

Congress has Taken Action to Ensure Post-9/11 Burn Pit Veterans Receive Disability Claims

By Second Lieutenant Lauren Walker, USMCR³

11.0—Veterans' claims

Burn pits have been utilized by the Armed Forces for decades, going back to Operation Desert Shield/Desert Storm in 1990.⁴ The use of burn pits has continued throughout the operations in Iraq, Kuwait, Qatar, United Arab Emirates, Saudi Arabia, and Bahrain.⁵ Many service members exposed to the smoke emitted from burn pits suffer from long-term health concerns, manifested long after their time in service.⁶ But thousands of service members have been denied disability claims related to burn pit exposure due to the many hoops a service member must jump through.⁷

In August 2021, the Department of Veterans Affairs (VA) began taking steps to get veterans the healthcare benefits they need and deserve by processing disability claims for asthma, rhinitis,

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 Spouse 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.

²See Lauren Walker, *The VA will begin Processing Disability Claims for Post-9/11 Burn Pit Vets*, ROA Law Review 21061 (Oct. 2021) (discussing burn pits and the VA's initial steps in establishing presumptive disability benefits for veterans exposed to the toxins of burn pits).
in more detail).

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*Military title used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. Government.

⁴*Issue Brief: Burn Pit Exposure*, DAV, <https://www.dav.org/wp-content/uploads/Burn-Pit-Exposure-2020.pdf> (last visited Aug. 12, 2021).

⁵*Id.*

⁶War Related Illness & Injury Study Center, *Burn Pits (Trash and Human Waste Exposure)*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.warrelatedillness.va.gov/education/factsheets/burn-pits.pdf> (last updated Nov. 2013).

⁷Leo Shane III, *Lawmakers question VA approach on burn pits, advance bill to help military toxic exposure victims*, MILITARY TIMES: VETERAN (Sept. 23, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/09/23/lawmakers-question-va-approach-on-burn-pits-advance-bill-to-help-military-toxic-exposure-victims/>.

and sinusitis on a presumptive basis if these conditions manifested within ten years after his or her service in Southwest Asia or one of the other designated areas.⁸ The VA has consistently held that Congress would need to take action if more is to be done.⁹ Congress has responded to the VA's call.¹⁰ The House and the Senate have each, separately, passed a bill that would provide healthcare benefits to more troops than ever before who have been exposed to the toxins of burn pits.¹¹

Health Care for Burn Pit Veterans Act

On February 16, the U.S. Senate passed major legislation that would allow more veterans to receive healthcare coverage from the Department of Veterans Affairs for burn pit exposure.¹² The legislation was introduced by Senate Veterans' Affairs Committee Ranking Member Jerry Moran, a Kansas Republican, and Chairman Jon Tester, a Montana Democrat.¹³ The *Health Care for Burn Pit Veterans Act* was unanimously passed, indicating to all veterans that the Senate is committed to addressing toxic exposure.¹⁴

The *Health Care for Burn Pit Veterans Act* expands the period of eligibility for VA health care for all post-9/11 combat veterans from five years to ten years and allows a one-year open enrollment period for veterans who did not enroll during their initial five years following their discharge.¹⁵ The bill also provides every veteran a toxic exposure screening during VA medical visits and increases training in toxic exposure for VA health care providers.¹⁶ The bill goes on to establish VA reporting requirements on VA medical data to treat toxic exposure and mandates the VA to reach out to veterans to provide them with critical information on care, benefits, and resources.¹⁷ Finally, the bill passed by the Senate mandates that the Federal Government do more to study and collect data on veterans' health.¹⁸ These studies are to include performing a mortality study on veterans who served in Southwest Asia during the Gulf War, a study on Post-9/11 veterans' health trends, a study on veterans' cancer rates, and a report on DOD's *Individual Longitudinal Exposure Record*.¹⁹ The *Health Care for Burn Pit Veterans Act* comes at a price of about \$1 billion.²⁰

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹See S. 437, 117th (2021); H.R. 3964, 117th Cong. (2021).

¹²See S. 3541, 117th (2022).

¹³News Release, Moran, Tester Bill to Expand V Health Care for Post-9/11 Veterans Unanimously Clears Senate, United State Senator for Kansas Jerry Moran (Feb. 16, 2022), <https://www.moran.senate.gov/public/index.cfm/news-releases?id=CBE06F2A-6FA0-490B-AEE7-A5B49F5E8E7C>.

¹⁴*Id.*

¹⁵S. 3541, 117th (2022).

¹⁶*Id.*

¹⁷*Id.*

¹⁸S. 3541, 117th (2022).

¹⁹*Id.*

²⁰Nikki Wentling, *Senators on VA committee agree on phased approach to help veterans exposed to burn pits*, STARS AND STRIPES (Feb. 1, 2022), <https://www.stripes.com/veterans/2022-02-01/toxic-exposure-burn-pits-legislation-senate-4495988.html>.

The bill passed by the Senate on February 16 is the first step in a longer three-phase approach.²¹ The first phase is to “provide greater access to health care.”²² While there has been pushback that the Senate is not doing enough, Senator Moran defended the phased approach claiming he didn’t want to pass legislation that would harm veterans.²³ He notes that the VA is experiencing a surge of backlogged claims due to the several conditions that were added to the presumptive list last year.²⁴ As of January, there were 260,000 backlogged claims.²⁵ The concern the Senate has is if presumptions are put in place “that adds significant numbers of new veterans to the list before the VA gets its act together with regard to its capacity of dealing with those cases disadvantages veterans who are already waiting in line.”²⁶

As of now, the second and third phases have not been released. In the coming weeks and months, more announcements should be made. However, many veterans’ organizations stress the *Health Care for Burn Pit Veterans Act* does not go far enough. While the vice president of the Wounded Warrior Project, Jose Romas, thanked Chairman Tester and Ranking Member Moran for taking the first step, he also stated “there is more work to be done.”²⁷

Honoring our PACT Act

After President Biden urged Congress to pass a law to make sure veterans exposed to burn pit toxins receive the benefits and comprehensive health care they deserve in his State of the Union Address on March 1, the House passed *the Honoring our PACT Act* two days later.²⁸ The *Honoring our PACT Act* was introduced by House Veterans’ Affairs Committee Chairman Mark Takano, a California Democrat.²⁹ The bill passed by a vote of 256-174 with 34 Republicans joining all House Democrats.³⁰

The bill passed by the House is much more expansive than the *Health Care for Burn Pit Veterans Act* passed by the Senate. Under the *Honoring our PACT Act*, there is an extension of combat eligibility for healthcare from five years to 10 years with a one-year open enrollment period for

²¹Nikki Wenting, *Senate passes bill extending health care to veterans suffering with illnesses caused by burn pits*, STARS AND STRIPES (Feb. 17, 2022), <https://www.stripes.com/veterans/2022-02-17/veterans-affairs-burn-pits-toxic-exposure-senate-house-bills-5056962.html>.

²²*Senators on VA committee agree on phased approach to help veterans exposed to burn pits*, *supra* note 20 (quoting Tester).

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* (quoting Moran).

²⁷*Senate passes bill extending health care to veterans suffering with illnesses caused by burn pits*, *supra* note 21.

²⁸H.R. 3964, 117th Cong. (2021); President Joe Biden, State of the Union Address (Mar. 1, 2022).

²⁹H.R. 3964, 117th Cong. (2021).

³⁰Clare Foran & Kristin Wilson, *House passes bill to help veterans exposed to toxic burn pits*, CNN, <https://www.cnn.com/2022/03/03/politics/house-burn-pits-bill/index.html> (last updated Mar. 3, 2022, 11:14 AM ET).

veterans who did not enroll during their initial five years following their discharge.³¹ The bill also implements a streamlined provision for the VA's review process for establishing toxic exposure presumptions. Additionally, the bill concedes exposure to airborne hazards and burn pits based on locations and dates of service and establishes a presumption of service connection for 23 respiratory illnesses and cancers related to burn pits and airborne hazards exposure.³² The *Honoring our PACT Act* goes on to require the VA to provide standardized training to improve toxic exposure disability claims adjudications, to conduct outreach, provide resources to veterans exposed to toxins, and to improve data collection between it and the Department of Defense.³³ Studies related to incidents of cancer among veterans, health trends Post-9/11 veterans, and the feasibility of providing healthcare to dependents of veterans are also a requirement under the bill.³⁴

The *Honoring our PACT Act* not only benefits veterans who have been exposed to burn pit toxins, but also veterans exposed to other toxins.³⁵ Under the bill passed by the House, hypertension and Monoclonal Gammopathy of Undetermined Significance are added to the list of presumptions for Agent Orange exposure.³⁶ Additionally, the bill creates a presumption of exposure to radiation for veterans who participated in cleanup activities in Palomares, Spain, and Eniwetok Atoll.³⁷ Finally, there is a new claim for veterans and their families who served in Thailand, Laos, and Cambodia.³⁸

The cost of the *Honoring our PACT Act* will be nearly \$85 billion in the next five years and more than \$280 billion over the next decade.³⁹ Representative Takano acknowledged that the "cost may raise eyebrows at first", but noted that the cost is "but a fraction of what our country spent on the war efforts in Iraq and Afghanistan."⁴⁰ Representative Pelosi, the Speaker of the House, also defended the cost by stating that the price should not even be talked about because "[t]his is the cost of war that we should recognize ... it's going to be worth it."⁴¹

The White House

³¹S. 3541, 117th (2022).

³²H.R. 3964, 117th Cong. (2021).

³³*Id.*

³⁴*Id.*

³⁵*See id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹H.R. 3967, as ordered by the House Committee on Veterans' Affairs, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE (Dec. 7, 2021), <https://www.cbo.gov/system/files/2021-12/hr3967.pdf>

⁴⁰Leo Shane III, *Plan to expand medical care, benefits or military toxic exposure could cost nearly \$300 billion*, MILITARY TIMES (Dec. 7, 2021), <https://www.militarytimes.com/veterans/2021/12/07/plan-to-expand-medical-care-benefits-for-military-toxic-exposure-could-cost-nearly-300-billion/>.

⁴¹Mariam Khan, *House approves bill to help veterans exposed to 'burn pits'*, ABC NEWS (Mar. 3, 2022, 11:47 AM), <https://abcnews.go.com/Politics/house-set-vote-veterans-exposed-burn-pits/story?id=83207054>.

While the two bills passed by the House and the Senate are similar, the *Health Care for Burn Pit Veterans Act* is much more restrictive. In the coming months, members of the House and Senate are expected to take their bills to conference to work through the policy differences and agree on a final bill to send to the President for signature.⁴²

No matter what the final bill looks like, one thing seems certain, President Biden will sign the bill once it reaches his desk. During the President Biden's State of the Union Address, he made it clear that he wanted veterans exposed to toxins in Iraq and Afghanistan to finally get the benefits and comprehensive healthcare they deserve.⁴³ President Biden has witnessed men and women come home, "many of [whom are] the world's finest and best-trained warriors in the world, never the same."⁴⁴ This includes his late son, Beau Biden. Veterans come home with "[h]eadaches. Numbness. Dizziness. A cancer that would put them in a flag-draped coffin."⁴⁵ While President Biden is not sure what caused his late son's brain cancer, or the diseases of many other troops, he is "committed to finding out everything we can" about the toxins that are harming and killing United States veterans.⁴⁶ Moreover, the White House has already endorsed the House bill, which offers extensive coverage to veterans.

Based on the evidence, President Biden is only waiting on Congress to respond to his call to "pass a law to make sure veterans devastated by toxic exposure in Iraq and Afghanistan finally get the benefits and comprehensive health care they deserve."⁴⁷

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⁴²*Id.*

⁴³President Joe Biden, State of the Union Address (Mar. 1, 2022).

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

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⁴⁸Congress recently established the United States Space Force as the 8th uniformed service.