Introduction

James A. Garland

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James A. Garland*

Ten years ago, the Department of Defense (DoD) began implementation of a policy that Congress developed for the purpose of separating “known” lesbians, bisexuals, and gay men from military service,¹ a policy resulting in regulations known colloquially as “Don’t Ask, Don’t Tell.”² Congress codified its policy following hearings and testimony


from military experts who claimed that sexual minorities threatened the cohesiveness of United States Armed Forces—in essence, maintaining that sexual anxiety and social tension produced by "open homosexuality" would polarize military units, especially combat units, where heterosexual service members would direct the resulting anxiety and tension at lesbians, bisexuals, and gay men. The testimony was virtually all second-hand, delivered by military leadership purportedly on behalf of troops allegedly discomfited with the idea of serving openly gay men. Congress permitted contrary testimony from a small group of gay and lesbian service members, though only at the conclusion of the hearings. To many, that testimony served as little more than a token gesture to objective inquiry, an afterthought to a foregone Congressional conclusion in favor of restricting service by lesbians, bisexuals, and gay men.

This past fall, Hofstra University convened a conference of scholars and military personnel to examine military policy on service by sexual minorities, to determine whether the policy had been effective or was needed in light of ten years' experience. Don't Ask, Don't Tell: 10 Years Later focused both on the practical ramifications of the policy in the United States, but also theoretical evaluations of the policy under law and in light of global developments. To the conference organizers' dismay, representatives from the DoD and the nation's most vociferous defenders of excluding lesbians and gay men from service declined to attend, despite repeated invitations and offers to give them an exclusive platform to air their views. Fortunately, several provocative and seasoned military scholars came to the conference to explain why military leaders are concerned about change from current policy, particularly any change that would accommodate lesbian, bisexual, and gay service

3. For key excerpts from the hearings as well as analysis of the legislative process, see WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 729–745 (2d ed. 2003).

4. For extensive analysis, see Diane H. Mazur, Re-making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even If Gay Men Are Not?, 58 OHIO ST. L.J. 953, 983–991 (1997). As Professor Mazur has explained the testimony focused almost exclusively on the subject of male comfort with homosexuality and virtually ignored experiences of women's tolerance for working with known lesbians. Id.

5. Grethe Cammermeyer, Remarks at Hofstra University's Don't Ask, Don't Tell Conference, Sept. 18, 2003 (transcript on file with author).

6. Id.

7. Eric Lane, Director's Message to DON'T ASK, DON'T TELL: 10 YEARS LATER, at 4 (Sept. 2003) (Hofstra Cultural Center and Hofstra University School of Law conference program) ("In each case our invitations were not accepted ... About this ... Professor Aaron Belkin, another conference participant, speculated that 'perhaps it is because opponents literally have run out of rational arguments.'").
members at a time when the United States is still not a gay-friendly place. One of the most experienced scholars in the field, conference participant Eugene Milhizer, a Professor of the Ave Maria School of Law, has provided a thoughtful summary of that view for this journal.\(^8\)

Perhaps not surprisingly, the absence of numerous policy defenders at the conference caused the balance of the conference testimony to question the policy's justifications and effectiveness—a result enhanced by the overwhelming attendance by renowned military and legal scholars who have studied military policy in remarkable detail.\(^9\) The highlights of their conclusions were daunting, notably among them that all of the United States' leading allies but Turkey had lifted their restrictions on service by lesbians and gay men who are open about their sexuality, without any of the problems claimed by American military leadership.\(^10\) Meanwhile, thousands of lesbian, bisexual, and gay service members have been needlessly discharged in the United States,\(^11\) including many who have essential skills to fight the war on terror,\(^12\) many who have given years of their lives to service, only to have that service dismissed for the sake of those in service who allegedly cannot accept homosexuality.\(^13\) Conference attendees also reported that the policy has resulted in deep intrusions on the private lives of all service members who must de-

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9. On this front, conference attendees included: Sharon Alexander of the Servicemembers Legal Defense Network (SLDN); Professor Aaron Belkin of the Center for the Study of Sexual Minorities in the Military; John Brittain of the Thurgood Marshall School of Law; Melissa Embser-Herbert of Hamline University; Sharrag Greer of SLDN; Nan Hunter of Brooklyn Law School; Sylvia Law of New York University Law School; Jonathan Lurie of Rutgers University, Diane Mazur of the University of Florida Levin College of Law; Ruthann Robson of CUNY’s Queens College of Law; and Tobias Wolff of University of California Davis Law School.
10. See Appendix B.
11. SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 2, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1411.pdf (2004)[hereinafter “CONDUCT UNBECOMING 2004”] (showing DoD reports that nearly 10,000 service members have been discharged in the last decade). For a listing of discharges by year, see ESKRIDGE & HUNTER, supra note 3, at 745.
12. As SLDN notes, the number of discharges is one-third of the total number of “new” recruits the DoD claims it needs to fight the war on terror, see CONDUCT UNBECOMING 2004, supra note 11, at 2, and the loss has been dramatized by discharges of linguists with strong skills in interpreting enemy communications. See SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS,” 7 (2003) (hereinafter “CONDUCT UNBECOMING 2003”).
13. For dramatic, renowned stories of such losses, see CONDUCT UNBECOMING 2004, supra note 11, at 17–20. SLDN has recently publicized several stories of lesser known gays and lesbians who were called to serve during the current war, some of whom who could not continue because of the climate created by the policy. See id. at 9–12. As SLDN notes, these losses have caused increasing numbers of military leaders to denounce the policy as a waste of human resources. Id. at 1.
fend against perceptions and accusations of homosexuality, and that the impact of the policy has spread beyond the military, most notably to American colleges and universities, where campuses are required to accommodate discrimination in violation of anti-discrimination prohibitions, and where distribution of materials critical of military policy risks punishment by loss of federal funding.

Despite all of this testimony, personal accounts of service members stood out dramatically at the Don’t Ask, Don’t Tell conference—stories told of service members, both straight and gay, who have suffered under the policy—an effort commendably continued by this edition of the Hofstra Labor & Employment Law Journal. In this volume, heterosexual service members Sharon Alexander and Keith Taylor document extraordinary losses of colleagues under past and present military policy targeting homosexuality. Gay service members Alastair Gamble and former Green Beret Jay Hatheway tell equally compelling personal stories of their exclusion from service, despite their contributions to national defense. The Documenting Courage Project—an effort by civil rights organizations to collect stories of lesbian, gay and bisexual veterans—has also generously donated select essays for inclusion here.

It is important to note that the perspectives and experiences of service members are the focus of this publication not merely because they are the experiences upon which military policy is purportedly based, but because they are also reflect the lives of those individuals most deeply affected by military policy. Service members constitute the only labor force in the United States whose private, sexual lives are directly regulated by federal law, and whose firing for being discovered as gay, lesbian, or bisexual is directly required by law. They comprise the only

15. For a summary of the controversy, see ESKRIDGE & HUNTER, supra note 3, at 941–943. For an up-to-date summary of the current litigation over this issue, see www.solomonresponse.org.
17. See pages 437-442 and 443-453, infra.
18. See pages 461-482, infra.
19. For a summary of the law, see SLDN SURVIVAL GUIDE, supra note 2, at 8; ESKRIDGE & HUNTER, supra note 3, at 707–714.
20. CONDUCT UNBECOMING 2003, supra note 12, at 9. To assist in the implementation of the Don’t Ask, Don’t Tell policy, the Assistant Secretary of Defense, Edwin Dom, issued a training plan to the Assistant Secretary of the Army, Assistant Secretary of the Navy and Assistant Secretary of the Air Force to provide an approach for educating the members of the Armed Forces on the new policy. According to the Assistant Secretary, the training plan was designed to making each Service aware of their responsibilities under the new policy. A copy of the training plan appears in Appendix C.
labor force forbidden by Congress from identifying as lesbian, gay, or bisexual, even though Congress and the DoD have both known for more than a decade that the prohibition increases the risk of violence perpetrated by service members against sexual minorities,\textsuperscript{21} and equally imposes severe political and personal costs on lesbian, gay, and bisexual service members as well.\textsuperscript{22}

The need for attention to service members' perspectives on the policy has never been more pressing. With the war in Iraq in progress for the last two years and the need for service members high, discharges of lesbians and gay men are at new lows,\textsuperscript{23} proving as civil rights activists have claimed for years that claims that service by lesbian and gay men threaten combat units are entirely false. With the DoD now claiming that heterosexual service members must refrain from harassing anyone perceived to be gay—including service members\textsuperscript{24}—the danger purportedly feared because of “known homosexuality” in service is phenomenally difficult to explain and corroborate. In these terms, understanding the stories of those lesbian, gay, and bisexual service members who have both hidden their sexuality in service and whose sexuality has become known may be more relevant to understanding current military policy than ever before. We hope that this edition of the Hofstra Labor and Employment Law Journal is a significant contribution to that effort.

\begin{enumerate}
\item[21.] As I have documented extensively before, the government’s own documents show the link between discrimination and anti-gay violence in service, particularly flowing from the silencing of lesbians, bisexuals, and gay men regarding their identities. See James Allon Garland, The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime, 10 LAW & SEXUALITY 57-73 (2001). SLDN continues to report military leadership encouraging gay violence with the knowledge that its victims cannot come forward to complain about it. See CONDUCT UNBECOMING 2004, supra note 11, at 27 (reporting how a Non-Commissioned Officer (NCO) announced to service members “if I ever found out someone on my crew was gay, I would kill him.”); CONDUCT UNBECOMING 2003, supra note 12, at 16 (noting how anti-gay officer told subordinates if “anyone who is gay . . . felt offended” by anti-gay epithets to raise their hand and self-identify in violation of the policy); Id. at 14 (reporting NCO telling soldiers “the only thing a good fag needs is a good fag-bashing.”). For extensive additional reports of violence, see SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 72-102, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/256.pdf (2001).
\item[22.] For an extensive discussion, see Tobias Barrington Wolff, Political Representation and Accountability Under Don’t Ask, Don’t Tell, 89 IOWA L. REV. (forthcoming May 2004); see also Tobias Barrington Wolff, Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy, 63 BROOK. L. REV. 1141(1997).
\item[23.] See CONDUCT UNBECOMING 2004, supra note 11, at 1; see CONDUCT UNBECOMING 2003, supra note 12, at 1.
\item[24.] See Garland, supra note 21, at 68 & n.334; see also SLDN Survival Guide, supra note 2, at 6.
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Appendix A

10 U.S.C. § 654(b)

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings. Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and
the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy. A member of the armed forces shall be separated from
the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
   (A) such conduct is a departure from the member’s usual and customary behavior;
   (B) such conduct, under all the circumstances, is unlikely to recur;
   (C) such conduct was not accomplished by use of force, coercion, or intimidation;
   (D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
   (E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings. The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uni-
form Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction. Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

1. the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

2. separation of the member would not be in the best interest of the armed forces.

(f) Definitions. In this section:

1. The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

2. The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

3. The term "homosexual act" means—

   (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

   (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).
Appendix B

COUNTRIES THAT ALLOW ACKNOWLEDGED GAYS AND LESBIANS TO SERVE OPENLY IN THE MILITARY (AS OF SEPTEMBER 2003)

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<th>Australia</th>
<th>Italy(^5)</th>
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<td>Belgium</td>
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<td>Canada</td>
<td>Netherlands</td>
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<td>Czech Republic(^1)</td>
<td>New Zealand</td>
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<td>Denmark</td>
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<td>Estonia(^2)</td>
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<td>Finland</td>
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<td>France</td>
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<td>Germany(^3)</td>
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<td>Ireland(^4)</td>
<td>Switzerland(^8)</td>
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<tr>
<td>Israel</td>
<td>UK</td>
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1. Czech Republic: Homosexuality is not considered a liability for enlistment. All citizens are required to serve, regardless of sexual orientation. Act No. 1218/1999 Coll. (Military Act) stipulates military service “for all citizens of the Czech Republic, regardless of sexual orientation.”

2. Estonia: There are no and have never been bans on sexual minorities in the Estonian military. The Public Relations Department writes, “according to the Estonian legislation all sexual minorities have the same rights and duties compared with the others. In respect to the army it means that all males have the duty to serve in the army and all females have the right to do so.”

3. Germany: In January of 2001, the General Inspector of the Federal Army, Harald Kujat, published a kind of code of conduct titled “Dealing with sexuality” that “established (within the army) an equal treatment for gay and lesbian members of the army. This has to be considered as a binding antidiscrimination measure” (SOURCE: Klaus Jetz of the Lesbian and Gay Federation in Germany).


5. Italy: According to Arcigay, though there may be no precedent of barring gays and lesbians from the military, a gay service member alleged to disrupt military discipline may be dismissed. Moreover, a law exists in Italy that allows gay people to avoid military service based on their homosexuality. Web resources: www.gay.it/loi, which offers a link to the home page of NOI, Notizie Omosessuali Italiane.

6. Lithuania: Gays and lesbians are not legally regulated in Lithuania’s Armed Forces. The
Ministry of Defense writes, "Theoretically [gays and lesbians] can serve openly but there is no practical case like this in Lithuania so far. Officially, no bans exist or have ever existed on service of sexual minorities in Lithuanian military."

7. Slovenia: There is no ban in the Slovenian military, but homosexuality is still listed among psychiatric diseases. "In practice . . . gay men can avoid being drafted if they state on the draft they are gay and that they do not want to service." There is no known case of a professional military personnel being fired for his homosexuality. (SOURCE: The Slovenian Queer Resources Directory.)

8. Switzerland: Gays and lesbians are allowed to serve and there is no ban. Their ability to service is only questioned if their sexual orientation somehow interferes with their service. (Both the Swiss Military and its gay and lesbian organization agree on this matter.)

SOURCE: Center for the Study of Sexual Minorities in the Military, Univ. of Ca., Santa Barbra
Appendix C

HYPOTHETICAL TEACHING SCENARIOS FOR COMMANDERS AND PERSONNEL INVOLVED IN RECRUITING, ACCESSION PROCESSING, CRIMINAL INVESTIGATIONS, AND ADMINISTRATIVE SEPARATIONS†

The following hypothetical scenarios are for training purposes only. They are not meant to prescribe “correct” outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense (“DoD”) policy on homosexual conduct in the Armed Forces. The scenarios do not establish any evidentiary standards or create any substantive or procedural rights.

1. Situation: During a commander’s “open-door” period, a young Service member comes into the commander’s office and states that he believes he may be homosexual. The commander advises the Service member of the military’s policy on homosexual conduct, and the Service member replies, “Maybe I shouldn’t say anything else.” The commander advises him he might wish to discuss the matter with the chaplain.

Issues: The commander wonders whether he should initiate separation action on the basis of the Service member’s statement that he believes he may be a homosexual. Should he refer the case to a Military Criminal Investigative Organization (MCIO) for an investigation to determine if the Service member has committed any homosexual acts since entering the service? Should he initiate a commander’s inquiry to determine if grounds for administrative separation exist?

Discussion: While the Service member’s commander may initiate a commander’s inquiry based on the Service member’s statement that

† These Hypothetical Teaching Scenarios originally appeared as part of a training manual prepared by Edwin Dorn, Assistant Secretary of Defense, which was designed to educate military personnel regarding the newly crafted policy pertaining to homosexual conduct in the Armed Forces. A full copy of the training plan is available at http://dont.stanford.edu/regulations/dornmemo.pdf.
he believes he may be a homosexual, he probably would not at this time. The statement, by itself, is ambiguous and quite possibly could indicate a young Service member’s confusion over some aspect of his sexual identity. It is not at all clear that the Service member intended to make a statement that he is homosexual.

Since the Service member has not indicated that he has committed any criminal act, this case should not be referred to any military law enforcement agency. Had the Service member stated he had engaged in a homosexual act or acts, the commander would also advise the Service member of his rights under Article 3 lb of the UCMJ.

2. **Situation:** An officer observes two male junior enlisted Service members walking and holding hands while off-duty and on liberty. The Service members are wearing civilian clothes and are in an isolated wooded public park and, except for the officer, they are alone. He reports the incident to the commanding officer (CO) and adds that he is surprised to find out they appear to be homosexuals. He asks the CO what he proposes to do about the incident. The CO decides he will call the two Service members into his office, separately, and ask them about the officer’s observations.

**Issue:** Was the CO’s action appropriate? If not, what action should he have taken?

**Discussion:** The officer’s observation of the two enlisted Service members walking and holding hands in the park constitutes credible information of homosexual conduct if the officer is someone the CO otherwise trusts and believes. The two Service members’ hand-holding in these circumstances indicates a homosexual act and therefore the commanding officer may follow-up and inquire further. Probably, the extent of the inquiry will be two confidential one-on-one conferences between the CO and the two Service members to inquire into the incident.

Before the Service members are asked to discuss or explain the incident, the CO should advise them of the military’s policy on homosexual conduct. Should they decline to discuss the matter, the questioning should stop. At that point, the CO may consider other relevant information and decide whether to initiate administrative separation actions based on the information he possesses.

3. **Situation:** A Service member tells his commanding officer (CO) that he is a homosexual Based on the Service member’s statement of his homosexuality, his CO begins immediately to process the Service member for separation from the Service. Three days later, the Service member complains that he has been receiving both written and spoken threats from unidentified Service members who are apparently
aware of his homosexuality, and who have stated they are going to beat him up.

Issue: What actions should the Service member’s CO take?

Discussion: The CO should ask for investigative assistance from the Military Criminal Investigative Organization with respect to the threat and take all reasonable means to protect the safety of the Service member, as he would any other Service member under his command. The CO should initiate a criminal investigation into the threats received by the Service member.

The Service member’s statement that he is a homosexual should not be investigated by the MCIO because a statement that a member is a homosexual does not, by itself, constitute credible information of a crime. The CO is appropriately initiating action under the Service’s administrative separation procedures.

The CO may consider transferring the Service member to another location. His final decision on this matter would depend on the nature of the threats and the investigative findings.

4. Situation: A Service member has been observed entering, leaving, and generally “hanging around” a downtown gay bar. The commander is notified of the observations but isn’t sure what action, if any, she should take.

Issues: What should the commander do? Can the commander administratively discharge the Service member for going to a gay bar? Should she conduct a commander’s inquiry?

Discussion: Given the absence of any information, credible or otherwise, of the occurrence of either a crime or otherwise proscribed conduct, the commander should not begin an inquiry into this matter. Going to a gay bar is not a crime, nor does it, in itself, constitute a “nonverbal statement” by the Service member that he is a homosexual. A commander may begin an inquiry, however, if a member engages in behavior that a reasonable person would believe is intended to convey the statement that the member is a homosexual or bisexual. The commander in this case may wish to point out to her subordinate that favorite is known to be an establishment catering to homosexuals.

5. Situation: A metropolitan area publication, oriented to the activities and interests of the area’s homosexual community, prints a story under the headline, “Gays in Government,” purporting to list government workers believed to be homosexuals. The story contains the names of two enlisted Service members stationed at a nearby military installation. The Service members’ commander receives an
anonymous letter containing a copy of the article “Gays in Gover-
nment” and after reading it wonders whether he should conduct an in-
quiry into the matter or begin administrative separation action on the
two Service members for homosexuality. He has never before seen a
copy of the publication that printed the article and the story gives no
supporting documentation for why any of the individuals listed were
believed to be homosexual.

**Issue:** What action should the commander take in regard to the
purported “outing” of the two enlisted Service members?

**Discussion:** The commander should not initiate any inquiry
based on the title. The article purports to identify the two Service
members as homosexuals, but does not allege any criminal or other-
wise proscribed homosexual conduct. A commander should begin an
inquiry only if he has credible information indicating proscribed ho-
mosexual conduct.

The commander might call the two Service members into his of-

Issue: Should the commander inquire into what meaning his Ser-
vice member had intended to convey by carrying that particular sign
in the gay rights parade?

**Discussion:** A Service member’s carrying of a banner or sign in a
gay rights activity would not in and of itself constitute credible infor-

A Service member’s statement that he or she is a homosexual, or
words to that effect, is evidence that the Service member engages in
homosexual acts or has an intent or propensity to do so. Therefore, the commander may inquire into the incident further. Before questioning his subordinate about the incident, the commander should advise her of the military's policy on homosexual conduct. Should the Service member choose not to discuss the matter further, the discussion should end. The commander would then decide whether to initiate administrative discharge procedures based on the information provided by the NCO.

**Recommended for Investigators and Commanders**

7. **Situation:** The commander of a military installation calls up his Military Criminal Investigative Organization commander and requests that he stop by to discuss a "problem" in the nearby civilian community, a new social club has recently opened and is known to be frequented almost exclusively by homosexuals. Thursday nights are advertised as "military night" with Service members being offered free admission and reduced price on alcoholic beverages. The commander wants his military law enforcement agents to coordinate with the local police to conduct surveillance of the gay bar on "military night" and compile a list of all Service members frequenting the club. He proposes that military law enforcement agents trace license numbers of all vehicles parking in the club's parking lot that display DoD identification stickers.

**Issue:** Is this type of "stake-out" permitted under the new policy?

**Discussion:** No. The installation commander does not have credible information that a specific crime has been committed. Even if the commander had received reports that numerous military members had been observed entering and exiting the purported gay bar, absent evidence of a crime, there would be no basis to conduct a surveillance operation as requested by the installation commander.

The MCIO commander reminds the installation commander that military law enforcement agents currently receive copies of all arrest documents relating to lewd and lascivious behavior or other criminal conduct occurring in the local community, which is punishable under the UCMJ. *(Note: This exemplifies a key change to the DoD policy on investigations. Even though the military authorities have information of an off-post gay bar frequented by Service members, they may not conduct an investigation absent a specific allegation of a criminal act. Frequenting a gay bar is not a criminal act.)*
There is no legal impediment to either local civilian or military law enforcement activities investigating alleged criminal activity at public locations. In this case, however, where no specific criminal activity is alleged, surveillance would have had the singular purpose of actively seeking out possible homosexuals. This is contrary to the DoD Policy on Investigations of Sexual Misconduct, which specifically precludes any investigation solely to establish an individual’s sexual orientation. In addition, a fact-finding inquiry by the commander for purposes of administrative separation would not be appropriate, as going to a gay bar does not constitute credible information of proscribed homosexual conduct.

**Recommended for Investigators and Commanders**

8. **Situation:** A Service member walks into his barracks room and observes two other enlisted men engaging in an act of sodomy. He notifies his supervisor and the military law enforcement agents. The military law enforcement agents respond to the barracks where the two suspects are placed under apprehension and advised of their rights. During the course of the apprehension, the military law enforcement agents find, in plain view, photographs of one of the suspects engaging in anal sodomy with other Service members, some of whom are known to the supervisor. They also find a personal letter from the same suspect, addressed to another man and signed “All my love, Sugar.” These items are taken as evidence. The enlisted men’s commander calls the Military Criminal Investigative Organization and advises that the two enlisted men have admitted, under rights advisement, to committing an act of sodomy.

The commander wants the MCIO to continue the investigation by scouring every photograph and the letter to attempt to compile a list of other possible homosexual Service members. Once the list is compiled, the commander wants the MCIO to question both suspects in detail concerning whether they know if anyone on the list is a homosexual or has committed homosexual acts. The commander says he wants the MCIO to hunt out any and all homosexuals within his unit.

**Issues:** Should the MCIO continue the investigation after the suspects have admitted to the offense of sodomy? If yes, how should the investigation proceed? Should the MCIO comply with the commander’s direction to ferret out any homosexuals in the unit?
Discussion: The MCIO would not normally initiate an investigation of consensual adult private sexual conduct. However, in this case the act of sodomy occurred not in private but in a shared barracks room, and therefore may be investigated. Even so, under the new policy, the MCIO should continue its investigation into alleged homosexual conduct only so long as necessary to develop the relevant facts and circumstances surrounding the offense. In cases of consensual sodomy in which the Service members involved in the sexual act admit to the crime, the case will usually be closed and further investigation halted. The Service members would not be asked about other partners with whom they may have had sex, absent evidence of other criminal activity.

In this case, in the routine course of investigating the act of sodomy, the MCIO has discovered credible information of additional alleged criminal acts—the photographs. The MCIO should investigate the facts surrounding the acts depicted in the photos. This would include questioning the suspect depicted in the photos concerning his sexual partners shown in the photographs engaging in criminal activity. Other Service members in the pictures who are identified by the suspect may be questioned regarding the activities at issue.

As to the letter, the fact that it is written to another man and signed, “All my love, Sugar” may indicate another homosexual relationship involving one of two Service members found committing sodomy. Furthermore, if the MCIO were to follow the commander’s instructions and proceed to “hunt” for any and all homosexuals, they would probably scrutinize the letter closely to compile a list of other names referenced therein. This way they could question each and every possible homosexual and, in turn, compile additional lists of other homosexuals. Such an approach to investing possible incidents of homosexuality is expressly prohibited. At any given point in a criminal investigation involving homosexuality, the investigating agents must be able clearly and specifically to explain which criminal acts they are investigating and how the investigation relates to those criminal acts. No criminal investigations should be made into whether a person is homosexual, but only to investigate criminally proscribed acts. In this case, unless the letter has evidentiary value relating to one of the suspects, the MCIO should give the letter to the commander and not use it to launch investigations of any other persons. The commander may evaluate it for credible information and possible grounds for administrative discharge.
9. **Situation:** While investigating a fraud case involving “E-Mail” transmissions between two officers, the Military Criminal Investigative Organization obtains the commander’s authorization to search one of the suspect’s computer files stored on his personal computer at home. During the search of the computer, the MCIO agent notices that the suspect subscribes to a computer information service apparently catering to a homosexual and bisexual clientele. The agent scrolls through the directory and notes that the computer service has a directory entitled “Gay Military Service Members” and lists the names, ranks and addresses of approximately 400 persons. The agent contacts his supervisor and asks whether, based on this list which purports to identify approximately 400 homosexuals in the military, the MCIO should investigate any or all of the names listed for sodomy or other crimes involving homosexual acts.

**Issues:** Should the MCIO investigate anybody on the list for crimes involving homosexual acts? What should the MCIO do with the list?

**Discussion:** The MCIO should not initiate an investigation of any of the names listed on the computer file. There is no alleged crime to investigate. Names on a list are not credible information of any crimes. Not only do the files disclose nothing more than the names of purported homosexuals, as opposed to information of alleged homosexual acts, but the information is not “credible information” because nothing is known about how the information came to be stored in the computer file or the reliability of the information. The information is also not a basis for administrative separation and should not be referred to the individual’s commander. The MCIO should leave the file alone and not take further action.

**Recommended for Investigators and Commanders**

10. **Situation:** A Military Criminal Investigative Organization office has received several complaints from both military and civilian personnel concerning homosexual acts occurring in a restroom at one of the gymnasiums on a military installation. Several different witnesses have provided names of Service members and civilians who have been seen numerous times in the restroom performing primarily oral sodomy, but in several incidents anal intercourse. In addition to naming individuals, Service members working out at the gym have pro-
provided specific times during the day that appear to be the "busy times" for homosexual activity. The agent in charge of the MCIO office decides to send a covert MCIO agent into the restroom to investigate and develop further information concerning the allegations.

**Issue:** Can the MCIO investigate alleged acts of sodomy using undercover techniques?

**Discussion:** Yes. The eyewitness accounts of frequent incidents of criminal activity on the military installation warrants an investigation. Once they have credible information to establish that criminal acts are being committed, MCIOs may utilize any reasonable investigative technique to prove the elements of the crime.

In this case, the MCIO has knowledge of repeated and frequent acts of sodomy occurring at specific times at one of the installation gymnasiums. Use of an undercover agent would be appropriate in this instance. Care must be taken in authorizing the use of surveillance techniques, such as hidden audio and video surveillance, but in the circumstances recited here, such techniques would be permitted.

11. **Situation:** An enlisted member sees an officer known to him walk into a well-known homosexual bar. A couple of days later, the enlisted member sees the officer walking closely with another man late at night in a park. The enlisted member tells the officer that he knows he is a homosexual and that if the officer does not pay him $10,000, he will report him to the Military Criminal Investigative Organization. The officer does not say anything, and immediately goes to the MCIO to report that the enlisted member is trying to blackmail him. The MCIO does not ask if the officer is a homosexual because, under these circumstances, it would be improper for the MCIO to question him about his sexual orientation. However, the MCIO begins an investigation of the enlisted member's alleged extortion of the officer.

**Issues:** Was the MCIO's action proper? Should they have investigated the officer for being a homosexual?

**Discussion:** The officer provided credible information of alleged extortion by the enlisted member. There is no credible information that the officer has committed any homosexual act, let alone any criminal act. Therefore, the MCIO's approach to the investigation—investigating alleged criminal activity of the enlisted member, but not inquiring further the sexual orientation of the officer—is proper.

Scenarios 12 and 13 are recommended for personnel that deal with administrative separations. These scenarios illustrate the operation of the "rebuttable presumption" that arises when a Service mem-
member states that he or she is a homosexual. The scenarios are examples of how Administrative Discharge Boards might treat cases in which a Service member attempts to rebut the presumption; they do not establish any evidentiary standards or create any substantive or procedural rights.

12. **Situation:** An enlisted Service member states to his commanding officer that he is a homosexual. He also tells this to several other enlisted members. An Administrative Discharge Board is convened. At the Board hearing, the member does not dispute that he stated on several occasions that he is a homosexual. He promises, however, that he will not engage in any homosexual acts during the remainder of his term of enlistment. The member presents no other evidence.

**Issue:** How should the Board consider whether the Service member has successfully rebutted the presumption?

**Discussion:** A statement by a Service member that he or she is a homosexual creates a rebuttable presumption that the member engages in or has a propensity or intent to engage in homosexual acts. This means that the statement itself is evidence that the member engages in or is likely to engage in homosexual acts. If the member fails to demonstrate that he or she in fact does not engage in homosexual acts and is not likely to do so, he or she may be discharged.

In determining whether a Service member has successfully rebutted the presumption, a Board may consider, among other things: whether the member has engaged in homosexual acts; the member’s credibility; testimony from others about the member’s past conduct, character, and credibility; the nature and circumstances of the statement; and any other evidence relevant to whether the member is likely to engage in homosexual acts.

If the only evidence that the member presented was his promise that he would not engage in any homosexual acts during the remainder of his term of enlistment, the Board would determine whether that promise, in light of the Board’s assessment of the member’s credibility and the nature and circumstances of his statements that he was a homosexual, was sufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so. If the Board determines that the member’s evidence is insufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so, it would recommend that the member be separated. If, however, the Board determines that the member’s evidence is sufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so, it would recommend that the member be retained.
13. **Situation.** An officer tells his best friend, another officer, that he has recently come to terms with his sexuality and has decided that he is a homosexual. He says, however, that he has not engaged in any homosexual acts during his six years of military service, and that he will continue to refrain from such acts. Although the officer asks his friend not to tell anyone else about their conversation, the friend tells the commanding officer (CO). Having determined that the friend’s account of the officer’s statement constitutes credible evidence of homosexual conduct, the CO then asks the officer whether he told his friend that he is a homosexual. The officer answers, “Yes.”

At a Board of Inquiry hearing, the Service presents the testimony of the officer’s friend and the CO about the officer’s statements to them. There is no evidence that the officer engaged in any homosexual acts.

The officer presents testimony from several fellow officers and subordinate enlisted persons, all males. Those individuals testify that the officer has never stated or suggested to them that he is a homosexual and has never made any sexual advances or engaged in sexual innuendo toward them or anyone they know. They also state that the officer is an outstanding leader, that he is always truthful and conscientious, and that they believe he is fully capable of abiding by all Service regulations, including its restrictions on homosexual conduct. Finally, the officer himself testifies that, although he considers himself a homosexual, he has not engaged in any homosexual acts during his six years of service and that he intends to continue to refrain from such acts during the remainder of his term of service.

**Issue:** How should the Board consider whether the officer has successfully rebutted the presumption?

**Discussion:** The officer’s statement to his friend that he is a homosexual created a rebuttable presumption that the officer engages in or has the propensity or intent to engage in homosexual acts. The question for the Board is whether the officer’s evidence succeeded in rebutting that presumption by demonstrating that the officer in fact does not engage in homosexual acts and is unlikely to do so. In making that determination, the Board could consider, among other things: the evidence that the officer had not engaged in any homosexual acts; the officer’s credibility; the testimony from other Service members about the officer’s past conduct, character, and credibility; and the nature and circumstances of the officer’s statements to his friend and commanding officer. If the Board determines that this evidence demonstrated that the officer did not engage in homosexual acts and was not likely to do
so, it would find that the officer had rebutted the presumption and would recommend that he be retained. If, however, in weighing all the evidence, the Board determines that the officer had not rebutted the presumption, it would recommend separation.

The next scenario is recommended for personnel involved in the accession process.

14. **Situation:** An applicant comes into a recruiting station and says that he would like to enlist. Although, in accordance with DoD policy, the recruiter does not ask any questions about the applicant’s sexual orientation or sexual conduct, the applicant states, of his own accord: “I am a homosexual.”

**Issue:** What should the recruiter do after hearing the applicant’s statement?

**Discussion:** Applicants will not be asked or required to reveal their sexual orientation during the accession process. In addition, applicants will not be asked whether they have engaged in homosexual conduct unless independent evidence is received indicating that an applicant has engaged in such conduct or unless the applicant volunteers a statement that he is a homosexual or bisexual, or words to that effect.

If an applicant nevertheless comes into a recruiting office and volunteers a statement that he is a homosexual, that applicant will be rejected, unless he can demonstrate that he does not engage in homosexual acts and does not have an intent or propensity to do so. In this scenario, once the applicant said “I am a homosexual,” the recruiter could tell him that the Service assumes that the applicant’s statement means that he engages in homosexual acts or has a propensity or intent to do so. The recruiter could then ask the applicant if this is what he meant. If the applicant answers “Yes,” the applicant could be rejected.