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COMMANDERS

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## *Preface*

This paper evolved from my experiences as a staff judge advocate at installation level. While not all inclusive, this paper is a guide for installation commanders (and staff judge advocates) so that they may wade through the quagmire of the law of debarment. I would like to thank my Air Command and Staff College faculty advisor, Dr. Abigail Gray-Briggs; Lieutenant Colonel Morris Davis, Vice Commandant, Air Force Judge Advocate General School; Lieutenant Colonel Stephen Suetterlein, Chief, Military Affairs Branch, General Law Division, Office of The Judge Advocate General, Headquarters, United States Air Force; Major Paul F. Smith, Current Operations Officer, HQ USAF/XOF; and the many other judge advocates who guided me on this project. Without their insights and assistance, I would never have completed this project.

It is imperative to note, however, that this paper is only a review of the law and procedures currently in effect concerning debarment actions. As with any legal writing, the reader is cautioned that this paper serves only as a starting point and is not a substitute for individual research.

*Abstract*

This study explores the capability of the commander of a military installation to debar—that is, permanently remove—individuals from the installation under his or her command. Debarment is one of many tools installation commanders can use to maintain good order and discipline on the installation. Often the most extreme of the tools available to commanders, a debarment must be used appropriately. This study gives installation commanders the historical, legal, and practical background concerning debarring individuals from military installations which commanders can readily use to their benefit. The study delineates the important statutes involved in debarments as well as the courts’ interpretation of those statutes, and the Air Force’s implementation of the laws pertaining to debarment. The information used in this research paper was gathered from a variety of sources including relevant case law, statutes, and other federal laws and regulations, as well as a review of the available opinions of The Judge Advocates General of the United States Armed Forces. Drawing upon the information gleaned from these sources, this paper provides conclusions and recommendations that may help decision-makers and reviewing authorities in navigating the debarment process.

## Chapter 1

### Introduction

*Debar: To exclude or shut out from a place or condition; to prevent or prohibit from entrance, or from having, attaining, or doing anything.<sup>1</sup>*

In today's military, force and resource protection is one of the most important functions an installation commander performs. Everyone, from the National Command Authority to the Service Secretaries and commanders on down to the general public, demands safe military installations. In fact, federal law mandates that installation commanders make their installations safe. "Air Force installation commanders are responsible for protecting personnel and property under their jurisdictions and for maintaining order on installations, to insure the uninterrupted and successful accomplishment of the Air Force mission."<sup>2</sup> This long-standing charge to installation commanders is among the most important a commander will ever receive. In the course of protecting these people and things, a commander handles misconduct by military members and their dependents, retirees and their dependents, and civilians--both those associated with the installation and those merely visiting the installation.<sup>3</sup> In fact, it is well settled that a commander of a military installation has the inherent authority to exclude individuals from military installations under his control.<sup>4</sup> One of the tools the installation commander can use to address the misconduct of civilians (including retirees) is a debarment to expel these individuals from the installation.<sup>5</sup> Many installation commanders, subordinate commanders, chiefs of

security forces, and judge advocates, however, misunderstand the debarment process or the legal basis for such actions.

In order for installation commanders to have a valid force and resource protection tool via debarment actions, they and their staffs must understand the underlying basis for debarment actions, as well as the necessary procedural concepts they must follow when they debar civilians from military installations. Installation commanders routinely remove individuals from military installations, and order them not to re-enter the installation without the prior approval of the installation commander. Typically, the removal of individuals is the result of misconduct or other behavior on the part of the removed individual who presents a threat to morale, welfare, or good order and discipline on the installation. There is little information available on how this practice began and evolved. In fact, even the terminology involved in these removals is subject to debate--not only by judge advocates,<sup>6</sup> security forces personnel,<sup>7</sup> and installation commanders, but also by the courts,<sup>8</sup> which have interpreted the applicable statutes and tried individuals who are alleged to have violated debarment orders. Is it *barment* or *debarment*?<sup>9</sup> Do installation commanders *debar* or *bar* people from the installation? What is the significance of being a military retiree or dependent who is eligible for medical and other benefits from military sources on the installation? These are just a few of the questions apparently not answered for installation commanders or their staff judge advocates. This paper will attempt to answer these and other questions associated with this area of the law.

Installation commanders (and their staff judge advocates) must be knowledgeable of the issues surrounding the debarment of individuals from military installations. It is imperative that all concerned parties understand the correct vernacular, associated first amendment issues, policies involving debarment orders, and due process rights of debarred individuals, as well as



the proper authority necessary to effectuate a debarment action. The debarment process and its ancillary issues often confuse commanders and judge advocates. Commanders and judge advocates need clarification of this important issue. Both parties need more than just a laundry list of do's and don'ts on the debarment issue if one is to protect them from claims of illegal or improper debarment actions. Both must be knowledgeable of the historical and constitutional basis for taking such actions, and they must understand the impact their actions have on the affected individual.

This paper addresses these and other concerns. The paper draws conclusions and makes recommendations for commanders, judge advocates, security forces personnel, and their staffs. The paper reviews the vernacular for debarment actions, examines the legal basis for debarment actions, analyzes the practical application of these actions, and offers some suggestions for better implemented and orchestrated debarment programs.

### Notes

<sup>1</sup> James A. H. Murray, ed., *The Oxford English Dictionary*, (Oxford: At The Clarendon Press, 1897) Volume III, pg. 76.

<sup>2</sup> 32 CFR § 809a.1(a) (2000).

<sup>3</sup> A debarment is only one tool available to installation commanders to handle civilian misconduct on military installations. This paper will deal only with the debarment of civilians from military installations, and will not address any other potential responses to civilian misconduct. Also, it will not address military member misconduct except as that misconduct is associated with involuntary separations and debarment proceedings ancillary thereto. For a comprehensive review of issues concerning civilian misconduct beyond debarment actions, see, John R. Brancato, *Base Commander Responses to Civilian Misconduct: Systems and Problems For the Staff Judge Advocate*, *Air Force Law Review*, Volume 19, No. 2 (1977).

<sup>4</sup> *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, et. al., v. McElroy et. al.*, 367 U.S. 886 (1961), citing JAGA 1925/680.44, 6 October 1925.

<sup>5</sup> These actions should not be confused with the debarment of contractors from their ability to do business with the government as a government contractor. That type of debarment is beyond the scope of this paper.

<sup>6</sup> See, OpJAGAF 1982/60 in which it is opined that commanders may “bar” individuals from base, and OpJAGAF 1993/21 in which it is opined that commanders “debar” individuals from base.

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<sup>7</sup> See, AFI 31-209, paragraph 2.5.5 (1 December 1998).

<sup>8</sup> See, *U.S. v. May, et. al.*, 622 F.2d 1000 (1980), for the proposition that commanders “bar” individuals from base, but see, *Flower v. United States*, 407 U.S. 197, 200 (1972), Rehnquist dissenting, for the proposition that commanders “debar” individuals from military installations. In his dissent, Justice Rehnquist emphasizes his use of the word debarment as if to send a message to the majority and to the reader as to the correct vernacular for such actions.

<sup>9</sup> A review of many dictionaries, both legal and otherwise, reveals that the term “barment” does not exist. In fact, *Black’s Law Dictionary* (Seventh Edition, 1999) contains only the term “debarment.” According to Black’s, a debarment--the noun form of the transitive verb debar--is “the act of precluding someone from having or doing something; exclusion or hindrance” (Black’s, pg. 407). See also, *The Oxford English Dictionary*, supra note 1. The terms bar, barment, debar, and debarment do not appear in Joint Publication 1-02, *DoD Dictionary of Military and Associated Terms* (1994, as amended through 1 September 2000).

## Chapter 2

### Historical and Legal Basis for Debarments

For one to appreciate the significance of a debarment action, a survey of the relevant law--statutory as well as case law--is necessary. This chapter explores the historically significant aspects of the debarment system beginning with the United States Constitution.<sup>1</sup> It is there that one finds the authority for the laws, regulations, and policies under which installation commanders control military installations. Article 1, Section 8, Clauses 11 through 14, vest Congress with what has been traditionally called the War Powers. In this capacity, Congress has, among other things, the authority to create rules and regulations for the armed forces.<sup>2</sup> Likewise, the President of the United States, pursuant to Article 2, Section 2, Clause 1, as Commander in Chief, retains the authority to promulgate rules and regulations for the armed forces.<sup>3</sup>

Drawing upon this constitutional authority, Congress has promulgated several statutory schemes designed to protect individuals and resources on military installations. Title 10, United States Code, Section 1382, is the first of these statutes. The current version of this statute reads: "Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to

reenter by any officer or person in command or charge thereof, shall be fined under this title or imprisoned not more than six months, or both.”<sup>4</sup>

This statute provides the underlying basis for prosecuting violators of debarment orders. It also provides a prosecutorial venue for individuals not previously removed from or ordered not to reenter military installations, but who enter for the purpose of committing a crime or who enter in violation of a regulation promulgated by the installation commander or head of the military department concerned.<sup>5</sup> In enacting the current statute, as well as its predecessor in 1909, Congress intended, among other reasons, for the statute to be used to thwart the access of spies and others who intended to compromise military secrets contained therein.<sup>6</sup>

In addition to 18 U.S.C. Section 1382, and to protect military installations and personnel further, Congress enacted the Internal Security Act.<sup>7</sup> Under the Internal Security Act, Congress proscribed the violation of any regulation or order as promulgated by the Secretary of Defense or of any military commander designated by him. Congress enacted this statute, which is similar to its sister statute above, in response to the growing fear of communism and of infiltration of communist party members in American society and military institutions.<sup>8</sup> Together, these statutes form the basis of debarment actions on military installations.<sup>9</sup> Clause 2 of 18 U.S.C. Section 1382, provides the basis for criminal prosecution of individuals who violate an order never to reenter.

In order to facilitate the implementation of these sections, and to comply with the mandate of the Internal Security Act, the Department of the Air Force has issued regulatory guidance. The Code of Federal Regulations authorizes Air Force commanders to “grant or deny access” to individuals and to exclude or remove persons whose presence is unauthorized.”<sup>10</sup> Additionally, the Code of Federal Regulations empowers the military installation commander to remove

unauthorized individuals from the installation.<sup>11</sup> 32 CFR Section 809a.3 directs the installation commander to apprehend violators, order violators to leave the installation, and escort violators off the installation.<sup>12</sup>

To help installation commanders maintain good order and discipline on the installation, the Secretary of Defense promulgated regulations to assist the military departments and their commanders in maintaining good order and discipline. Department of Defense Directive (DoD) 5200.8, Security of DoD Installations and Resources, establishes the DoD policy for personnel and installation security.<sup>13</sup> Under this directive, the Secretary of Defense has ordered that installations, personnel, and property be protected, that applicable laws and regulations be enforced,<sup>14</sup> and that installation commanders have the authority to remove from or deny access to military installations individuals who threaten the good order and discipline of the installation.<sup>15</sup> Additionally, the Secretary of Defense encouraged the use of 18 U.S.C. Section 1382 to prosecute individuals whom installation commanders have previously ordered off the installation and told them never to re-enter.<sup>16</sup>

To carry out the directives contained in the Code of Federal Regulations and the DoD Directive, the Secretary of the Air Force,<sup>17</sup> through the Chief of Security Forces, United States Air Force, promulgated instructions intended to facilitate the removal of individuals from Air Force installations and their subsequent prosecution for violating an order not to re-enter.<sup>18</sup> Air Force Instruction 31-209<sup>19</sup> prescribes the rules and procedures for dealing with unauthorized entry on an Air Force installation as well as delineating the authority of installation commanders to expel individuals from Air Force installations.<sup>20</sup> This instruction implements the guidance found in not only the Code of Federal Regulations, but also the Internal Security Act. These provisions, when coupled with the commander's authority and responsibility to protect resources

and personnel and control access to the installation, establish the regulatory guidance for debarment actions.<sup>21</sup>

## **The Courts Interpret the Statutes**

In order for the commander and his staff to apply even-handedly the statutory and regulatory provisions discussed above, they should understand how the courts, including the United States Supreme Court, have interpreted these statutes and regulations.

The seminal case of *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, et. al. v. McElroy et.al.*<sup>22</sup> was the first of a long progeny of United States Supreme Court cases interpreting the applications of 18 U.S.C. Section 1382 and 50 U.S.C. Section 797. In 1956, the United States Supreme Court was called upon to decide whether the commander of the Naval Weapons Plant in Washington, D.C., had acted properly when he summarily denied access to a contractor's employee, and did not first give the employee an opportunity for a hearing, thus denying the employee's due process rights under the Fifth Amendment to the United States Constitution.<sup>23</sup> The facts of *McElroy* are rather straightforward. A contractor that provided food services on the grounds of the Naval Gun Factory employed the petitioner, Rachel Brawner. The Gun Factory was located on United States property, and Rear Admiral D. M. Tyree commanded the installation.<sup>24</sup> The government required every contractor and government employee to meet minimal security clearance requirements in order to be employed on the installation. In November 1956, security officials at the Naval Gun Factory required Mrs. Brawner to surrender her identification badge because the security officials determined that she failed to meet security requirements.<sup>25</sup>

From the day the security officials withdrew her identification, Mrs. Brawner could not enter the installation. After failing to negotiate a meeting with Admiral Tyree, the petitioners brought suit in United States District Court against the government seeking “to compel the return to Mrs. Brawner of her identification badge, so that she might be permitted to enter the Gun Factory and resume her employment.” After losing at both the District Court and the Court of Appeals for the District Of Columbia, the United States Supreme Court granted certiorari to determine two issues: “Was the commanding officer of the Gun Factory authorized to deny Mrs. Brawner access to the installation in the way he did,”<sup>26</sup> and “[i]f he was so authorized, did his action in excluding her operate to deprive her of any right secured to her by the Constitution.”<sup>27</sup>

The Supreme Court affirmed the rulings of the lower court finding that the control of military installations was an inherent power held by an installation commander pursuant to Article 1, Section 8, of the Constitution.<sup>28</sup> Furthermore, the Court held that, under these circumstances, the Due Process Clause did not require the government to advise the petitioners of the specific grounds for the removal prior to the order to surrender the identification card, nor was Mrs. Brawner entitled to a hearing at which she would have the opportunity to refute the basis for the withdrawal of her identification card.<sup>29</sup> For these reasons, the majority of the Court held that it is within an installation commander’s authority to summarily exclude individuals from an installation under his command.

In 1972, the Supreme Court again confronted the task of interpreting statutes that allowed for the removal of individuals from military installations by order of the installation commander. In *Flower v. United States*,<sup>30</sup> the Supreme Court began to clarify its holding in *McElroy*, and articulate the parameters within which an installation commander can operate in protecting assets and people under his command. In *Flower*, the Supreme Court began its examination of the

scope of a commander's authority over the installation. Title 18 U.S.C. Section 1382 allows for the prosecution of individuals who reenter a military installation after the installation commander has ordered them to leave and never to return. In *Flower*, the Supreme Court faced the issue of the extent the commander has over the property on his installation.<sup>31</sup> Focusing on the facts surrounding the use of New Braunfels Avenue, the Supreme Court overturned the petitioner's conviction.

Citing *Cafeteria Workers v. McElroy*, and the installation commander's inherent authority to regulate access to a military installation, the Supreme Court found that the Fort Sam Houston Commander's acquiescence to the general public's use of New Braunfels Avenue vitiated his right to control the petitioners use of the area.<sup>32</sup> Determining that Fort Sam Houston was an open post, the Supreme Court concluded that the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."<sup>33</sup> The Supreme Court concluded that "the base commandant can no more order [Mr. Flower] off this public street because he was distributing leaflets than could the police order any leafleteer off any public street."<sup>34</sup> The Supreme Court concluded that the First Amendment principle of freedom of speech protected Mr. Flower from prosecution for violating 18 U.S.C. §1382.<sup>35</sup>

In 1973, the Court of Appeals for the Tenth Circuit addressed a First Amendment issue surrounding the right to free speech. In *U.S. v. Gourley, et. al.*,<sup>36</sup> the Court of Appeals, relying on the holding in *Flower*, reversed the conviction of Gourley<sup>37</sup> and his co-appellants because, in the court's opinion, the actions for which the appellants were convicted occurred in public areas on a military installation. The Circuit Court, citing *Flower*, ruled that "when the commander permits portions of the installation to be open to the general public, and visitors are encouraged, he may not restrict an individual's exercise of his First Amendment rights in such public areas."<sup>38</sup>



The Circuit Court basically ruled that the government could not have its cake and eat it too. The Circuit Court reasoned that the military must prove, by substantial evidence,<sup>39</sup> that the area from which the installation commander debarred the individuals is in fact a closed post or base.<sup>40</sup>

### **But Then Came Spock**

The apparent split of the Supreme Court Justices in *Flower*, coupled with the Tenth Circuit Court of Appeal's ruling in *Gourley*, was settled when the Supreme Court announced its decision in *Greer, Commander, Fort Dix Military Reservation, et. al. v. Spock, et. al.*<sup>41</sup> *Spock* dealt with facts similar to those confronted by the Supreme Court in *Flower*.<sup>42</sup> *Spock* involved attempts by candidates for public office near the Fort Dix, New Jersey, Military Reservation to distribute campaign literature and hold what appeared to be campaign rallies on the installation.<sup>43</sup> After the installation commander evicted them from the installation for distributing pamphlets, the respondents sued the government in United States District Court asserting that the installation commander's actions in debarring them from the installation and prohibiting them from distributing their campaign literature and holding discussions with interested constituents violated the First and Fifth Amendments of the United States Constitution. In *Spock*, Fort Dix had a post regulation that proscribed the activity in which Spock and his co-respondents sought to engage. The first challenged regulation prohibited sit-ins, demonstrations, political speeches and other similar activities. A second challenged regulation made it unlawful to distribute leaflets or other literature without the advance approval of the installation commander. The District Court issued an injunction against the government stopping it from prohibiting the respondent's actions on the installation. The Circuit Court affirmed.<sup>44</sup>

In holding that the installation commander had the authority to prohibit the actions of the respondents, the Supreme Court effectively overruled its earlier ruling in *Flower v. U.S.*<sup>45</sup> While it did not reject the argument that an individual still has some constitutional rights when on a military reservation, the Supreme Court found that the Circuit Court's application of the holding in *Flower* was flawed.<sup>46</sup> In general, the Supreme Court held that the First Amendment rights of individuals are limited when it comes to military installations, and that "the primary business of a military installation is to train soldiers ... not to provide a public forum."<sup>47</sup> The Court in *Spock* again relied on the underlying basis for an installation commander to limit access to his installation and summarily exclude individuals therefrom as it had stated more than a decade before in *Cafeteria Workers v. McElroy*.<sup>48</sup> It should be noted, however, that the Court found that this plenary power of the commander need not be handled consistently, but rather found that, in the commander's discretion, he could allow some speakers to come on base to talk to troops and other located therein, while summarily prohibiting others from speaking or distributing leaflets or other information on the installation.<sup>49</sup> Additionally, the Court confirmed the installation commander's right to protect the resources of his installation.<sup>50</sup> The ruling in *Spock* is the leading theory of application of resource protection on military installations today. The Court has thus expanded the commander's authority to control the installation.

### Notes

<sup>1</sup> U.S. Const., art. 1, § 8, cl. 11-14 and art. 2, § 2, cl. 1.

<sup>2</sup> U.S. Const., art. 1, § 8, cl. 14.

<sup>3</sup> U.S. Const., art. 2, § 2, cl. 1.

<sup>4</sup> 18 U.S.C. § 1382 (1994).

<sup>5</sup> This paper will not address violations of clause one of 18 U.S.C. § 1382. For a discussion of clause one, see, Jules B. Lloyd, *Unlawful Entry and Re-Entry Into Military Reservations in Violation of 18 U.S.C. § 1382*, 53 *Military Law Review*, 137 (1971). It should be realized that the courts have held that clause one of §1382 involves an intent element not present in § 1382's second clause. This distinction is imperative when prosecuting offenses for violations of clause

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two or of 50 U.S.C. § 797. See, *Holdridge v. U.S.*, 282 F.2d 302 (Court of Appeals, 8<sup>th</sup> Cir., 1960).

<sup>6</sup> 42 Cong. Rec 689 (1908) as cited in Lloyd, *Unlawful Entry and Re-Entry Into Military Reservations in Violation of 18 U.S.C. § 1382*, 53 Military Law Review, 137 (1971).

<sup>7</sup> 50 U.S.C. § 797 (1950).

<sup>8</sup> 81 Cong. Rec. 3886 (1950).

<sup>9</sup> The implementation of 50 U.S.C. § 797 is seen regularly outside the gates of military installations. Upon entering any installation, individuals are met by a sign which warns them of the commander's authority to deny access to the installation and his authority to remove them from the installation. A note of caution is necessary at this juncture. When one deals with debarments, one may be dealing with two separate laws, 18 U.S.C. § 1382 and 50 U.S.C. § 797. Only the latter serves as a basis for prosecution of offenders without any overt act or intent on the part of the wrongdoer.

<sup>10</sup> 32 CFR § 809a.1(a) reads: "Air Force installation commanders are responsible for protecting personnel and property under their jurisdictions and for maintaining order on installations, to insure the uninterrupted and successful accomplishment of the Air Force mission." 32 CFR § 809a.1(b) prescribes that "each commander is authorized to grant or deny access to his installation, and to exclude or remove persons whose presence is unauthorized. In excluding or removing persons from the installation, he must not act in an arbitrary or capricious manner. His actions must be reasonable in relation to his responsibility to protect and to preserve order on the installation and to safeguard persons and property thereon. As far as practicable, he should prescribe by regulation the rules and conditions governing access to his installation."

<sup>11</sup> 32 CFR § 809a.3 reads: "Removal of violators: If unauthorized entry occurs, the violators may be apprehended, ordered to leave, and escorted off the installation by personnel carefully selected for such duties. The complete and proper identification of the violators, including taking of photographs must be accomplished. Violators who reenter an installation--after having been removed from it, or having been ordered, by an officer or person in command or charge, not to reenter--may be prosecuted under 18 U.S.C. § 1382. If prosecution for subsequent reentry is contemplated, the order not to reenter should be in writing so as to be easily susceptible of proof. Commanders are cautioned that only civil law enforcement authorities have the power to arrest and prosecute for unauthorized entry of government property."

<sup>12</sup> 32 CFR § 809a.3.

<sup>13</sup> DODD 5200.8 (25 April 1991).

<sup>14</sup> DODD 5200.8 (C)(1).

<sup>15</sup> DODD 5200.8 (C)(2)(b).

<sup>16</sup> DODD 5200.8 (C)(2)(d).

<sup>17</sup> Note, however, that even if the Secretary of Defense had not issued regulatory guidance directing the secretaries of the military departments to issue their own guidance concerning the exclusion and removal of individuals from military installations, the Secretary of the Air Force would have the authority to promulgate such regulations under 50 U.S.C. § 797 or 10 U.S.C. § 8013.

<sup>18</sup> AFI 31-209 (1 December 1998).

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<sup>19</sup> It should be noted that AFI 31-209 gives limited guidance for commander's implementation of debarment proceedings. On the other hand, some installations, like the Ogden Air Logistics Center at Hill AFB, Utah, have promulgated local instructions clearly delineating the debarment process. For further information, see OO-ALC-HAFB Instruction 31-101, 13 February 1996, and the text accompanying note 19, Chapter 3, *supra*.

<sup>20</sup> The pertinent parts of AFI 31-209 read: "Under Section 21 of the Internal Security Act of 1950 (50 U.S.C. 797) any directive issued by the commander of a military installation or facility, which includes the parameters for authorized entry to or exit from a military installation, is legally enforceable against all persons whether or not those persons are subject to the Uniformed [sic] Code of Military Justice (UCMJ). If unauthorized entry occurs, security forces may detain violators, order them to leave, or escort them off the installation. Military personnel who reenter an installation after having been properly ordered not to do so may be apprehended. Civilian violators may be detained and either escorted off the installation or turned over to proper civilian authorities. Civilian violators may be prosecuted under 18 U.S.C. §1382. Acting within the authority [listed above], installation commanders may deny access to the installation through the use of a barment [sic] system. Barment [sic] orders should be in writing, but may also be oral. Security police maintain a list of personnel barred [sic] from the installation."

<sup>21</sup> See, 32 CFR § 809a.1 (2000).

<sup>22</sup> 367 U.S. 886 (1961).

<sup>23</sup> The pertinent part of the Fifth Amendment reads, "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

<sup>24</sup> 367 U.S. 886, 887 (1961).

<sup>25</sup> 367 U.S. 886, 888.

<sup>26</sup> 367 U.S. 886, 889.

<sup>27</sup> *ibid*.

<sup>28</sup> 367 U.S. 886, 890. The Court also relied upon Naval regulations in effect at the time which allowed the commanding officer in charge of an installation to control access to that installation. These regulations, it appears, stem from 50 U.S.C. §797. Additionally, the Court noted, with approval, the opinion of Attorney General Butler who opined that even in 1837 an installation commander held broad powers to exclude at will persons who earned their living on military bases. In fact, Butler's opinion likened employees on military reservations to tenants at will and as such could be removed whenever the interests of the installation called for such removal. See 3 Op. Atty. Gen. 268, 269, as cited at 367 U.S. 886, 893. See also, JAGA 1925/680.44, 6 October 1925.

<sup>29</sup> 367 U.S. 886, 894. The Court's rationale rested on the determination of the nature of the government's function under its actions were taken. In fact, the Court relied heavily on the notion that the Executive's power is plenary and that notice and an opportunity to be heard are not necessarily constitutionally required. See, 367 U.S. 886, 895.

<sup>30</sup> 407 U.S. 197 (1972).

<sup>31</sup> In *Flower*, the petitioner was arrested for distributing leaflets in New Braunfels Avenue at a point within the limits of Fort Sam Houston in San Antonio, Texas. Mr. Flower had previously been removed from Fort Sam Houston and ordered not to reenter. The earlier removal was also

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for attempting to distribute leaflets. After his conviction by the District Court, the Court of appeals for the Fifth Circuit affirmed. Fort Sam Houston was an open post. At issue was whether the government actually had control over the portion of the installation upon which Mr. Flower was arrested and charged with violating the previously issued debarment order. The pertinent part of the statute reads, "...[A]fter having been removed therefrom or ordered not to reenter by any officer or person on command or charge thereof. There were no guards posted at the entrances, and the street upon which Mr. Flower was distributing his leaflets was totally open, and served as a critical traffic area. New Braunfels Avenue was freely used by private vehicles, public transportation, and taxis, as well as pedestrian, and was a busy thoroughfare throughout the day." (See, 407 U.S. 197, 198).

<sup>32</sup> 407 U.S. 197, 198.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

<sup>35</sup> But see Justice Rehnquist's dissent at 407 U.S. 197, 200, 202 (1972). Justice Rehnquist rebuts the majority's seemingly fine line test to vitiate debarment order violations based merely upon the concept of opened versus close posts. Justice Rehnquist opines that "the unique requirements of military morale and security may well necessitate control over certain persons and activities on the base even while normal traffic flow through the area can be tolerated."

<sup>36</sup> 502 F.2d 785 (1973).

<sup>37</sup> *U.S. v. Gourley* involved demonstrations at the United States Air Force Academy (USAFA) in Colorado Springs, Colorado, specifically at football games and outside the Academy's chapel. The public is encouraged to attend the football games, little if any entry security is provided, and the Chapel is likewise publicized for visits by the general public. The appellants had been convicted under 18 U.S.C. § 1382 for reentering a military reservation after having been ordered not to reenter by the superintendent of USAFA. In their appeal, the appellants challenge the effectiveness of the orders not to reenter and argue that under the circumstances, the USAFA had become an open post, and thus the appellant's freedom of speech rights could not be abridged by ordering them to leave the USAFA grounds, and thus prosecuting them for reentering.

<sup>38</sup> 502 F.2d 785, 787.

<sup>39</sup> The court's reference to substantial evidence apparently is drawn from the provisions of the Administrative Procedure Act, 5 U.S.C. §706. One should note that substantial evidence is merely one of the five levels of persuasion commonly referred to in the law, the others being scintilla, preponderance, clear and convincing, and beyond a reasonable doubt. Substantial evidence and the application of the Administrative Procedure Act is discussed in Chapter 3.

<sup>40</sup> 502 F.2d 785, 788

<sup>41</sup> 424 U.S. 828 (1976).

<sup>42</sup> *Supra*, note 31.

<sup>43</sup> Spock was the presidential candidate of the People's Party in 1972. The facts of this case revolve around the presidential campaign of that election year.

<sup>44</sup> 424 U.S. 828 (1976).

<sup>45</sup> But see, 424 U.S. 828, 849 (1976), Justice Marshall and Brennan dissenting. In their dissent, the Justices opined that the majority's distinguishing of *Flower* from the present case is

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flawed. The dissent suggests that Fort Dix is no different than Fort Sam Houston, and as such is an open post which would limit the commander's ability to prohibit the actions of the respondents.

<sup>46</sup> 424 U.S. 828, 836 (1976). The Court in fact chastised the lower court for its holding. The Court found that "The Court of appeals was mistaken, therefore in thinking that the Flower case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that Flower stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for the purposes of the First Amendment. Such a principle of Constitutional Law has never existed, and does not exist now."

<sup>47</sup> 424 U.S. 828, 838.

<sup>48</sup> 424 U.S. 828, 838. See also, the text accompanying notes 23-30, *supra*.

<sup>49</sup> In a footnote to the majority decision, the Court stated, "The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not in and of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever." 424 U.S. 828, 838.

<sup>50</sup> "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on a base under his command." 424 U.S. 828, 840.

## **Chapter 3**

### **Practical Application of Debarment Actions**

Having knowledge of theory and the law is not enough for an installation commander (or a staff judge advocate) to use debarment proceedings effectively as a tool for force and resource protection. On the other hand, both the installation commander and the staff judge advocate need a working knowledge of the primary and practical applications of the debarment system. This chapter proposes some recommendations for an effective debarment program.<sup>1</sup>

#### **Who may debar?**

It is clear from the reading of the statutes and the Code of Federal Regulations that only an installation commander can debar an individual from an installation.<sup>2</sup> In the Air Force, there are all kinds of commanders--wing commanders, center commanders, group commanders, flight commanders, aircraft commanders, and even student organization "commanders." On the other hand, when dealing with debarments and the plenary authority associated with debarment procedures, the debarment authority is the wing or center commander.<sup>3</sup> The defining factor is whether the individual has control over the installation.<sup>4</sup> Installation commanders should not confuse this control over the installation with legislative or special maritime jurisdiction. It is not necessary for the United States to exercise exclusive jurisdiction over the area concerned, but

rather that it controls the area.<sup>5</sup> Subordinate commanders do not have the authority to issue or lift debarment orders, although they may sign the debarment order “FOR THE COMMANDER” after the installation commander has made the debarment decision.<sup>6</sup>

### **Who Can Installation Commanders Debar?**

The cases cited and discussed in Chapter 2 of this paper, as well as Air Force policy, provide the necessary guidance for determining whom installation commanders may debar from installations. Normally, only civilians--retirees (and their dependents), dependents of active duty members, civilian government employees,<sup>7</sup> civilian contractors, and civilian visitors to the installation-- are debarred when necessary to protect people and resources and to maintain good order and discipline on the installation.

### **When is Debarment Appropriate?**

Not every instance of misconduct calls for a debarment proceeding. However, there are times when the installation commander will want to debar individuals from the installation. The status of the person whom the installation commander is considering debarring may influence the commander's decision in this area.

When the individual whom may be debarred is a retiree or a dependent (of the retiree or of an active duty military member) it is necessary to realize that the retirees and dependents possess certain statutory rights to services on the installation. Foremost among these rights is the right to receive medical and dental care at the military treatment facility.<sup>8</sup> As such, it is difficult to defend the denial of medical benefits because, unlike the use of the base gym or other facilities, military officials have recognized the individual's statutory entitlement to medical care as a long standing exception to the debarment rule. In fact, the sample letter found in AFI 31-209<sup>9</sup>



incorporates an exception to the debarment order. The essential issue, however, is whether granting limited access to the installation for medical care vitiates the debarment order. If the facts warranted a debarment, and thus the installation commander decided that the actions of the individual warranted his total exclusion from the installation,<sup>10</sup> does allowing the individual onto the installation violate the common sense test? There has been no case law on this point. On the other hand, it is Air Force policy is to allow the individual on the base for the limited purpose of receiving care under 10 U.S.C. Section 1074 or Section 1076.<sup>11</sup>

In the author's opinion, an installation commander could follow the literal interpretation of the debarment statute by not permitting any debarred individual on base for any purpose.<sup>12</sup> Nothing in the statute states that the individual, while entitled to medical care, is entitled to medical care at a military treatment facility of his own choosing. While this would be impracticable in a remote area, it is feasible in areas with more than one military treatment facility. Additionally, the use of nonavailability statements, so that the entitled party may receive care from a civilian provider, is another avenue for the installation commander to use to avoid degrading the debarment order. TRICARE policies state that military treatment facility commanders can issue nonavailability statements when care is not available at the military treatment facility.<sup>13</sup> The policies, however, do not contemplate the use of nonavailability statements for such purposes, but do not appear to preclude their use in such a manner.

Unlike medical care, statutes do not govern the receipt of some other benefits available on the installation. For example, DoD Regulation 1330.17-R governs commissary privileges. Unlike 10 U.S.C. Section 1074 and Section 1076, commissary use is a privilege, not a right.<sup>14</sup> As such, the restrictions on denying medical care to debarred individuals otherwise entitled to medical care are not applicable to commissary use. Similarly, other privileges on the installation

(for example, fitness center, open messes, recreation areas, etc.) are free from the statutory oversight as it pertains to medical care.

Military members who are involuntarily separated from the service under the provisions of AFI 36-3209 or AFI 36-3208, may be debarred if the situation warrants such measures. Normally, an individual who is involuntarily separated will only be debarred if the basis for the involuntary separation is misconduct involving moral turpitude or for misconduct which has a rational relationship to good order and discipline on the installation.<sup>15</sup> To expedite the debarment procedure in such cases, the staff judge advocate should make a recommendation to the separation authority<sup>16</sup> in the legal review, and include the necessary paperwork for executing the debarment order in the separation case file.

### **Duration of Debarments**

By definition, a debarment is permanent.<sup>17</sup> On the other hand, the literature infers that the debarment can be for any period of time, and that the period of time should be explicitly stated if the commander's intent is not that the debarment be permanent.<sup>18</sup> On the other hand, one base instruction prescribing the procedural rules for implementing the installation debarment program places a cap of three years on all debarment actions.<sup>19</sup>

### **Scope of Review**

In making a decision to debar an individual from a military installation, the decision authorities must bear in mind the likelihood that any reviewing authority may review the decision authority's actions in any debarment case.<sup>20</sup> A basic application of Administrative Law finds that unless an agency has established a standard of proof applicable to the actions it is taking,<sup>21</sup> the Administrative Procedure Act, 5 U.S.C. Section 706, applies.<sup>22</sup> The Administrative Procedure

Act, therefore, will be used to evaluate the actions of the agency--the Air Force--when the reviewing authorities evaluate the basis for the debarment actions. Section 706 provides in part that,

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious,<sup>23</sup> an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, limitations, or short of statutory right; without observance of procedure required by law; unsupported by substantial evidence<sup>24</sup>... or unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.<sup>25</sup>

These parameters, which the reviewing courts will use when assessing the validity of a debarment order, should be taken into account when the installation commander is deciding whether to debar an individual. In this manner, the installation commander may prevent his decision from being overturned by reviewing authorities. Likewise, the staff judge advocate should use the same rationale when fashioning his recommendations on the debarment action. In fact, there is a long line of opinions from the General Law Division, Office of The Judge Advocate General, United States Air Force, which reiterate these concepts and those contained in the explanatory notes herein.<sup>26</sup>

### **Notes**

<sup>1</sup> A note of caution should be recognized at this point. The opinions and recommendations contained in this chapter are designed only as a guide and should not be relied upon as carte blanche for debarring individuals from military installations. Rather, the points addressed here serve as only one example of an effective debarment system. The reader is advised that each

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debarment should be acted upon individually, and that there is not a one size fits all solution to debarment issues.

<sup>2</sup> 18 U.S.C. § 1382, 50 U.S.C. §797, and 32 CFR §§809a.1 and 809a.3.

<sup>3</sup> For a discussion of command and associated responsibilities, see, AFI 38-101, *Manpower and Organizations* (1 July 1998) and AFI 51-604, *Appointment to and Assumption of Command* (1 October 2000).

<sup>4</sup> *U.S. v. Renkoski*, 644 F. Supp 1065 (1986). See also, OpJAGAF 1984/60 for the authority of reservists to issue debarment orders.

<sup>5</sup> *U.S. v. Vasarajs*, 908 F.2d 443 (1990).

<sup>6</sup> Although many higher headquarters opinions (see, OpJAGAF 1998/69) validate the subordinate commander's signing of the debarment order following the determination by the debarment authority that the individual should be debarred, the author opines that this should be done only in an emergency when the debarment authority is not reasonably available.

<sup>7</sup> When debarring civilian employees, the rules and procedures for terminating a civilian employee must still be followed. Seldom does the Air Force debar an employee prior to the termination action being taken. On the other hand, if the Air Force is willing to continue to pay the civilian employee between the time the installation commander debars the individual and the time the termination is effective, a debarment is still a valid measure for the installation commander to use to control and maintain good order and discipline on his installation. It should be noted that although the Air Force seldom debars prior to termination, the debarment action is nonetheless valid and should be enforced. Debarring civilian employees prior to completion of employment termination proceedings may be appropriate when the debarred employee is being removed for a violent act on or off the installation, and the rational basis for the debarment negatively impacts security on the installation.

<sup>8</sup> 10 U.S.C. §§ 1074, 1076.

<sup>9</sup> *Supra*, Chapter 2, notes 20-21.

<sup>10</sup> *Supra*, Chapter 2, note 20.

<sup>11</sup> AFI 31-209, paragraph 2.5.5 (1 December 1998).

<sup>12</sup> Naturally, no one would argue that the denial to enter the installation to receive medical care is justified if the basis for the debarment involved actions by the entitlement holder at the military treatment facility. In the author's opinion, the denial would not be arbitrary and capricious and would be supported by substantial evidence.

<sup>13</sup> TRICARE Policy Handbook, [www.tricare.osd.mil](http://www.tricare.osd.mil).

<sup>14</sup> DOD 1330.17-R, *Armed Service Commissary Regulations*, April 1987.

<sup>15</sup> Examples of misconduct which may warrant debarment from the installation following involuntary separation may include the sale or transfer of controlled substances, violent acts, or other acts which, when taken with the totality of the circumstances are necessary to preserve good order and discipline and security of the installation.

<sup>16</sup> According to AFI 36-3208, the separation authority for discharges based on misconduct is either the Special Court-Martial Convening Authority (SPCMCA) or the General Court-Martial Convening Authority. The SPCMCA is usually the installation commander.

<sup>17</sup> See note 1, Chapter 1.

<sup>18</sup> See *The Military Commander and the Law*, Fifth Edition (2000), p.378.

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<sup>19</sup> OO-ALC-HAFB Instruction 31-101, 13 February 1996, Paragraph 7.

<sup>20</sup> By reviewing authorities we mean any superior commander and any higher headquarters charged with reviewing installation level actions, as well as the civilian courts.

<sup>21</sup> See, for example, AFI 36-3208, *Administrative Separation of Airman*, in which the Air Force has set the standard of review for involuntary separation actions as a preponderance of the evidence.

<sup>22</sup> See generally, Richard J. Pierce, et. al., Administrative Law and Process, Third Edition, 1999.

<sup>23</sup> An action is arbitrary and capricious if “the agency has relied upon factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in the view or the product of agency expertise.” *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983). See also, *Cafeteria and Restaurant Workers v. McElroy*, supra, Chapter 1.

<sup>24</sup> See, *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1939), where the Supreme Court defines substantial evidence as “[M]ore than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” See also, Cooper, *Administrative Law: The Substantial Evidence Rule*, 44 A.B.A.J. 945, 1002-3, (1958), as cited in Pierce, Administrative Law and Process, Third Edition, 1999, p. 363. Professor Cooper espouses seven “rules of thumb” that courts use in applying the substantial evidence test. These include the propositions that: hearsay is not substantial evidence, at least if it is opposed by competent evidence (but see , Pierce, note 22 supra, citing *Richardson v. Perales*, 402 U.S. 389 (1971), for the premise that hearsay is now a valid basis for finding that substantial evidence exists to support a finding by an agency); a finding contrary to uncontradicted testimony is not supported by substantial evidence; evidence that is slight or sketchy in an absolute sense is not substantial evidence; evidence that is slight in relation to much stronger contrary evidence is not substantial evidence; an Administrative Law Judge’s finding contrary to an agency finding can be a significant factor leading a court to conclude that the agency finding is not supported by substantial evidence; dissenting opinions by members of the agency with respect to agency findings of fact have an effect on a reviewing court comparable to a contrary finding by an Administrative Law Judge; and a court is more likely to reverse an agency finding if the agency has engaged in a consistent pattern of crediting the agency’s witnesses and discrediting opposing witnesses.

<sup>25</sup> 5 U.S.C. §706 (1966).

<sup>26</sup> See, OpJAGAF 1982/60, OpJAGAF 1988/75 and OpJAGAF 1998/69.

## Chapter 4

### General Considerations

In taking debarment actions, installation commanders are not bound by the decisions of a criminal court relative to the underlying incident, nor are they constrained by the same rules of evidence or the same standard of proof applicable in a criminal court. If the basis for the debarment stems from civilian criminal proceedings, installation commanders do not need to wait to debar individuals until after civilian criminal proceedings are completed. In acting in this manner, however, the commander cannot and should not develop an overall policy effectively debarring all members of a certain class or individuals who commit a certain offense. Rather, the installation commander should consider all the facts of each debarment action on their own merits so as to avoid a charge of arbitrary and capriciousness<sup>1</sup> and subject his decision to challenge under the Administrative Procedure Act.

The installation commander should give each case an exhaustive and individualized review, and carefully consider the nature and number of incidents the offender has engaged in before reaching his decision to debar the individual. In any case, before making the determination to debar, the installation commander should consider taking a less severe action against the individual. An installation commander should use warnings, suspensions, revocations, and limitations against the civilian wrongdoer before issuing a debarment order. As discussed above, a debarment, by its very definition, terminates the individuals right to gain access to the

installation. Each of these actions is recommended to help avoid a claim that the commander's actions are arbitrary and capricious.

When it comes to civilians who do not reside on the installation, the installation commander should ascertain the civilian's connection to the installation (for example civilian employee, contractor employee, retiree, dependent, visitor, or trespasser) before initiating debarment proceedings. If the civilian has a substantial connection to the installation, the installation commander should debar only in serious cases or for repeat offenders. If the civilian does not have a substantial connection to the installation, the installation commander should consider debarment proceedings even for first-time offenders. The civilian's status, however, should only be one element the installation commander considers in the debarment determination. The installation commander should also weigh the seriousness of the offense that serves as the basis for debarments. Unless the misconduct is quite serious, the installation commander should consider warning letters, suspensions, and revocations before initiating the debarment action.

Debarments are not trifling matters. Installation commanders should debar individuals only if the entire case file supports the debarment action. A commander who requires his staff to produce complete and accurate case files for his deliberate review prior to debarring an individual and reviews it with an eye to the requirements of the Administrative Procedure Act should be on solid ground to defend any challenge to the debarment action.

### **Notes**

<sup>1</sup> JACM Opinion, 27 October 1983.

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