July 13, 2021

Office of General Counsel
Department of Defense
The Pentagon
Washington, DC 20301-1600

Re: Docket ID: DOD-2021-OS-0047; RIN 0790-AL22; Interim final rule, Medical Malpractice Claims by Members of the Uniformed Services

Dear General Counsel:

The undersigned organizations strongly urge you to delay the effective date of, and make critical changes to, the extremely flawed interim final rule establishing an administrative claims process and compensation for active-duty service members harmed by incompetent or reckless medical care. While we recognize the need for regulations implementing Section 731 of the National Defense Authorization Act, the interim final rule would produce unacceptable hardships for service members and their families, which is the opposite of Congress' intent.

As you know, Congress passed this 2019 law to remedy a terrible injustice caused by the *Feres* doctrine. It shocked the conscience that active-duty service members, including those who serve in war and survive, could become seriously injured or killed as a result of medical malpractice in military hospitals and yet have no recourse. Congress intended to fix this inequity by creating some parity between those who currently can bring claims against the government – such as veterans, service members' dependents, and even inmates harmed by prison health care – and active-duty service members. Administrative structures were already in place to guide the Department in creating an equal, fair, and efficient administrative system for these new claims under the Federal Tort Claims Act (FTCA) and the Military Claims Act (MCA). Indeed, as a bi-partisan group told DoD in a 2020 letter, it expected DoD to establish a process "comparable to those of their civilian counterparts pursuing claims under the Federal Tort Claims Act" and should "allow for uncapped monetary compensation under the Military Claims Act."[1]

However, DoD's interim final rule fails to do this and instead creates a completely unfair system that deviates substantially from the existing administrative systems under the FCTA and the MCA and undermines what Congress was trying to accomplish. While numerous sections of this rule are problematic, the following highlight just three of the most troublesome provisions:

DoD Establishes a $500,000 Cap on Non-Economic Damages, Which Congress Did Not Intend

If Congress wanted to impose a federal cap on non-economic damages – a highly controversial federal "tort reform" provision that Congress has consistently rejected in other bills – it would have done so. It did not for good reason. The full availability of damages is particularly important for a harmed service member who, as a result of substandard medical care, may be

[1] Letter to Honorable Mark Esper, Secretary of Defense, from U.S. Sen. Richard Blumenthal (D-CT) and U.S. Reps. Jackie Speier (D-CA), Guy Reschenthaler (R-PA), and Richard Hudson (R-NC), February 18, 2020.

transformed from an able-bodied active-duty member of the military, respected for their accomplishments, to an individual who may no longer be able to function, work, or live independently. They may be dependent on others for the rest of their lives. These are the kinds of intangible losses that are compensated by non-economic damages and service members are entitled to them, without limit.

It should also be noted that non-economic damages caps have a disproportionate impact on women, including in medical negligence cases, because of the type of injuries that women are likely to experience.[2] In essence, then, this regulation adds a new type of discrimination against women in the military that Congress certainly did not intend and that DoD does not seem to understand.

To justify fabricating a $500,000 cap, DoD states:

> Consistent with the rule of law in a majority of States, total non-economic damages may not exceed a cap amount. Based on the current average cap amount in those States, the total cap amount for all non-economic damages arising from the malpractice is set at $500,000.

This entire paragraph is erroneous. It is blatantly incorrect to suggest that a majority of states have laws that cap non-economic damages. They do not. Only 23 states have a law expressly capping non-economic damages in medical malpractice cases.[3] And many of these laws provide exceptions for serious injury or death.[4] So instead of being consistent with the rule in a majority of states, DoD's cap is incompatible with most state laws.

What's more, choosing to set the cap at $500,000 by calling it an "average" amount and therefore consistent with most states is inexplicable. Any high school algebra student can probably see the inappropriateness of calculating an average figure that ignores the (majority of) states with no cap. (Notably, the "median" non-economic damages cap is "no cap.")

---

[2] *See* Lucinda M. Finley, "The Hidden Victims of Tort Reform: Women, Children and the Elderly," 53 EMORY L.J. 1266 (2004) ("Noneconomic loss damage caps … amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women.")("One major reason why women, on average, recover more in noneconomic damages – and why a greater proportion of their total damages are for noneconomic loss – is that certain injuries that happen primarily to women are compensated predominantly or almost exclusively through noneconomic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries. The impact of these injuries – impaired fertility or sexual functioning, miscarriage, incontinence, trauma associated with sexual relationships, and scarring or disfigurement in sensitive, intimate areas of the body – is not primarily on the economic wage earning aspects of life.".")

[3] Those 23 states are: AK, CA, CO, HI, IA, ID, MA, MD, MI, MO, MS, MT, NC, ND, NV, OH, SC, SD, TN, TX, UT, WI, and WV. In nine states, medical malpractice non-economic damages caps were struck down as unconstitutional and those cases are still law. Those states are: AL, FL, GA, IL, KS, NH, OK, OR, and WA. Notably, six states cap all damages, although some exempt future medical care from the cap. However, DoD does not indicate that those laws are part of its discussion. Those states are: CO, IN, LA, NE, NM, and VA. Only one of these six states – Colorado – also caps non-economic damages.

[4] For example, North Carolina's $500,000 cap statute expressly makes the cap inoperable in cases of gross negligence where "[t]he plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death." North Carolina G.S. § 90-21.19. Liability limit for noneconomic damages, https://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_90/GS_90-21.19.pdf

Weakened rights for surviving family members

Wrongful death actions are, by definition, derivative. The rights of survivors derive from the deceased family member. They are not "new" rights and Congress did not intend to block these claims. To the contrary, it specifically contemplated them by allowing claims for "personal injury or death" and instructs DoD to seek "uniform standards consistent with generally accepted standards used in a majority of States." Every state in the nation allows family members to file wrongful death claims, and all but a very few allow them to seek compensation for intangible losses like loss of care, comfort, and companionship as well as the pre-death pain and suffering of their loved one.[5] Yet the interim rule simply blocks "derivative" claims.

It is outrageous that the DoD would disrespect military families in this way. Perhaps most ironically, families of some service members who fought for equity and have since passed away, such as Major Richard Star, would have almost no recovery under these regulations. It is also outrageous that the family members of active-duty service members are provided with fewer remedies than family members of veterans injured while receiving medical care in a VA hospital. Congress did not intend to create this dichotomy between the families of active-duty service members and other military families.

Docking Benefits

Rather than doing all they can to improve the lives of those harmed by medical negligence, DoD proposes docking VA and DoD benefits from service members' recovery. This is offensive. Some service members may end up with no recovery at all. As with the cap on damages, it is troubling that DoD may be trying to save money on the backs of those who have sacrificed for this country and received negligent care at military medical facilities. This violates the law's intent and should not be allowed.

We urge you to delay the effective date of the interim final rule and make critical changes to these regulations. Allowing them to go into effect will be harmful to members of the military, who do not deserve such unfair treatment.

Very sincerely,

Alliance for Justice
Center for Justice and Democracy
Consumer Action
Consumer Federation of America
Consumer Watchdog
Georgia Watch
National Association of Consumer Advocates
People's Parity Project
Public Citizen
Public Justice

[5] *See* James E. Rooks, Jr., *Recovery for Wrongful Death* (5th Ed. 2020).