions require any claimant to have been diagnosed within ten years after separation of service.¹⁵³

The VA accepted comments on the interim final rule until October 4, 2021.¹⁵⁴ Twenty-six comments were received in total.¹⁵⁵ Veterans' advocacy groups submitted the bulk of the comments.¹⁵⁶ Most comments addressed the arbitrary nature of the ten-year limitation to claim the presumptions.¹⁵⁷ The Working Group asserted that the manifestation period for these three chronic respiratory conditions was generally five to ten years after separation from service.¹⁵⁸ The comments took issue with this assertion because neither the 2011 nor the 2020 National Academies of Science, Engineering, and Medicine reports provided any basis for this statement.¹⁵⁹ The Wounded Warrior Project noted from their own survey that "a majority (70.6%) of

152. See 86 Fed. Reg. 42,724 (stating that these presumptions "will ease the evidentiary burden of Gulf War Veterans who file claims with VA for these three conditions, which are among the most commonly claimed respiratory conditions").

153. See *id.* at 42,729–30 ("The VA Secretary will apply the liberal manifestation period of [ten] years from separation from the last period of military service that includes a qualifying period of service.").

154. *Id.*

155. 86 Fed. Reg. 42,733; U.S. DEP'T OF VETERANS AFFS., *AR25-Interim Final Rule- Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter* (2021), <https://www.regulations.gov/document/VA-2021-VBA-0015-0001>.

156. See generally Comments on Interim Final Rule on Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter, <https://www.regulations.gov/docket/VA-2021-VBA-0015/comments>; see, e.g., Wounded Warrior Project, Comment Letter on Interim Final Rule-Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter (Oct. 5, 2021), <https://www.regulations.gov/comment/VA-2021-VBA-0015-0028> (urging the VA to consider additional presumptions for more serious and life-threatening conditions).

157. See e.g., Disabled Veteran Americans, Comment Letter on Interim Final Rule-Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter (Oct. 1, 2021), <https://www.regulations.gov/comment/VA-2021-VBA-0015-0025> (highlighting that neither the 2011 nor the 2020 National Academies of Science, Engineering, and Medicine reports provided any evidence or studies to warrant a ten-year limitation on making a claim).

158. 38 C.F.R. § 3.320; U.S. DEP'T OF VETERANS AFFS., *AR25-Interim Final Rule- Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter* (2021), <https://www.regulations.gov/document/VA-2021-VBA-0015-0001> (claiming this time period was supported by claims data and the human and epidemiological studies).

159. See generally LONG-TERM HEALTH CONSEQUENCES STUDY OF 2011, *supra* note 77 (stating that while the study found some long-term pulmonary issues in veterans, no definitive conclusions could be drawn regarding the long-term health effects of exposure to burn pits, and further studies would be needed). Neither this study nor any proposed future studies indicated a time frame of ten years between exposure and any adverse health effects. *Id.*

warriors reported that they were ‘definitely’ exposed to toxic substances or hazardous chemicals during their service, and another 18.1% reported they were ‘probably’ exposed.”¹⁶⁰ Further, warriors reported their exposures led to “muscle and joint pain (87.5%), sleep disturbances (85.6%), neurological problems (40.4%), chronic fatigue syndrome (35.8%), gastrointestinal disorders (33.3%), and respiratory disorders (21.6%).”¹⁶¹ Worse still, 4.1% reported being diagnosed with some form of cancer.¹⁶² As of April 2021, more than 42,000 burn pit claims were related to cancer, and previously deployed soldiers were found to be twice as likely as non-previously deployed soldiers to be diagnosed with cancer.¹⁶³ However, fewer than 40% of those claims were granted.¹⁶⁴

In March 2022, President Biden used his State of the Union Address to discuss the need for new presumptive benefits for veterans exposed to burn pits.¹⁶⁵ On April 26, 2022, the VA issued an interim final rule to recognize nine respiratory cancers associated with burn pit exposure.¹⁶⁶

While the department has made subtle moves in the right direction, the VA has still denied about 75% of veterans’ burn pit related claims.¹⁶⁷ The VA’s lengthy and unpredictable presumption approval process is costing service members and their families time and money that many do not have.¹⁶⁸

160. Wounded Warrior Project, Comment Letter on Interim Final Rule on Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter (Oct. 5, 2021), <https://www.regulations.gov/comment/VA-2021-VBA-0015-0028>.

161. *Id.*

162. *Id.*

163. Steve Beynon, *VA Secretary Wants More Vets Sickened by Burn Pits to File Claims, But Many Are Still Being Turned Away*, MILITARY.COM (Apr. 28, 2021), <https://www.military.com/daily-news/2021/04/28/va-secretary-wants-more-vets-sickened-burn-pits-file-claims-many-are-still-being-turned-away.html>.

164. *Id.* (stating at the time, 42,686 claims had been filed related to cancer, and less than 16,000 of those claims were granted).

165. *Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery*, THE WHITE HOUSE (Mar. 1, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/>.

166. 38 C.F.R. § 3.320.

167. Abou-Sabe & Martinez, *supra* note 25.

168. *See, e.g.*, Wesley Black, *Veteran: Afghanistan’s Toxic Burn Pits Left Me Staring Down the Barrel of a Death Sentence*, IAVA (June 21, 2021), https://iava.org/media_hits/read-veteran-afghan-istans-toxic-burn-pits-left-me-staring-down-the-barrel-of-a-death-sentence/ (“The cancers and health impacts veterans of the wars in Iraq and Afghanistan face because of our military’s burn pits are my generation’s Agent Orange.”).

IV. RECOMMENDATION FOR IMPROVING THE APPROVAL PROCESS FOR PRELIMINARY CONDITIONS

VA Secretary McDonough said in a recent press conference, “[w]e’re urging vets to come forward with their claims.”¹⁶⁹ Secretary McDonough continued, “[a]s we get more claims, we can aggregate those claims to draw bigger conclusions.”¹⁷⁰ Secretary McDonough should focus on formalizing procedures and streamlining the VA’s cumbersome presumption determination process so more veterans are likely to pursue their claims. By setting clear, objective standards, efforts can be focused on providing the necessary evidence and relieving veterans, their families, and their advocacy groups from the overwhelming uncertainty of the VA’s threshold of what they consider conclusive evidence of service-connection.

Congress introduced the Presumptive Benefits for War Fighters Exposed to Burn Pits and Other Toxins Act on April 5, 2021.¹⁷¹ One of the purposes of the Act is to amend Title 38 and add new presumptions for certain diseases associated with exposure to toxins.¹⁷² The Act further proposes processes for petitioning to add presumptive conditions, sets timelines to address petitions for adding presumptive conditions, and addresses that the Secretary must provide reasoning for any determination not to publish a proposed regulation for a presumptive condition.¹⁷³ The Act, however, does not set out more formalized procedures for reviewing third-party reports or clear standards for when a condition may or may not be considered presumptive.¹⁷⁴

The VA Secretary should exercise his authority to prescribe rules that create a more formalized process for reviewing presumption-related reports, as well as to regulate the nature and extent of proof and evidence needed to establish presumptions for veterans.¹⁷⁵

A. Formalized Procedure

While the Agent Orange Act of 1991 established a process for determining presumptions, its steps are not explicitly required and the VA has not adopted a formalized procedure.¹⁷⁶ The VA Secretary should establish rules

169. Beynon, *supra* note 163.

170. *Id.*

171. Presumptive Benefits for War Fighters Exposed to Burn Pits and Other Toxins Act of 2021, H.R. 2372, 117th Cong. § 2(a) (2021).

172. *Id.*

173. *See id.*

174. *Cf. id.* (providing language similar to what already exists in Title 38 for other presumptions).

175. *See* 38 U.S.C. § 501 (outlining the Secretary’s authority).

176. IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 59.

requiring each of the steps outlined in the Agent Orange Act of 1991 to be completed, as well as require public notice at every stage of review.¹⁷⁷ Further, while the Working Group may choose to seek input from a veteran service organization (VSO), this should also be a requirement.¹⁷⁸ A list of approved VSOs should be provided to the Working Group.¹⁷⁹ The Working Group would then be required to contract with a VSO, just as the Agent Orange Act of 1991 required the VA to contract with an independent third party.¹⁸⁰ A VSO will help ensure that the VA is not serving its own interest, but rather the interest of veterans in need of VA assistance.

Once the Working Group has completed a review with the assistance of a VSO, the report should be publicly available and sent to the Task Force Group. The Task Force should review the report and be required to provide their own report to the VA Secretary; both reports should be made publicly available.¹⁸¹ The VA Secretary should then review both reports from the Working Group and the Task Force. Finally, if no presumptions are established from the diseases addressed in the reports, the Secretary should issue a notice explaining why these presumptions were not established.

Requiring this formalized process would help ensure the VA is held accountable for their decisions and provide a clearer path for veterans and VSOs to provide information for the decisionmaking processes.

B. Evidence Based Standard

The Secretary should prescribe rules describing objective standards and criteria for establishing presumptions before commissioning any third-party studies.¹⁸² These standards and criteria should be transparent, evidence-based thresholds that, when met by commissioned studies, will automatically trigger a presumption. The VA Secretary should also establish the presumption time frame a veteran has for claiming a presumption. The time frame must be based on scientific evidence of the conditions to consider latency periods.

177 See Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11.

178. See IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 59.

179. See generally U.S. DEPT OF VETERANS AFFS., VETERANS & MILITARY SERV. ORGS. (2019), <https://www.va.gov/vso/VSO-Directory.pdf> (directory of veteran's service organizations).

180. See Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11.

181. See IOM IMPROVING PRESUMPTION PROCESS, *supra* note 7, at 60 (noting the Task Force Group does not always provide its own separate report).

182. See *Nehmar v. U.S. Veterans Admin.*, 712 F. Supp. 1404, 1420, 1423 (N.D. Cal. 1989) (holding the VA could not hold too high a standard for proving a relationship between Agent Orange Exposure and claimed diseases).

Evidence of the rate of disease in specific veteran populations, such as those deployed to identified war zones during certain periods of time, should be compared to a national average when determining whether a more positive correlation is present in the grouping.¹⁸³ The incidence rate of a particular disease for civilian persons in the United States should be compared to veterans who were exposed to burn pits due to their service.¹⁸⁴ The VA should set thresholds before reviewing scientific data to determine at what rate the VA is willing to accept and declare a presumption. For example, the VA should indicate that should a soldier become 15% more likely to be diagnosed with cancer after being deployed within a set proximity to a burn pit, the cancer shall be presumed to be service-connected. This set threshold will encourage more veterans to report their diagnoses and symptoms to a voluntary registry, as well as help to bring awareness to certain conditions that soldiers may face in the future. Unfortunately, many veterans have already died who may have never filed a claim or submitted their information to the burn pit registry. The VA can mitigate their previous shortcomings by implementing set standards. These standards would provide a clear understanding of why a presumption has or has not been determined.

CONCLUSION

The VA consistently claims that “insufficient evidence” exists to grant presumptions for many of the diseases claimed by veterans.¹⁸⁵ However, evidence from multiple sources consistently provides higher rates of disease compared to the national averages for service members exposed to burn pits for extended periods of time.¹⁸⁶

183. See Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter, 86 Fed. Reg. 42,724, 42,726 (Aug. 5, 2021) comparing servicemembers that were deployed to relevant locations with servicemembers in a “similar cohort” who had not deployed to these areas) (to be codified at 38 C.F.R. pt. 3).

184. See *id.*

185. LONG-TERM HEALTH CONSEQUENCES STUDY OF 2015, *supra* note 110, at 602 (claiming the IOM committee concluded that there is inadequate/insufficient evidence but noting the limitations and uncertainties in their studies).

186. See Patricia Kime, *New Burn Pit Report: Lung Disease, High Blood Pressure Common in Exposed Vets*, MIL. TIMES (July 22, 2015), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2015/07/22/new-burn-pit-report-lung-disease-high-blood-pressure-common-in-exposed-vets/> (reporting higher rates of respiratory, as well as rare lung disorders, according to data from the VA Airborne Hazards and Open Burn Pit Registry).

The United States outlawed open burn pits in the 1970s because they posed such dangerous risks to American citizens.¹⁸⁷ Those health risks do not disappear when the burn pits are in combat zones where our military serves. The VA must adopt new regulations to provide for formalized procedures, as well as evidence-based standards, to fulfill the mission of the U.S. Department of Veterans Affairs and “fulfill President Lincoln’s promise: ‘[t]o care for him who shall have borne the battle, and for his widow, and his orphan’ by serving and honoring the men and women who are America’s Veterans.”¹⁸⁸

187. See Bigad Shaban, Rachel Witte & Anthony Rutanashoodech, *Veterans Exposed to Flaming Piles of Trash, Known as Military ‘Burn Pits,’ Caught in Battle with VA to Receive Medical Care*, NBC BAY AREA (Mar. 1, 2019, 5:18 PM), <https://www.nbcbayarea.com/news/local/burn-pits/7979/> (highlighting veterans’ struggles to persuade the VA that their chronic health conditions are service-connected and related to burn pits).

188. *I Care*, *supra* note 2.