

Commentary

CAROL WILD SCOTT

Indian Veterans' Issues are Indian Law Issues

IT WAS A very hot, dry, dusty July afternoon a few years ago. My husband, a veteran and a member of the Mountain Assiniboine tribe, was showing me around his reservation in Montana. The road was virtually empty, shimmering in the heat. An old man was standing by the road, looking for a ride. In response to my inquiry about who would

be out here alone in the hot sun and where he could possibly be going, my husband told me that Percy Nine Pipes, a Korean War veteran and former prisoner of war, was hitchhiking to Helena for his cancer treatment at the Veterans' Administration (VA) Hospital. Helena is more than 300 miles from the reservation. Gas prices were much higher there than anywhere else, and his family could not afford to take him. That was an eye-opener.

As the days of my visit passed, it rapidly became clear that services for veterans on that reservation were nearly nonexistent. I have since learned that my husband's reservation is not unique. Indian veterans have contributed proportionally greater service to this country than any other racial group. They are also, proportionally, the most underserved veterans, receiving fewer benefits than any other group of veterans. Any veteran with dependents and rated at 100 percent disability is eligible to receive more than \$2,600 per month. It is therefore necessary for the legal community to provide legal services so that Indian veterans receive the assistance that is due to them.

Yet, bringing the Indian veterans into a position in which they have equal access to the services, benefits, and opportunities available to all of America's veterans is a huge challenge that the Indian legal community has largely ignored thus far. Indian veterans, especially on Western reservations, are far removed geographically from practitioners of the law that deals with veterans' rights. Indian veterans are familiar with practitioners of Indian law and trust them. But the law that deals with veterans is often highly personal and, particularly where mental health issues are involved, includes cultural nuances that require culturally compliant representation and articulation that only Indian legal representation can provide. The time is long past when it is acceptable to limit the visibility of Indian veterans to processions and opening ceremonies

that are frequently performed by Indian veterans in Indian country.

In 2004, veterans constituted 10 percent of Fort Belknap's population. The number is higher now, following three deployments of the local National Guard unit and with the fourth deployment looming. Among American Indians, Alaskan Natives, Native Hawaiians and Pacific Islanders, roughly 27 percent of the total population is either a member of the military or a veteran. In these areas, the Department of Veterans Affairs is making efforts through the Veterans Health Administration to improve access to VA health care by building more clinics under the Rural Health Act, making greater use of telemedicine, and, above all, implementing a Memorandum of Understanding between Indian Health Services and the VA. The Veterans Benefits Administration is another matter. That agency deals with an abundance of legal issues—from simply providing representation before the VA to obtaining compensation and pension payments, to ensuring that veterans are properly treated within the purview of the Tribal Law and Order Act, to ensuring that the framework is there to encourage economic and employment opportunities that should be available to them. All too frequently, it seems as though lawyers working in the area of Indian law simply say, "Veterans can go to the VA." As suggested by the plight of Percy Nine Pipes, it is not that simple.

After several years of effort by the National Congress of American Indians (NCAI) through several administrations, an Office of Tribal Governmental Affairs has finally been established within the Office of the Secretary of Veterans Affairs. The mission of that office will be to further the recognition of Indian veterans' issues and to implement programs and policies that will better serve Indian veterans. In 2006, the VA Office of Policy, Planning, and Preparedness published a report entitled "American Indian and Alaska Native Veterans: Lasting Contributions," written by Holiday, Bell, Klein, and Wells, which is available at www1.va.gov/VETDATA/docs/SpecialReports/AIANpaper9-12-06final.pdf. It should be noted that this report preceded troop surges in both Iraq and Afghanistan, which, along with recent deployments of National Guard units, substantially increased the number of combat troops to which substantial numbers of Indians belong. Many American Indians enlist in the military because of the high levels of unemployment that they are facing at home.

According to the report, there are roughly 400,000

Indian veterans, 19 percent of whom are older than 65 years of age; 36,000 Indian veterans are women, 9 percent of whom are 65 years old or older. Moreover, by 2020, the number of Indian veterans over the age of 65 is projected to increase from 40,000 to 64,000. This group is in need of significant medical care and other services and benefits. For instance, any veteran who has served honorably in time of war is entitled to a pension. Information about the services available to elderly and housebound veterans is virtually useless unless lawyers working in Indian country and individuals working in social services who deal with the issues of seniors are aware of such services and benefits and know how to use them. Among services for aging veterans is the availability of health care and nursing home and home health care, as well as special monthly compensation for various conditions, such as blindness, paralysis, or amputation.

Furthermore, many Indian veterans experience the effects of post-traumatic stress disorder (PTSD). The incidence of PTSD tends to be high, with estimates running as high as 35 percent to 50 percent of all veterans of the wars in Iraq and Afghanistan. The incidence of PTSD among Vietnam veterans is generally believed to range between 30 percent and 37 percent of the 146,900 Indian veterans who served in Vietnam. Statistically, 48,000 Indian veterans of the Vietnam War suffer from PTSD. In addition, PTSD may contribute to many of the situations that constitute serious issues in Indian country, including domestic violence, substance abuse, assault, theft, and other crimes. Anecdotally, the U.S. Bureau of Prisons has estimated that between 3,800 and 4,000 Indians are incarcerated in federal prisons, although it is unknown how many of them are veterans.

Illnesses in any family present serious medical and economic issues. Veterans of the Vietnam War and the Persian Gulf War in 1991 suffer from a considerable list of diseases and disorders for which compensation may be relatively easy to obtain because the conditions of their service in those combat areas result in a legal presumption that they were subject to the diseases and disorders on that list. Thus, a service-related illness on a presumptive basis may be shown and benefits obtained. For example, diabetes is a scourge in Indian communities, but very few Indians seem to recognize that, depending on the geography of his or her service, a Vietnam veteran may very well be eligible for benefits for not only diabetes II, because it is on the presumptive list, but also for the residuals of that condition. In addition, ischemic heart disease, Parkinson's disease, and most of the B cell leukemias are now on the presumptive list because exposure to Agent Orange is presumed for those who served in Vietnam and selected other places during that time. Moreover, suicide is at epidemic proportions in Indian communities, and the statistics on Indian suicides are increased by the number of veterans who commit suicide in areas where no effective

or culturally compliant mental health intervention is available.

Homelessness is currently estimated at 10 percent for all veterans. Statistically, when applied to the Indian veteran community, this 10 percent indicates that between 30,000 and 40,000 Indian veterans are homeless. As is the case among the homeless population in general, mental illness is a significant factor, along with unemployment and other economic factors. In the Indian community, homeless veterans are often taken in either by relatives or by other compassionate persons and are thus a hidden factor. Nonetheless, the situation often results in economic stress for the host family as well as the stress that results from mental illness on the part of the veteran. These veterans are in great need of legal assistance to help resolve the issues that led to their status by obtaining available treatment and beginning the application process for benefits that can help solve the economic problems that contribute to their condition.

The Tribal Law and Order Act, enacted by the last Congress, provides a unique opportunity, with expanded tribal court jurisdiction, for the implementation of veterans' courts in the tribal justice system. This is now of great interest to the NCAI's Veterans Committee as well as the NCAI leadership. Considerable opportunity now exists to divert veterans from jail to treatment, benefits, and productive participation in the tribal communities through increased access to services and benefits. It will require cooperation among the tribes, Indian Health Service, and the VA. It will also require legal knowledge of the pertinent provisions of VA regulations and programs and of veterans law on the part of the defense bar, prosecutors, and tribal courts.

One of the greatest needs of Indian veterans and their families in responding to these issues is legal representation in applying to the VA for compensation, pension, adequate and culturally compliant health and mental health care, and economic opportunities. Currently, many parts of Indian country have tribal veterans' representatives (TVRs), who are trained under the auspices of the VA. As such, because of concerns over conflicts of interest, TVRs are trained to serve only as liaisons with state, county, or national veterans service organizations. According to anecdotal evidence, these officers often do not seek out Indian veterans and often find it ineffective from a cost perspective to exert any efforts on the reservations.

When the unemployment rate on many reservations far exceeds the national average, there is little money to pay membership dues to veterans service organizations. The availability of representation by state and county veterans service officers is often characterized by reluctance and racial bias. When compared to the national average, a lower percentage of regional office decisions denying compensation

COMMENTARY *continued on page 47*

- adequate funding to build the facilities, purchase the equipment, and hire the personnel that the TLOA contemplates;⁵
- zeal and willingness by the Department of Justice, the Department of the Interior, and the Department of Health and Human Services to implement the act;⁶ and
- interest, engagement, and input from the federally recognized tribes to ensure that implementation is done in a way that improves public safety in a professional and culturally appropriate way. **TFL**

Christopher B. Chaney is a member of the Seneca-Cayuga Tribe of Oklahoma and serves as a deputy director in the U.S. Department of Justice, Office of Tribal Justice. This article reflects the opinion of the author and may not necessarily reflect the opinions or positions of the U.S. Department of Justice or its components. The author thanks Tracy Toulou, Gaye Tenoso, and Leslie Hagen for their advice and support.

Endnotes

¹“Indian country” is defined at 18 U.S.C. § 1151 to include all land within the exterior boundaries of a reservation, “dependent Indian communities,” and allotments. In addition, other forms of Indian country have been recognized by Congress and by the U.S. Supreme Court. *See*,

e.g., *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993).

²Technically, Public Law 111-211 is entitled, An Act to Protect Indian Arts and Crafts Through the Improvement of Applicable Criminal Proceedings and for Other Purposes. Title I of the act (§§ 101–103) amends certain provisions that deal with enforcement of laws designed to protect the Indian arts and crafts market from fraud. Title II of the act (§§ 201–266) is entitled the Tribal Law and Order Act of 2010.

³As explained above, there are a number of types of territory that can be considered to be Indian country for jurisdictional purposes; *Venetie* dealt only with Alaska Native Village land, not reservations, informal reservations, or allotments.

⁴The Supreme Court had held that the provisions of the Constitution do not apply in tribal courts; *see Talton v. Mayes*, 163 U.S. 376 (1896). Under the Indian Civil Rights Act, most—but not all—of the provisions of the Bill of Rights were made statutorily applicable to tribal courts.

⁵It should be noted that the TLOA provides significant statutory authorities, but it does not appropriate any funds for implementation.

⁶As of the time that this article was written, all three departments were actively engaged in working together on implementing the TLOA using existing available resources.

COMMENTARY *continued from page 43*

to Indian veterans appear to be appealed to the Board of Veterans Appeals. Therefore, TVRs must be trained as advocates so that they can directly represent Indian veterans before the VA at the regional offices as well as the Board of Veterans’ Appeals. It is essential in this regard to amend the inherently discriminatory language of 38 C.F.R. §§ 14.628 and 14.629, which limits certification and accreditation to state and county employees, with no provision for employees (or designees) of any other entity, such as tribal employees.

There is a concurrent need for lawyers to provide legal representation in complex cases in Indian country. At a minimum, there should be some education in veterans law available to lawyers who work in Indian country. There are considerable cultural ramifications inherent in PTSD cases, for example, as the impact of the type of experience that results in PTSD is as much the product of the culture from which the veteran came as it is of the event he or she experienced. One such case has gone before the Court of Appeals for Veterans’ Claims, but it was unsuccessful. It is essential to develop and pursue the theory espoused in that case—that the reservation culture in which the veteran grew up had a profound influence on the way in which he reacted to the situation that produced his PTSD, more so than it perhaps would have for someone from an urban culture. It is equally important for the Indian legal community to bring to the court issues that have strong cultural ramifications for Indian veterans.

There are currently three vacancies on the Court of Appeals for Veterans’ Claims, and it is incumbent upon the Indian legal community, including the Native American Bar

Association and the FBA Indian Law Section, to encourage the nomination of an American Indian, Alaska Native, or Native Hawai’ian individual for one of those vacancies.

It certainly makes economic sense to use advocacy skills to assist veterans in this regard. Every Indian family has been touched or affected by the military service of a family member. Many veterans returning from the current wars would not have survived the battlefield in any prior war. Devastating burns and multiple amputations are common. The signature wound of Iraq and Afghanistan is traumatic brain injury, which requires lengthy treatment and often never heals. Warriors in these conflicts have engaged in guerrilla warfare in close quarters that has left their minds and psyches badly damaged.

Surely, Indian veterans, their survivors, and their dependents are as deserving of adequate legal representation in obtaining the compensation and services earned by going in harm’s way as they are of representation in matters of water rights, gaming, economic growth, energy development, and the protection of sacred places. There is no more sacred place than the soul of a warrior. Indian veterans’ issues are Indian law issues. It is time for the Indian legal community to rise to the challenge. **TFL**

Carol Wild Scott has been deputy director of The Veterans Consortium Pro Bono Program since 1996, and is chair of the FBA Veterans Law Section. Her background over the last 40 years has been primarily in military law and veterans law.