

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## ***Legal Assistance Items***

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

## **Office Management Note**

### *New Tax Law Course Offered*

The Judge Advocate General's School is offering a new course 15-17 December 1997. The course is Tax Law for Attorneys and is designed for the legal assistance officer in charge of the tax program at each installation. Staff judge advocates and chiefs of legal assistance should plan to send one attorney from their offices. A course very similar to this one has been taught overseas for years, and attorneys who have attended it have indicated that it was invaluable. The goal is to provide the same instruction to attorneys stateside. Again, each installation should seriously consider sending one attorney. As always, spaces will be limited, and registration will be handled through ATRRS.

## **Family Law Note**

### *Modifying Support Orders Under the Uniform Interstate Family Support Act and the Federal Full Faith and Credit for Child Support Orders Act*

Since 1950, the Uniform Reciprocal Enforcement of Support Act (URESA)<sup>1</sup> has been the primary interstate support stat-

ute addressing establishment, enforcement, and modification of support orders. While reviewing URESA in 1992, the National Conference of Commissioners on Uniform State Laws promulgated an entirely new act entitled the Uniform Interstate Family Support Act (UIFSA)<sup>2</sup> to replace URESA. The UIFSA, however, is not currently adopted in all 50 states.<sup>3</sup> In an attempt to force the URESA states to follow the limitations on modification of existing support orders set out in the UIFSA, Congress enacted the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).<sup>4</sup> The FFCCSOA prohibits states from modifying existing support orders except under specific circumstances identical to those spelled out in the UIFSA.<sup>5</sup> The FFCCSOA, therefore, is essentially a stop gap measure which is only necessary until all 50 states adopt the UIFSA. Because it is a federal statute, federal supremacy requires URESA states to follow the FFCCSOA when a conflict arises.

Judge advocates should understand the UIFSA rules on modification because: (1) these rules are the future of support modification and (2) even current URESA states must adhere to the UIFSA model, as mandated by the FFCCSOA. The hallmark of the UIFSA is the establishment of one controlling order that cannot be modified by any other state tribunal except under restricted rules.<sup>6</sup> Under the UIFSA, the issuing state of the controlling order is the only state that can modify the order, so long as it retains continuing exclusive jurisdiction (CEJ).<sup>7</sup> If all parties have moved from the issuing state of the controlling order, another tribunal can modify the order, but the petitioner seeking modification must go to the state of residence of the other party. Alternately, the parties can agree in writing to consent to a tribunal modifying the order. The modified order becomes the controlling order, and the state of CEJ changes to that of the court which modified the order. The support guidelines of the modifying state control the amount of support.<sup>8</sup>

The UIFSA and the FFCCSOA dramatically change traditional family law rules on modifying support orders. Since mil-

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1. 9B U.L.A. 567 (1988) (*amended* 1958). The URESA was extensively revised in 1968 and was called the Revised Uniform Reciprocal Enforcement of Support Act (RURESA). All 50 states eventually adopted some version of the URESA.

2. 9 U.L.A. 229 (1993) (*amended* 1996). See Family Law Note, *Welfare Reform Act Mandates Adoption of Uniform Interstate Family Support Act*, ARMY LAW., Mar. 1997, at 15 [Hereinafter Welfare Reform Note].

3. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), requires states to adopt the UIFSA by 1 January 1998. Currently, 36 states have enacted the UIFSA. See Welfare Reform Note, *supra* note 2, at n. 3 for a list of the UIFSA states.

4. 28 U.S.C.A. § 1738B (West 1996) (*amended* 1996). As originally enacted, the FFCCSOA had slight variations from the UIFSA. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 amended the FFCCSOA to rectify these differences.

5. *Id.*

6. See Welfare Reform Note, *supra* note 2, at 15 (discussing how to establish which order controls).

7. The UIFSA defines this as the state that issues a support order and remains the residence of the obligor, obligee, or child.

itary families are some of the most mobile in our society, legal assistance attorneys must be able to answer questions on jurisdiction to modify support orders. Attorneys cannot accurately advise clients on this important issue without a basic understanding of the UIFSA and FFCCSOA rules. Major Fenton.

## Consumer Law Notes

### *The IRS Helps to Collect Student Loans*

The National Consumer Law Center (NCLC) reports that the use of tax refund intercepts<sup>9</sup> to collect delinquent student loans is on the rise.<sup>10</sup> The ratio of refund intercepts to lawsuit filings for collection of student loans is 70 to 1.<sup>11</sup> Last year, refund intercepts resulted in the recovery of over half a billion dollars.<sup>12</sup>

Intercepting a tax refund to help satisfy debts owed to federal agencies is an attractive procedure because it requires only minimal due process.<sup>13</sup> In recent years, the statute authorizing this collection procedure has been changed to include "debt[s] administered by a third party acting as an agent for the Federal Government."<sup>14</sup> In actual practice, however, tax intercepts based upon debts administered by third parties have still been initiated through the appropriate federal agency, despite the presence of the "third party" language. For student loans, the guaranty agency would ordinarily assign the debt to the Department of Education (DOE), which would process the intercept to the Internal Revenue Service (IRS).<sup>15</sup> If any debt remained

after the intercept, DOE would assign the debt back to the guaranty agency for further collection actions.<sup>16</sup>

The NCLC now indicates that this practice has changed. The IRS is now accepting intercept claims directly from guaranty agencies.<sup>17</sup> This makes intercept actions easier to process for guaranty agencies<sup>18</sup> and allows the agency to file as a principal.<sup>19</sup>

Legal assistance practitioners should be aware of the possibility of tax intercept so that they can properly and fully advise their clients who may be struggling with student loan debts or other debts owed to federal agencies. Additionally, soldiers who have already defaulted on a debt may receive an intercept notice from the agency and may seek an explanation from the legal assistance office. For soldiers in these situations, legal assistance attorneys should be aware of potential avenues to avoid the intercept action. The NCLC lists a number of possibilities, including filing bankruptcy, entering into a repayment agreement, obtaining a closed school or false certification discharge, and seeking a loan consolidation.<sup>20</sup>

As the cost of higher education skyrockets, the amount of debt that students undertake to finance their degrees is increasing. Legal assistance practitioners should remain aware of developments in the administration and recovery of student loan debts so that they can properly advise soldiers who face debt problems from these loans. The ease of processing a tax intercept makes it a likely avenue that DOE and guaranty agencies will use to collect from students in default. Major Lescault.

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8. UIFSA § 611, 9 U.L.A. 229 (1993) (*amended* 1996).

9. A "tax refund intercept" is the reduction of any refund of Federal taxes paid by the amount of a debt legally owed to a federal government agency. *See* 31 U.S.C.A. § 3720A (West Supp. 1996).

10. *Coping With the Flood of Tax Refund Intercepts*, 15 NCLC REPORTS, DECEPTIVE PRACTICES AND WARRANTIES EDITION 13 (Nat'l Consumer L. Ctr.) Jan./Feb. 1997 [hereinafter NCLC Reports].

11. *Id.*

12. *Id.*

13. The due process mandated by the statute is simply notice, 60 days for the person to respond and present evidence that the debt is not past due or is not legally enforceable, and consideration of any evidence presented. 31 U.S.C.A. § 3720A(b) (West 1997).

14. This language was originally added in 1992. *See id.* notes (1992 Amendments). Further amendments in 1996 changed the location and punctuation of the third party language. *See id.* notes (1996 Amendments).

15. *See* NCLC Reports, *supra* note 10, at 13; NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 11.2.4.1 (Supp. 1996) [hereinafter UDAP].

16. UDAP, *supra* note 15.

17. NCLC Reports, *supra* note 10, at 13.

18. For example, under the prior practice of assigning the debt to the federal agency for intercept, it was considered too complicated to assign a debt that had been reduced to judgment. Now guaranty agencies can easily submit intercept actions on these debts. *See id.*

19. *Id.*

20. *See id.* at 13-14. *See also* UDAP, *supra* note 15, § 11.2.4.

*Tie-ins for Lease of Mobile Home Space May Be an Unfair Deceptive Acts and Practices (UDAP) Violation*

The practice of conditioning the lease of mobile home space on the purchase of a mobile home from a particular seller is a fairly widespread practice.<sup>21</sup> In a 1996 decision, the Vermont Supreme Court called this practice, which is usually referred to as a “tie-in,” a state Unfair Deceptive Acts and Practices (UDAP) violation.<sup>22</sup>

In *Russell v. Atkins*,<sup>23</sup> the court dealt with a number of issues surrounding attempts by the owners of a mobile home park to sell the park and, when that failed, to convert the park to a condominium arrangement.<sup>24</sup> For the purposes of this note, the critical claim was raised by plaintiff Russell, who alleged that the owners of the park had conditioned the rental of a site on the purchase of a mobile home from them.<sup>25</sup> Russell claimed that this practice violated Vermont’s Consumer Fraud Act<sup>26</sup> because the state’s Mobile Homes Park Act<sup>27</sup> did not address the tie-in issue.

The trial court found that there was no violation of the Vermont Consumer Fraud Act because the legislature had considered and rejected a provision forbidding tie-ins when it passed the Vermont Mobile Home Park Act.<sup>28</sup> The lower court felt that this legislative omission was intended to permit the tie-in practice.<sup>29</sup> The Vermont Supreme Court disagreed.

The Vermont Supreme Court looked to the Vermont Consumer Fraud Act itself and found that it “explicitly states that ‘in construing [the Act], the courts of this state will be guided by the construction of similar terms contained in section 5(a)(1) of the Federal Trade Commission Act as . . . amended by the Federal Trade Commission and the courts of the United

States.’”<sup>30</sup> The court went on to note that “[u]nder section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), which is identical to 9 V.S.A. § 2453, the FTC has declared that it is illegal to tie or condition the leasing of lots in mobile home parks to the purchase of homes from the park owner.”<sup>31</sup> Thus, the court found that Russell’s claim was actionable under the Consumer Fraud Act.<sup>32</sup>

*Russell* is significant because it marks the first time that a reported decision has held the practice of tie-ins involving mobile home park rental space to be a state UDAP violation.<sup>33</sup> Moreover, it demonstrates the utility of using UDAP statutes to deal with conduct that eliminates competition.<sup>34</sup>

Many soldiers live in mobile home parks. Consequently, protections from abusive practices by mobile home park owners may be valuable to them. Legal assistance practitioners should be aware of the decision in *Russell* and use it to the advantage of their clients, particularly where similar statutory language and reliance on interpretation of the Federal Trade Commission Act are contained in their state’s statutes. More importantly, however, attorneys must remain aware of protections available to soldiers in their state’s UDAP legislation and use these protections creatively in *any* situation where doing so will protect their clients’ interests. Major Lescault.

## Tax Notes

### *Limit on Deductions With Certain Rental Property*

Taxpayer deductions for rental property may be limited to the amount of income when the taxpayer uses the rental property for more than 14 days or 10% of the number of days that

21. NCLC Reports, *supra* note 10, at 16.

22. *Id.*

23. 679 A.2d 333 (Vt. 1996).

24. *Id.* at 334.

25. *Id.* at 336.

26. VT. STAT. ANN. tit. 9, §§ 2451-80g (West 1995) (This is Vermont’s Unfair and Deceptive Acts and Practices (UDAP) legislation.).

27. VT. STAT. ANN. tit 10, §§ 6201-65 (West 1995).

28. *Russell*, 679 A.2d at 336.

29. *Id.*

30. *Id.* (quoting VT. STAT. ANN. tit 9, § 2453(b)).

31. *Id.* (citing *Mobile Homes—Multiplex Corp.*, 94 F.T.C. 151, 156 (1979); *MacLeod Mobile Homes, Inc.*, 94 F.T.C. 144, 148 (1979)).

32. *Id.*

33. NCLC Reports, *supra* note 10, at 16.

34. *Id.*

the property is rented during the year, whichever is greater.<sup>35</sup> Personal use of the property includes use by family members,<sup>36</sup> including brothers, sisters, spouses, ancestors, and lineal descendants.<sup>37</sup>

The tax court reiterated these rules in a recent case in which a taxpayer rented out several rooms in his house, but continued to occupy a room in the house.<sup>38</sup> Since the taxpayer continued to live in the residence, the court held that he could only deduct as much of the expenses and depreciation as would reduce his income to zero.<sup>39</sup> He could not report a loss on the rental of the rooms.

Legal assistance attorneys should be careful when calculating rental property income to ensure that their client's deductions are not limited because the client or a family member occupied the rental property. There are two common situations in which this rule applies. First, when a client rents out part of a building in which he is also living, the deduction will be limited. Second, when the client has vacation property that he rents to others, but in which he also spends more than the allowed time, the deduction will be limited.

It is important to note that this rule does not apply to the situation where the taxpayer lives in a home during part of the year and then rents the home for the remainder of the year. The reason it does not apply is because the property was not rental property until the taxpayer began renting it. For example, a client who lives in a residence from January to June and rents it to others from July to December may be entitled to deduct fully all expenses and depreciation. This is true so long as neither the client nor a family member lives in the residence for more than the allowed time during the period from July to December. This situation is frequently encountered when a client moves during the year and either cannot or does not sell his residence.

In contrast, use of a dwelling by family members can sometimes be beneficial to the taxpayer. In *Dickerson v. Commissioner*,<sup>40</sup> the taxpayer had let his grandson live in a second home rent free. Since the use by the grandson counted as personal use by the taxpayer, the taxpayer was entitled to treat the home as his second home and deduct the interest payments on the mortgage. Lieutenant Colonel Henderson.

#### *Rollover of Individual Retirement Account Must Be to a United States Account*

An Individual Retirement Account (IRA) is a good way to save money for retirement. Although many service members cannot deduct contributions to IRAs,<sup>41</sup> the earnings generated in an IRA are exempt from taxation.<sup>42</sup> When using an IRA to save money, however, taxpayers must be cautious to ensure that their actions comply with the legal requirements for an IRA.

Taxpayers can only contribute \$2,000 each year to an IRA. If a taxpayer contributes more than \$2,000, he will be subject to a 6% tax.<sup>43</sup> Taxpayers can also be subject to a 10% penalty for early withdrawal of money from an IRA.<sup>44</sup> A taxpayer can be subject to a \$100 penalty for overstating the amount of a non-deductible IRA contribution, and is also subject to a \$50 penalty for failing to file IRS Form 8806 when he has made nondeductible IRA contributions.<sup>45</sup>

Rollover of an IRA into another IRA is one area where it is easy to run afoul of the IRA rules. If a taxpayer fails to transfer or rollover an IRA properly, he may have to include some or all of the withdrawal in his gross income for the year. The taxpayer may also be subject to the 10% early withdrawal penalty.

In order to rollover an IRA, the taxpayer must deposit, within 60 days from the date of receipt, the entire amount he desires to rollover.<sup>46</sup> This can be difficult since the IRA custodian is required to withhold 20% from the amount the taxpayer

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35. I.R.C. § 280A(d) (RIA 1996).

36. *Id.* § 280A(d)(2). Note, however, that use by family members does not count as personal use if the family members pay fair market value for such use and use the rental property as their personal residence. *Id.* § 280(d)(3)(A).

37. *Id.* § 267(c)(4).

38. *Shih v. Commissioner*, 73 T.C.M. (CCH) 2588 (1997).

39. *Id.*

40. 73 T.C.M. (CCH) 2506 (1997).

41. See I.R.C. § 219(g) (RIA 1996) (limiting the deductibility of IRA contributions for active participants in other retirement plans); *id.* § 219(g)(5)(A)(iii) (treating all government employees as active participants).

42. *Id.* § 408(e).

43. *Id.* § 4973.

44. *Id.* § 72(t).

45. *Id.* § 6693(b).

wants to receive from the custodian to rollover into another IRA.<sup>47</sup> This withholding can be avoided by having the old custodian pay the IRA assets directly into a new IRA account. By using this method, the taxpayer avoids all the potential pitfalls of trying to rollover the IRA account himself.

A taxpayer can only rollover an IRA once within a one-year period,<sup>48</sup> and in order for a rollover to qualify, it must be made from one IRA into another qualifying IRA. A qualifying IRA is a trust that is "created or organized in the United States."<sup>49</sup> In *Chiu v. Commissioner*,<sup>50</sup> the taxpayer withdrew his money from an IRA account in the United States and deposited it into an account in China. The court held that the transfer was not a qualifying transfer because the account in China was not a United States account or trust.<sup>51</sup> As a result, Mr. Chiu had to include the withdrawal in his gross income and pay a 10% early withdrawal penalty.

Legal assistance attorneys who have clients with IRAs should ensure that their clients have complied with all the various IRA requirements. If a client has not complied with some requirements, the attorney must advise the client as to how to come into compliance and what the penalties are for noncompliance. Lieutenant Colonel Henderson.

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46. *Id.* § 408(d)(3).

47. *Id.* § 3405(c)(1).

48. *Id.* § 408(d)(3)(B).

49. *Id.* § 408(a).

50. 73 T.C.M. (CCH) 2679 (1997).

51. *Id.*

52. DEP'T OF ARMY, NATIONAL GUARD REG. 635-101, EFFICIENCY AND PHYSICAL FITNESS BOARDS, para. 14 (14 Aug. 1977) [hereinafter NGR 635-101]. Army National Guard FWR board actions are roughly equivalent to Active Component Army officer separation board actions. A federal withdrawal of recognition board recommendation to withdraw federal recognition of an Army National Guard officer, upon approval of the Chief, National Guard Bureau (acting for the Secretary of the Army), is tantamount to separation from the military. Normally, National Guard officers, because of their unique dual federal-state status under Title 32, United States Code, upon having their federal recognition withdrawn, are transferred to the Individual Ready Reserve, United States Army Reserve, and separated for cause. If they are jointly boarded for withdrawal of federal recognition and separation from the Reserve Components, they are discharged. Army National Guard officers, upon withdrawal of federal recognition, while still members of their state guard organization, are not eligible to be mobilized or federalized to serve on any Title 10, U.S. Code status federal active duty.

53. *Id.* paras. 12-16.

54. *Id.* Pursuant to NGR 635-101, ARNG officers may lose their federal recognition status because of substandard performance of duty; moral or professional dereliction; national security violations; or medical, physical, or mental conditions which prevent further Guard service. In most cases, a board must be appointed prior to action being taken by the Chief, National Guard Bureau.

55. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS [ARMY NATIONAL GUARD AND ARMY RESERVE], paras. 1-4, 2-16b (22 Feb. 1971). "Area commanders" and "area commands" are defined by reference to the definitions in the Consolidated Glossary for the Reserve Components Personnel UPDATE. DEP'T OF ARMY, RESERVE COMPONENTS PERSONNEL UPDATE 23, Consolidated Glossary (1 Sept. 1994) [hereinafter UPDATE 23]. Area Commanders are defined as "Commanders of area commands." Area Commands are defined as:

- a. (Rescinded.) [Previously CONUSAs]
- b. United States Army, Europe (USAREUR).
- c. United States Army Pacific Command (USARPAC).
- d. United States Army Southern Command (SOUTHCOM).
- e. United States Army Special Operations Command (USASOC).
- f. United States Army Reserve Personnel Center (ARPERCEN).
- g. United States Army Reserve Command (USARC).

## Army National Guard Note

### Regulatory Problem for *Federal Withdrawal of Recognition* Boards is Resolved

Army National Guard (ARNG) commands recently faced a perplexing problem. The Continental United States Armies (CONUSAs), which appoint ARNG officer *federal withdrawal of recognition* (FWR) boards,<sup>52</sup> realized that they had inadvertently lost their regulatory authority to appoint such boards because of a change in regulations. As a result of the change, CONUSAs temporarily froze appointments of FWR boards for the ARNG until the problem could be resolved.

National Guard Regulation 635-101, which governs FWR boards for Guard officers, states that the Army area commander is charged with the responsibility of reviewing recommendations for withdrawal of federal recognition of Guard officers who are endorsed to them by the appropriate State Adjutant General.<sup>53</sup> The Army area commander is also responsible for appointing FWR boards for the ARNG, when appropriate.<sup>54</sup> The terms "area commander" and "area commands" are terms of art defined in Army Regulation 135-175.<sup>55</sup> No definitions of

“area commands” or “area commander” are provided in the National Guard FWR regulation.<sup>56</sup>

Prior to the start of the United States Army Reserve Command (USARC) in 1991, the CONUSA commanders were solely responsible for: (1) reviewing officer separation recommendations for action by either the Army Reserve or the Army National Guard, (2) appointing separation boards, and (3) reviewing board results for legal sufficiency.<sup>57</sup> With the advent of the USARC, all United States Army Reserve officer elimination actions were transferred to the USARC,<sup>58</sup> but the CONUSAs continued to process ARNG officer FWR actions.<sup>59</sup>

When the Reserve Components Personnel UPDATE was revised in 1994, the Consolidated Glossary dropped all mention of the CONUSAs as Army area commands.<sup>60</sup> The apparently unintended result of this action was that the CONUSAs no longer had clear regulatory authority to initiate FWR boards for ARNG officers. Despite the regulatory fog created by the rescission of the CONUSAs as area commands for Reserve Component personnel actions, the CONUSAs continued to review ARNG recommendations for FWR of Guard officers, to appoint FWR boards, and to conduct legal reviews of board proceedings. The definition deletion was not discovered until the fall of 1996, and the CONUSAs immediately halted appointing any new ARNG boards.<sup>61</sup>

On 25 March 1997, the Headquarters, Department of the Army, recognizing the potential for a buildup of unresolved cases, issued a message which restored the CONUSAs as area commands for ARNG matters only and designated CONUSAs

as area commands for the Reserve Components Personnel UPDATE.<sup>62</sup> Thus, the message restored the status quo. Lieutenant Colonel Conrad.

### Contract Law Note

#### *Recent Changes to the Administrative Dispute Resolution Act Affecting Federal Agency Use of Alternative Dispute Resolution Techniques*

The concept of using alternative dispute resolution (ADR) techniques to resolve government contract protests and disputes has received increased emphasis in recent months, as Congress and federal agencies struggle to cope with the tension between decreased budgets and the demands of litigation. This Practice Note will address the recent changes to the Administrative Dispute Resolution Act that can impact the government contracting process.

The Administrative Dispute Resolution Act (ADRA)<sup>63</sup> was originally enacted in 1990 after Congress determined that “administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.”<sup>64</sup> The area of contract disputes was one of the areas Congress identified as being in need of help. Only twelve years earlier, Congress enacted one of the first statutes to incorporate an ADR approach to dispute resolution, the Contract Disputes Act of 1978 (CDA).<sup>65</sup> The intent of the CDA was “to provide, to the fullest extent practicable, informal, expeditious, and inexpensive resolution of [contract] disputes.”<sup>66</sup>

56. NGR 635-101, *supra* note 52.

57. DEP'T OF ARMY, RESERVE COMPONENTS PERSONNEL UPDATE 22, Consolidated Glossary (1 June 1990).

58. *Id.*, Interim Change No. I01 (28 Feb. 1992) (adding the USARC to the definition of area commands in the Consolidated Glossary).

59. The USARC, as an Army Reserve Command, declined to take responsibility for ARNG separation actions.

60. UPDATE 23, *supra* note 55 (rescinding CONUSAs from the commands defined as area commands in the Consolidated Glossary).

61. Telephone Interview with Colonel Gary Casida, Staff Judge Advocate, Fifth U.S. Army, Fort Sam Houston, Texas (May 7, 1997).

62. Message, Headquarters, Dep't of Army, DAAR-PE-P, subject: Change to Reserve Components Personnel Update 23, Consolidated Glossary (251900Z Mar 97). The message reads in part:

1. Effective immediately, subparagraph A of the definition of “area command” as defined in the Consolidated Glossary of Reserve Components Personnel Update 23 is changed to read as follows: “Continental United States Army (CONUSA), for Army National Guard matters only.”
2. Previous editions of the Reserve Components Personnel Update Consolidated Glossary contained a definition of area command that included CONUSA. However, this definition was deleted in Update 23, inadvertently withdrawing authority for CONUSA Commanders to appoint federal withdrawal of recognition boards.
3. The change in paragraph 1 will restore authority for CONUSA Commanders to appoint federal withdrawal of recognition boards.

63. 5 U.S.C. §§ 571-84 (1990).

64. Administrative Dispute Resolution Act (ADRA), Pub. L. No. 101-552, § 2(2), 104 Stat. 2738 (1990).

65. 41 U.S.C. §§ 601-13 (1978).

66. *Id.* § 607.

Unfortunately, the Congressional intent has not been realized in the judicialized rules of practice and procedure followed by the Boards of Contract Appeals, especially when combined with the complex nature of many government contract claims.

Congress saw that ADR was being used successfully in the private sector and that several government agencies, most notably the United States Army Corps of Engineers, had developed ADR procedures on their own that showed that ADR could work in the public sector. In light of the success of ADR in both the private and public sectors, the ADRA became a much touted solution to the problem of spiraling litigation costs, leading to “more creative, efficient and sensible outcomes.”<sup>67</sup> In the ADRA Congress explicitly authorized federal agencies to use “any alternative means of dispute resolution” to resolve administrative disputes, including contract disputes.<sup>68</sup> The ADRA required each agency to adopt an ADR policy, but it also included a “sunset provision” which provided for the ADRA’s expiration on 30 September 1995.

After temporarily extending the ADRA by four years to 30 September 1999,<sup>69</sup> Congress decided to make the ADRA permanent and to fix some of the perceived flaws in the original ADRA. Thus, on 30 September 1996, Congress passed the Administrative Dispute Resolution Act of 1996.<sup>70</sup>

One of the more controversial changes to the ADRA was the elimination of the right of federal agencies to *opt out* of arbitration decisions with which they disagreed. Previously, the head of the agency was authorized to terminate an arbitration proceeding at any time for any reason and could vacate an arbitration award before the award became final.<sup>71</sup> All that was required to *opt out* was notice to the other party or parties to the arbitration.<sup>72</sup>

At the time the original *opt out* provision was enacted, Congress believed that the long-standing conclusion of the Department of Justice (DOJ) that the United States Constitution’s Appointments Clause prohibited federal agencies from submitting to *binding* arbitration by an independent arbitrator was correct.<sup>73</sup> This conclusion was based upon the argument that only officers appointed under the Appointments Clause could bind

the United States to an action or payment, and arbitrators are not typically appointed as officers under that Clause. However, in an opinion issued on 7 September 1995, DOJ reversed its position, stating that because arbitrators are normally retained one case at a time they are not in a position of employment within the federal government, and thus they are not “officers” within the meaning of the Appointments Clause. Left unstated in the DOJ opinion is the key assumption that the contracting officer or other person who agrees to the binding nature of an arbitration in the first place must be an “officer” within the meaning of the Clause (i.e., who can bind the United States to the action or subsequent requirement to pay an arbitration award).

Section 8 the 1996 ADRA amendments eliminated the *opt out* provision and, in effect, allows federal agencies to agree to use binding arbitration to settle contract disputes. However, before a federal agency can use binding arbitration, the agency must consult with the DOJ and issue guidance on the appropriate use of binding arbitration.<sup>74</sup> The Department of Defense (DOD) has not yet cleared this last remaining hurdle and might not do so for several months.

When issued, the agency’s guidance must incorporate another key change made by the 1996 amendments to the ADRA: every binding arbitration agreement must specify a maximum award that may be issued by the arbitrator. Agency guidance may also include other conditions limiting the range of possible outcomes, but the inclusion of such conditions is not mandatory.<sup>75</sup> These provisions have the effect of limiting the potential for the agency getting stuck with an outrageous decision from a “runaway arbitrator,” as well as taking care of any Antideficiency Act concerns.

The 1996 ADRA amendments also made two other significant changes regarding federal agency use of ADR in general. First, the amendments eliminated the requirement that, as a condition of the federal agency agreeing to use any form of ADR, the contractor certify its claim regardless of its amount. Now, only claims which exceed the Contract Disputes Act threshold (\$100,000) need to be certified.<sup>76</sup> The other change expanded the protections from disclosure of communications

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67. ADRA, § 2(3), (4).

68. 41 U.S.C. § 605(d) (1996).

69. Pub. L. No. 103-355, § 2352(a) (codified at 41 U.S.C. § 605(e) (1996)).

70. Administrative Dispute Resolution Act of 1996 (ADRA 1996), Pub. L. No. 104-320, 110 Stat. 3870 (1996).

71. By statute, an arbitration award does not become final until 30 days after it is served on all parties. 5 U.S.C. § 580(b)(2) (1996).

72. *Id.* § 580(c).

73. *See* U.S. CONST. art. II, § 2, cl. 2.

74. ADRA 1996, § 8(c) (amending 5 U.S.C. § 575).

75. *Id.*

made to and from ADR “neutrals,” for example, mediators or other facilitators of settlement discussions. Previously, such communications were protected from disclosure in the ADR process, but they were not protected from disclosure under the Freedom of Information Act. The 1996 amendments to the ADRA fixed this problem by making the ADRA a statute which specifically exempts disclosure under section 552(b)(3) of the FOIA.<sup>77</sup>

Although the use of ADR techniques to resolve contract disputes and protests remains voluntary<sup>78</sup> and agencies may not require contractors to agree to arbitration as a condition to receiving a contract,<sup>79</sup> the 1996 amendments to the ADRA show that even Congress recognizes the potential benefits of

more widespread use of ADR techniques. Further legislation is both pending and expected, including HR 903 which would encourage arbitration of government contract cases pending before federal district courts.

There are a wide variety of ADR techniques available for use even while waiting for DOD to issue its guidance on the use of binding arbitration. Judge advocates may want to get on the ADR bandwagon and check out some of these techniques when faced with a potentially costly or time-consuming contract dispute or protest. Colonel McCann.

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76. *Id.* § 6 (amending 41 U.S.C. § 605).

77. *Id.* § 3(d) (amending 5 U.S.C. § 574).

78. 5 U.S.C. § 572(c) (1996).

79. *Id.* § 575(a)(3).