RESOLVED, That the American Bar Association urges Congress and the Administration to require the Department of Veterans Affairs to remove regulatory barriers to full accreditation of Tribal Veterans Service Officers (“TVSOs”) under 38 C.F.R. 14.627 and 38 C.F.R. 14.628, and, consistent with the federal trust responsibility for Indian tribes, provide sufficient federal funding for establishing and operating TVSOs in those instances where a tribal community is economically disadvantaged; and

FURTHER RESOLVED, That the American Bar Association urges that when the Department of Veterans Affairs promulgates rules and regulations governing agent accreditation or the administration of programs, benefits, treatment, and services for veterans on Tribal land, the proposals be culturally competent, acknowledge the status of federally-recognized tribes as domestic dependent sovereigns, and be consistent with prevailing laws of sovereignty.
The American Bar Association urges Congress to adopt legislation that would require the Department of Veterans Affairs (the “VA” or the “Agency”) to remove existing regulatory barriers to full accreditation of Tribal Veterans Service Officers (“TVSOs”) such as those within 38 C.F.R. § 14.627 and 38 C.F.R. § 14.628, and, consistent with the federal trust responsibility for Indian tribes, provide sufficient federal funding for establishing and operating TVSOs in those instances where a tribal community is economically disadvantaged. Further, the American Bar Association urges the VA to promulgate regulations that allow full accreditation of TVSOs employed by individual tribal communities that are consistent with existing laws of sovereignty and cultural competence. In so recommending, it is acknowledged that such TVSOs would be required to meet training, continuing education and background requirements of the Agency.

Recognizing the barriers faced by Native American veterans to utilize assistance to apply for and obtain earned VA benefits, in 2017, new rules were created under 38 C.F.R. §§ 14.627–14.628 to allow tribal organizations to be VA-recognized for the purpose of providing assistance to VA benefits claimants. Despite these regulations, to date, the VA has failed to approve any tribal applications for accreditation, demonstrating that the rules are too onerous, resulting in continued barriers for native veterans to seek and obtain their benefits.

The Post-Separation Process

After military members separate or retire from the service, they are entitled to file a claim for benefits with the VA. The claims procedure is complex, time consuming, and rule-oriented. In order to help navigate the VA process, many veterans enlist the help of accredited representatives who work for Veteran Service Organizations (“VSOs”), which are private non-profit groups recognized under the VA’s rules. They assist veterans in

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1 “The trust doctrine is a source of federal responsibility to Indians requiring the federal government to support tribal self-government and economic prosperity, duties that stem from the government’s treaty guarantees to protect Indian tribes and respect their sovereignty. In 1977, the Senate report of the American Indian Policy Review Commission expressed the trust obligation as follows:

The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance tribal lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.”

See https://www.acf.hhs.gov/ana/resource/american-indians-and-alaska-natives-the-trust-responsibility (last accessed May 3, 2020). “A second aspect of the trust responsibility arises from the fact that Congress, primarily through legislation, has placed most tribal land and other property under the control of federal agencies to the extent that virtually everything a tribe may wish to do with its land must be approved by the federal government. Courts have recognized that, when Congress delegates to federal officials the power to control or manage tribal land, their actions with respect to those resources must be ‘judged by the most exacting fiduciary standards.’ Seminole Nation v. U.S. (1942)” Id.
applying for claims for benefits, which can include compensation, education, vocational rehabilitation and employment, home loans, life insurance, pension, health care, and burial benefits. Because VSOs are familiar with the complex VA process, they provide veterans with valuable assistance in obtaining the benefits they have earned as a result of their service. VSOs also have access to the Veterans Benefits Management System, which is a VA database that includes information that is essential to the claims process.

Native American Veterans

Indigenous people, which include American Indians, Alaska Natives, Native Hawaiians and Pacific Islanders, serve in the armed forces at a higher percentage than any other ethnic group. They form a portion of active duty forces that is twice that of their proportion of the U.S. population. A reported 25% of all able-bodied Native Americans enlist in the military, and a majority of these Native American service members return to the reservation after they have completed their service. Accordingly, it is not unheard of for half the population of a given Native American community to be military veterans; such military service has been culturally important for many tribes going back centuries.

Visits with tribes across the country and discussions with tribal leaders indicate that a disproportionate number of native veterans fail to apply for the benefits they have earned. There is likely a confluence of factors that accounts for this disparity. Tribes generally distrust the federal government, which to-date has violated more than 400 treaties. This distrust, in turn, makes it less likely that a native veteran will participate in the VA process. Many native veterans also live in rural, isolated communities with only general mail delivery and without internet access; sheer geographic remoteness makes the VA process significantly more challenging. Native veterans and their tribes are not educated about their available VA benefits and how to apply for them. National VSOs that require membership dues do not do outreach to or even serve Indian country. Each of these factors is in addition to the general reluctance to seek help common to many veterans.

TVSOs working within tribes would function as an important asset to native veterans. A TVSO is a culturally competent and integral part of the tribal community who is almost always a veteran. TVSOs who are part of the community understand the needs of the veterans, are acquainted with the veterans’ extended families, and are able to incorporate into claims the accurate specifics of each individual veteran’s situation, including trying to ensure cultural competence in mental health assessment and

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treatment. This is important because native people do not process wounds of war like post-traumatic stress in the same way as others; concepts like “family” and “wellness” do not resemble what those terms mean in a society focused around the nuclear family. To a far greater extent than with national VSOs, TVSOs are the gateway to VA benefits to which tribal veterans are entitled, such as health care, housing loans, educational programs, adaptive housing and special needs—virtually every program made available to all other veterans everywhere.

TVSOs would not only ensure culturally-competent assistance, but they are necessary to meet the urgent need for delivery of benefits and services to veterans on tribal lands. The sheer size of some reservations necessitates the presence of a local TVSO. This is especially true because no national VSO serves Indian country. VA accreditation is necessary for these TVSOs to assist native veterans in submitting claims and claims appeals to the VA. With significant poverty and unemployment rates as high as 90% on some reservations, infusion of earned benefits into these communities is especially important.

The Rule: 38 C.F.R. § 14.628(b)(2) & (d)

It was in this context that the Department of Veterans Affairs promulgated new rules in 2017 that included the process of accreditation for TVSOs. These new rules were enacted “to address the needs of Native American populations who are geographically isolated from existing recognized Veterans Service Organizations (VSOs) or who may not be utilizing other recognized VSOs due to cultural barriers or lack of familiarity with those organizations.”

The 2017 rule provides that a tribal organization established and funded by one or more tribal governments may be recognized for the purpose of providing assistance on VA benefit claims. Additionally, the rule allows an employee of a tribal government to become accredited through a recognized state organization in a similar manner as a County Veterans’ Service Officer may become accredited through a recognized State organization.

7 The Navajo Nation encompasses more than 17 million acres. See https://www.fs.fed.us/people/tribal/tribexd.pdf (last accessed March 3, 2020).
8 Sokaogon Chippewa Community (93% unemployment), Pechanga Band of Luiseno Indians (91% unemployment), Oglala Sioux Tribe of Pine Ridge (89% unemployment), Cheyenne River Sioux Tribe (88% unemployment), The Apache Tribe of Oklahoma (87% unemployment), Standing Rock Sioux Tribe (86% unemployment), Little Traverse Bay Band (86% unemployment), Round Valley Indian Tribes (86% unemployment), Shoshone Tribe of the Wind River Reservation (86% unemployment); https://newsmaven.io/indiancountrytoday/archive/terrible-statistics-15-native-tribes-with-unemployment-rates-over-80-percent-iAV-3u_770-C6fEcCc3IfA (last accessed February 17, 2020).
10 “VSO” is often used interchangeably to refer to Veterans Service Organizations, which include national, state, regional, and local organizations with VA-recognition, and Veteran Service Officers, who are accredited representatives of VA-recognized Veteran Service Organizations.
11 While the rule provides that accreditation could be made through a state, only 38 states have offices of veterans’ affairs that prosecute claims before the VA.
The applicable portions of the 2017 rule\(^ {12}\) provide as follows:

(b) (2) **Tribal organization.** For the purposes of 38 CFR 14.626 through 14.637, an organization that is a legally established organization that is primarily funded and controlled, sanctioned, or chartered by one or more tribal governments and that has a primary purpose of serving the needs of Native American veterans.

(d) **Requirements for recognition.**

(1) In order to be recognized under this section, an organization shall meet the following requirements:

(i) Have as a primary purpose serving veterans.

(ii) Demonstrate a substantial service commitment to veterans either by showing a sizable organizational membership or by showing performance of veterans’ services to a sizable number of veterans.

(iii) Commit a significant portion of its assets to veterans’ services and have adequate funding to properly perform those services.

(iv) Maintain a policy and capability of providing complete claims service to each claimant requesting representation or give written notice of any limitation in its claims service with advice concerning the availability of alternative sources of claims service.

During the public comment period prior to enactment, the Veterans and Military Law Section of the Federal Bar Association (the “FBA”) sent a letter alerting the VA to problems with the then-proposed regulation. The VA summarized the FBA’s concerns as follows:

Many tribal organizations may not be able to satisfy the requirement of having a primary purpose of serving veterans, the requirement of a substantial service commitment to veterans as shown either by a sizable organizational membership or by performance of veterans’ services to a sizable number of veterans, or requirements concerning funding and training, to include providing the required supporting documentation.\(^ {13}\)

In response to this concern, the VA stated that they have

\(^{12}\) 38 CFR § 14.628 - Recognition of organizations.

provided additional means to achieve VA recognition or accreditation for those tribal governments that may have difficulty establishing a tribal organization capable of meeting the § 14.628(d) requirements, to include the ability for one or more tribal governments to establish and fund a tribal organization and the ability of an employee of a tribal government to become accredited as a tribal veterans’ service officer through a recognized State organization. Therefore, VA makes no changes based on these comments.14

The VA contends that the regulations were not intended to hurt a TVSO’s ability to become accredited, but that there are standards established to help ensure that veterans on tribal lands receive competent, sustained support from qualified and trained representatives.

The Impact

At the outset, it is important to note that the VA did not expect a robust response in the form of tribes applying for TVSO recognition. At the time the rule was adopted, the VA estimated it would receive five applications per year.15 One reason for this may be how large or well-resourced a tribe would need to be for its veterans organization to meet the requirements. This is consistent with an observation made during a meeting at the VA that smaller tribes may have difficulty meeting the requirements, and examples of tribes that conceivably could meet the requirements included some of the largest, for example, Choctaw or Chippewa. There are more than 500 federally-recognized tribes in the United States. A rule aimed at addressing the needs of 1% of the native veteran community is not and cannot be sufficient.

To date three Tribal Communities have applied for VA accreditation. None has been approved. In fact, the Confederated Tribes of the Umatilla Reservation in Oregon have submitted two requests, to no avail.16 The VA’s rationale in not approving the most recent request focused on the scope of the Umatilla representative’s responsibilities and the VA’s concern that the Umatilla may not be able to accommodate increased growth in the veteran population. Ultimately, and regardless of the rationale, it is clear that the provisions in the final rule have proved to be insurmountable for TVSO accreditation. A rule whose purpose, as articulated by its drafters, was to “provide veterans with better, more culturally competent services”17 must be re-evaluated when not a single tribe has succeeded in obtaining this recognition.

14 Id.
16 One application was submitted before the 2017 rule change, and two were submitted afterwards.
Conclusion

The first peoples of this country have served in the armed forces since before the Revolutionary War and continue to do so in far greater proportion than any other ethnic group. Each tribe and their veteran citizens are entitled to culturally-competent VSO representation and meaningful access to VA benefits and services.

Respectfully submitted,

Katherine Ellsworth Oler
Chair, ABA Standing Committee on Legal Assistance for Military Personnel
August 2020
1. **Summary of the Resolution(s).** This Resolution calls for the ABA to urge Congress to adopt legislation that would require the Department of Veterans Affairs (the “VA”) to remove existing regulatory barriers to full accreditation of Tribal Veterans Service Officers (“TVSOs”) and provide sufficient federal funding for establishing and operating TVSOs where a tribal community is economically disadvantaged. This Resolution further urges the VA to promulgate regulations that allow full accreditation of TVSOs employed by individual tribal communities that are consistent with existing laws of sovereignty and cultural competence.

2. **Approval by Submitting Entity.** The ABA Standing Committee on Legal Assistance for Military Personnel approved this Resolution on March 12, 2020.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No proposal has been submitted on this specific subject matter.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This Resolution reinforces, and is fully consistent with existing ABA policies related to access to justice for low-income and/or military-connected individuals and families, including the following policies that support veterans’ legal rights and administration of supportive services:

   - **08M108,** to urge lawmakers to support legislation that increases the availability of, and access to, legal services for veterans to assist them in seeking their due federal benefits.
   - **17M118,** to urge lawmakers at all levels to work with the legal profession to collaborate in the identification and removal of legal barriers to veterans’ access to due and necessary assistance, including housing, education, employment, treatment, benefits, and services, particularly those provided by the Department of Veterans Affairs.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** N/A


7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Implementation will be undertaken by the ABA Governmental
Affairs Office working with the ABA Standing Committee on Legal Assistance for Military Personnel, as well as other military- and veteran-focused ABA entities. Congress and the Administration will be urged to require the VA to promulgate regulations that will remove regulatory barriers for TVSOs to obtain VA accreditation.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of this Resolution implicates no cost to the ABA.

9. **Disclosure of Interest.** (If applicable) None.

10. **Referrals.** Input and support are being sought from relevant ABA entities involved with related legal issues, including the following:

- Center for Human Rights
- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Commission on Homelessness and Poverty
- Government and Public Sector Lawyers Division
- Health Law Section
- Section of Administrative Law and Regulatory Practice
- Section of Civil Rights and Social Justice
- Section of State and Local Government Law
- Solo, Small Firm and General Practice Division
- Standing Committee on Armed Forces Law

This Resolution will also be broadcasted and circulated broadly to additional ABA policy-making entities.

11. **Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address).** *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

   Katherine Ellsworth Oler
   United States Court of Federal Claims
   1401 H Street NW
   Washington, DC 20005
   Ph: 703-201-6858
   Email: katherine.oler@gmail.com

12. **Name and Contact Information.** (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

   Katherine Ellsworth Oler
   United States Court of Federal Claims
EXECUTIVE SUMMARY

1. **Summary of the Resolution.**

   This Resolution calls for the ABA to urge Congress to adopt legislation that would require the Department of Veterans Affairs (the “VA”) to remove existing regulatory barriers to full accreditation of Tribal Veterans Service Officers (“TVSOs”) and provide sufficient federal funding for establishing and operating TVSOs where a tribal community is economically disadvantaged. This Resolution further urges the VA to promulgate regulations that allow full accreditation of TVSOs employed by individual tribal communities that are consistent with existing laws of sovereignty and cultural competence.

2. **Summary of the issue that the resolution addresses.**

   After military members separate or retire from the service, they are entitled to file claims with the VA to obtain the benefits they have earned. To navigate the VA process, many veterans enlist the help of an accredited representative who works for a Veterans Service Organization (“VSO”). A VSO is a private non-profit group recognized by the VA that advocates on behalf of veterans and provides veteran-specific resources. Each tribe and their veteran citizens are entitled to culturally-competent representation and meaningful access to VA benefits and services. However, current VA regulations provide obstacles preventing TVSOs from receiving VA accreditation, as tribal organizations are unable to meet the existing requirements, resulting in difficulty for native veterans to seek and obtain their benefits. This also fails to consider cultural competence, understanding that accredited TVSOs would be a beneficial and integral part of a tribal community.

3. **Please explain how the proposed policy position will address the issue.**

   Native veterans need the help of accredited TVSOs. VA regulations establish uniform standards for private and governmental organizations for VA-recognition, but when applied to sovereigns such as Native tribes, the standards present unnecessary and insurmountable barriers. This prevents tribal entities from being recognized by the VA, leaving TVSOs with few if any reliable alternative routes for accreditation. This Resolution, if adopted, will permit the ABA to advocate for removing any regulations that unfairly impede tribal organization recognition by the VA for TVSO accreditation. Further, this Resolution will allow the ABA to advocate for the proper recognition of tribal authorities under the relevant VA regulations as sovereigns, consistent with the federal government’s trust obligation to recognized tribes, to be distinguished from other types of “organizations” that seek recognition from the VA.

4. **Summary of any minority views or opposition internal and/or external to the ABA which have been identified.**
There is no known opposition. The only external minority view to-date is from the VA, as VA regulations require that all entities seeking recognition by the VA must abide by the same set of standards.