# THE THIRTY-SECOND CHARLES L. DECKER LECTURE IN ADMINISTRATIVE AND CIVIL LAW[*]

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[*] This is an edited transcript of a lecture as delivered on February 27, 2014, by Stuart Delery to members of the staff and faculty, distinguished guests, and officers attending the 62d Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The lecture is in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and the 25th Judge Advocate General of the Army.

[1] Mr. Delery was sworn in as the Assistant Attorney General for the Civil Division on August 5, 2013, following confirmation by the U.S. Senate. He has led the Division since March 2012.

As the Assistant Attorney General, Mr. Delery oversees the largest litigating division in the Department of Justice. Each year, the Civil Division represents some 200 client agencies in approximately 50,000 different matters. The Civil Division represents the United States in legal challenges to congressional statutes, Administration policies, and federal agency actions. These cases concern federal benefit programs; commercial issues, such as contract disputes, banking, insurance, patents, and debt collection; international trade matters; enforcement of immigration laws; and civil and criminal violations of consumer protection laws. The Division protects the health and safety of Americans by defending cases related to national security and by enforcing protections for the safety of food and medicines. Finally, the Civil Division recovers billions of dollars for taxpayers through affirmative litigation, such as its enforcement of federal consumer-protection laws and its record-setting efforts under the False Claims Act, including cases targeting health care fraud, financial fraud, and fraud against the military. Since joining the Civil Division, Mr. Delery has focused on cases involving national security, health and safety, and financial fraud. He also co-chairs several working groups of the Financial Fraud Enforcement Task Force, which was established by President Obama in 2009. In addition, at the Attorney General's direction, Mr. Delery leads the team of Department lawyers coordinating the government-wide implementation of the Supreme Court's decision in *United States v. Windsor*, which struck down Section 3 of the Defense of Marriage Act (DOMA).

Mr. Delery joined the U.S. Department of Justice in January 2009 as Chief of Staff and Counselor to the Deputy Attorney General, and later served as Associate Deputy Attorney General. From August 2010 until March 2012, Mr. Delery served as Senior Counselor to the Attorney General. Before joining the Department of Justice, Mr. Delery was a partner in the Washington D.C. office of the law firm WilmerHale, where he was a member of the Litigation Department and the Appellate and Supreme Court Litigation Practice Group, and was Vice Chair of the firm's Securities Department. His practice focused on matters involving securities and other financial frauds, internal corporate investigations, and complex litigation in trial courts and on appeal presenting novel questions of constitutional and federal law.

Mr. Delery graduated from Yale Law School and the University of Virginia. He clerked for Justices Sandra Day O'Connor and Byron R. White of the U.S. Supreme Court, and for Chief Judge Gerald B. Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit.

Thank you, Lieutenant Colonel (LTC) [Luis] Rodriguez, for that warm introduction. And thank you, Colonel (COL) [Stuart] Risch, for inviting me here and for your leadership and service.

It is a distinct honor to be here. The Judge Advocate General's (JAG) School is truly a special place, educating and training some of the best and brightest in the military on law and leadership. And it is an even bigger honor to be a part of the legacy of Major General Decker, who not only brought the Army JAG School to Charlottesville but helped make it this incredible place to learn.

I am also pleased to be back in Charlottesville for another reason: I went to college here at University of Virginia (UVA), and I still have fond memories of my time here and a deep appreciation for the opportunities I had here to grapple with difficult questions.

It is more than a bit daunting to see the list of Decker lecturers who came before me, including a Supreme Court justice, other distinguished judges, a U.S. Senator, and Cabinet secretaries. I noted particularly that the Seventh Lecturer was Professor Henry Abraham of UVA, whose undergraduate government course I took. In fact, it was research for his excellent constitutional law and history class that first brought me to the law library here on North Grounds. And that class was one of the things that started me down the path that took me to law school and ultimately to public service.

This distinguished list makes me even more proud to be the first speaker from the Department of Justice (DOJ), and I welcome this opportunity to share a bit of who we are, the work we do—including our work with and on behalf of the military—and, most importantly, how and why we do it.

As LTC Rodriguez mentioned, I have been at the DOJ for five years, the last two as head of the Civil Division—the Justice Department's largest litigating component, with almost 1,000 lawyers and 400 support staff.

Here is a bit of history for you. The Division started in 1933 as something called the Claims Division. A 1951 article about the Claims Division in *The Kiplinger Magazine*, entitled "If You Sue The Government . . . ," opened with the following lines:

> If you ever get hit by a mail truck and want to collect damages—or if you want to sue your Uncle Sam for almost any other reason—the man you will be up against is a quiet-spoken, pleasant Oklahoman named Holmes Baldridge.

With due respect to my predecessor Mr. Baldridge, no article written about the Civil Division of the 21st century would begin with a case about a mail truck (although those cases still happen). In 1953, Attorney General Herbert Brownell changed the name of the Claims Division to the Civil Division and expanded its duties. Since then, the Division has grown exponentially in size and scope.

Now, I know that this seems like a short time compared to the history of the JAG Corps, which was created by a much more well-known figure, General George Washington, back in 1775. But there are many similarities between what the staff judge advocates and newly created brigade judge advocates in the audience do and what we do. In a sense, we share the hardest legal job: that of a generalist.

Think of the Civil Division like a large law firm with one client—the United States. Other parts of the Justice Department that litigate civil cases focus on specialized areas, like civil rights, or antitrust, or tax. In the Civil Division, we do just about everything else.

So when someone sues the government to challenge a new law or policy, like the health care law or these NSA's surveillance programs, we defend it. When the government is accused of breaching a contract or injuring someone, we defend it. When the government has a claim against someone, like a drug company accused of defrauding Medicare, we bring that suit. And when the government seeks to hold accountable those responsible for the financial crisis, and to protect the safety of the medicines we take and the food we eat, we litigate those cases.

It's an incredible mix. Nearly all aspects of federal government operations and domestic, foreign, and national security policy priorities find their way through our doors and across my desk at one time or another. And we have an annual docket of more than 50,000 active cases.

I have been told that the Civil Division is like the "Admin Law" section of the Army. If an issue is complicated, does not fit squarely in

another section, but you want it to be solved correctly and justly, it has a good chance of coming to us.

And it is through the lens of our work that we have had the privilege and the duty to learn about yours—the critical work of the military and of the intelligence community—the critical contribution of individual servicemembers. And the critical role of those who train and educate them, like so many of you here today.

The Attorney General has consistently identified "combating terrorism and other national security threats at home and abroad"—and using every available and appropriate tool to keep the American people safe—as the Department's highest priority. What many people don't know is that the Civil Division plays an important role in meeting this obligation. Of course, other parts of the DOJ—notably the Federal Bureau of Investigation, the National Security Division, and prosecutors in U.S. Attorney's offices—have critical counter-terrorism and counter-intelligence functions. But national security matters, including those directly involving the military, make up a significant part of the Civil Division's caseload.

For example, we defend cases brought by detainees challenging the legality of their detention at Guantanamo Bay or in Afghanistan; cases under the Freedom of Information Act seeking documents about national security programs and operations; and even cases seeking to enjoin ongoing military operations. We also represent individual current or former Department of Defense (DoD) officials—including some military officers—when they are sued in their personal capacities for things they have done in their service to the country.

We also use our affirmative authorities, including the False Claims Act, to stop those who not only defraud American taxpayers but also threaten the safety and security of our active duty servicemembers. These include cases ranging from overcharging for transporting military containers in Iraq and Afghanistan to selling dangerous and defective illumination used by the Army and Air Force for nighttime combat and for covert and search and rescue operations.

These cases are among our most important because we know that if we do our jobs well, it will leave you free to focus on your invaluable work protecting our Nation. They are among our most challenging, both because they often involve complex legal issues and because the

evidence often comes from a far-away battlefield or a classified document—obtained under circumstances that don't resemble anything you'd see on the TV show *CSI*. But these cases are also among our most rewarding because at the heart of each is a fundamental interest in protecting the Nation.

So, that is a brief overview of what the Civil Division does. But what I really want to share with you today is how we do what we do. The process. Both the process you see and the process you don't. What challenges we face. And what might surprise you about how we tackle many of these tough legal and policy issues.

How do we approach this privilege of representing the government in court? Like all lawyers, our touchstone is what is in the best interest of our client. And for us, the client is always the United States. But advancing the interests of the United States in court is a lot more complicated than representing a private individual or company.

On the one hand, the foundation of our legal system is the adversarial process. The taxpayers and the government acting on their behalf deserve a zealous advocate just like the parties on the other side. On the other hand, though, when your client is the United States, your goal is not just to win the case before you or to advance every argument you can.

As just one example, our cases usually involve the actions of a particular part of the government—like a cabinet agency. Certainly, we afford weight to the views of that agency, based on its expertise and institutional history, as we work to formulate the position of the United States in the case. But the agency that has been sued may not be the only agency—or even the principal agency—with an interest in the legal question.

This is one of the main reasons that the Attorney General has generally been given control of the federal government's litigation. Our obligations as DOJ lawyers include evaluating the long-term interests of the United States and conducting litigation accordingly—looking beyond the case at hand or what a particular official might prefer right now. And consistency is important. A single client agency's desires cannot and do not necessarily determine government-wide litigation interests.

The same is true as we decide when to take an appeal. When you are in private practice and your client loses, deciding whether to appeal is pretty straightforward. Indeed, most of the time, there's little downside to trying if the client can afford it. But the United States is a repeat player. We don't appeal every case we lose. And often, it is not a question of *whether* to appeal but *which case* to appeal to best pursue the legal issue on behalf of the government.

To inform these litigation judgments, we consult widely in what government lawyers call the "interagency"—a process deeply rooted in deep history. Indeed, one of the earliest examples involved a debate about the constitutionality of the First Bank of the United States. Then Secretary of State Thomas Jefferson argued against it; Treasury Secretary Alexander Hamilton argued in favor; and ultimately President Washington decided, agreeing with Hamilton. As a UVA alumnus, it is risky for me to side against Jefferson—particularly here in Charlottesville—but I think history and Supreme Court precedent have taught that Washington, informed by that vigorous debate, got this right.

So, on a daily basis, we find ourselves working across the government to ensure that many (often disagreeing) voices are heard—trying to forge consensus on the right path forward where we can, or preparing to make difficult decisions when consensus is not possible.

It is not the story often heard about government—that various components, often with differing points of view and mandates, are discussing, collaborating, and working through the hard questions. But it is the story I see come to life every day. And it is a process that we at the DOJ take seriously in representing the United States in court. We have to make sure that no issue is left unconsidered and that all stakeholders feel that they are heard. The result is legal debates of startlingly high quality, and ultimately better decision-making and credibility with the courts.

Now, this kind of collaboration and debate is even more critical in national security cases, where both security and liberty interests are at stake and the pressure to get it right is particularly high.

As you well know after more than a decade at war, we face real threats from those who would do us harm. At the same time, as the President and Attorney General have made clear, the rule of law is central to our national security efforts.

In 2009, at a speech at the National Archives in the presence of the Constitution and our other founding documents, the President emphasized that "[w]e uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset." The Attorney General similarly said that "[w]e do not have to choose between security and liberty—and we will not." And as Supreme Court Justice Sandra Day O'Connor put it a decade ago: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

But it is one thing to say in the abstract that we must balance these interests in protecting the country from very real threats and upholding our bedrock legal values. It is quite another to do the work of balancing them in practice. And one of the places where the government is called upon to do just that is in litigation concerning military matters.

Federal courts have long recognized that their role is appropriately limited in matters of national security and that the judgments of Congress and the President in that area are deserving of special deference. Article I gives Congress the authority to "provide for the common Defence," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." And of course, Article II makes the President the Commander-in-Chief. Because of these broad grants of authority, and the courts' own institutional limits, the Supreme Court has cautioned:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Indeed, just yesterday, in a case called *United States v. Apel*, the Supreme Court observed again that judges are not experts in military operations.

The result has been a set of doctrines that preserve a range of discretion for military decision-making. For example, Article III courts generally are limited in their ability to review what goes on in court-martial proceedings (except through ultimate Supreme Court review at the end of the military justice process). And servicemembers generally cannot sue their leaders for injuries they suffer in the course of their military service.

On the other hand, courts are called upon to enforce the Constitution's guarantees, and Congress and the executive branch must conduct military affairs subject to the Constitution's commands. The Supreme Court repeatedly has confirmed a role for the judiciary, emphasizing that "[w]e of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires . . . deference." As Justice O'Connor put it in the *Hamdi* case, "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

Let me give a few examples drawn from our Civil Division docket to illustrate how the DOJ and the courts have dealt with this balance.

First, detention. In the Civil Division, we are currently defending against approximately ninety habeas corpus petitions brought by detainees held at Guantánamo Bay, and that number is down from where it was a few years ago. The President has stated that it would be in the best interests of the United States to close the facility but that we will not release lawfully-detained individuals who endanger the American people. So, in the meantime, our job is to defend the legality of military detention there.

This is an area where courts have made clear that they have a role: the Supreme Court held in 2008 that the habeas right extends to DoD detainees at Guantánamo, and thus that courts may review the legality of the detention. Since that decision, the government advanced and the courts accepted a legal standard: in part, that an individual may be detained under the 2001 Authorization for Use of Military Force if he was part of al Qaida, the Taliban, or associated forces at the time of his capture. This standard was developed in collaboration with lawyers across the government, including JAG officers. It is informed by and consistent with the laws of war.

While the courts test the military's authority to detain individuals, they have also recognized that their meaningful judicial review must take account of these unique circumstances. The evidence that we present in these cases often comes from a battlefield half a world away. Courts have agreed with the government on a number of procedural issues, such as the admissibility of hearsay evidence. And they have emphasized that the determination whether a person is part of al Qaida should be made on a case-by-case basis using a functional approach.

Beyond Guantánamo, we have successfully defended against extending habeas rights to detainees held in Afghanistan, an active theatre of war where, as many of you well know, the DoD provides detainees robust review.

Second, use of force. Over the years, courts have resisted attempts by individuals (including individual members of Congress) to challenge decisions by the President to launch military operations, whether in Vietnam or Somalia or Libya. In a recent example, in December 2010, the U.S. District Court for the District of Columbia dismissed a suit by the father of Anwar al-Aulaqi (a U.S. citizen who the Department of the Treasury had designated a global terrorist) in which he claimed that his son was a potential target of attack and sought to have the court intervene in and regulate the decisions that might lead to such an attack. While issues surrounding the government's use of lethal force are undoubtedly of the utmost public concern, the court agreed with the Department that (among other things) these types of claims pose the complex policy questions concerning the use of force overseas that courts are not well-suited to resolve.

But the fact that the courts may not be the place to address these critical issues does not mean that the executive branch is free from oversight. Indeed, the President explained last year, "Not only did Congress authorize the use of force in the 2001 AUMF, it is briefed on every strike that America takes" outside of Iraq and Afghanistan.

Third, transparency. It is no surprise that Americans want to know more about what their government does in their defense. At the same time, some activities are properly classified for a reason: they are only effective if our adversaries don't know about them. The President has made clear that we must craft an appropriate balance between transparency and national security.

It is in this context that the Civil Division defends lawsuits under the Freedom of Information Act, as well as other types of cases, that seek information related to some of the Nation's most closely guarded secrets. In these matters, the litigators do not control the decisions about classification. Instead, the responsible officials—often at the DoD—carefully analyze the various interests at stake and decide what information can be shared publicly and what must remain classified, consistent with national security and foreign policy considerations. The Civil Division's job is to defend those determinations in court.

One legal doctrine that protects sensitive national security information in civil litigation is the state-secrets privilege. The Attorney General established a policy in 2009 to provide a more formal review within the Department prior to its use. The DOJ will defend an assertion of the privilege in court only if disclosure of information reasonably could be expected to cause significant harm to national security. We will attempt to allow cases or claims to proceed whenever possible. We will never defend an assertion of the privilege to cover up official wrongdoing or to prevent embarrassment to government officials or departments. And each assertion of the state-secrets privilege is subject to a rigorous, formal process that requires serious consideration by officials at the highest levels of the DOJ—and of the agencies whose information is at issue.

All of these situations are complicated. All of the legal questions are difficult. And all of these cases require the DOJ litigators to consult widely with DoD and other national security agencies to arrive at a position that best furthers the interests of the United States.

As I have said, most of our time in the Civil Division is spent litigating on behalf of the United States or advising on potential litigation. But sometimes we are pressed into service in unusual ways—but where interagency collaboration is still invaluable. I would like to turn briefly to one of those: our role in implementing the Supreme Court's decision last year in *United States v. Windsor*, where the legal and policy questions have an immediate, tangible impact on the lives of many Americans, including servicemembers and their families.

To recap: Section 3 of the Defense of Marriage Act defined marriage for federal purposes as between individuals of the opposite sex. That meant federal benefits and obligations that are based on marriage were not available to same-sex married couples. Consistent with the DOJ's

general practice of defending duly-enacted statutes, the Civil Division defended Section 3 of DOMA when it was challenged.

However, in 2011, the President and the Attorney General concluded that classifications based on sexual orientation warrant heightened constitutional scrutiny—and that Section 3, as applied to same-sex married couples, was unconstitutional. The President instructed the DOJ not to defend Section 3 in such cases.

The issue ended up before the Supreme Court, which ruled in *Windsor* that Section 3 was unconstitutional. That landmark ruling meant that thousands of same-sex married couples would be treated with the same dignity as all other married couples under federal law—a powerful step forward in the fight for equal justice under the law.

But the Supreme Court decision did not just flip a switch. The decision had to be made real; the words on the page had to be turned into action so that married couples receive the critical benefits to which they are entitled. So the President directed the Attorney General to oversee government-wide implementation of the decision and emphasized that it be carried out swiftly and smoothly. The Attorney General then asked me to lead the effort to ensure that all government agencies complied with the decision as quickly and carefully as possible.

Since June of last year, I've been privileged to lead that interagency process. We established a team at the DOJ, with attorneys responsible for outreach to agencies across the government—and there are a lot—to work with their general counsels and policy staff to review relevant statutes, regulations, and policy statements, and to decide what each agency needed to do to comply with *Windsor*.

Of course, there have been significant challenges. The task is enormous, with more than a thousand statutory provisions and regulations to be carefully analyzed. Moreover, the task is government-wide, which means working with innumerable institutional cultures and, often, learning the language of entirely foreign areas of law and policy. And, perhaps most importantly, the task requires us to ensure that same-sex marriages are recognized appropriately, not just in policy statements on paper in Washington but when individuals walk into federal offices across the country.

Despite these challenges, we have made a lot of progress in a relatively short period of time. But few have worked as quickly as the DoD. As you well know, yours is an enormous agency with many regulations and rules implicated by *Windsor* that needed to be identified, reviewed, and updated. But with the full support of the Secretary of Defense, we worked closely with the Office of the General Counsel and the Acting Undersecretary for Personnel and Readiness to make quick work of it.

Last August, the Secretary of Defense issued a memorandum to all military departments stating that, consistent with the Supreme Court's decision, "[i]t is now the Department's policy to treat all married military personnel equally." The Secretary went on to outline a new policy allowing military personnel in same-sex relationships—but stationed in jurisdictions where they could *not* marry—to take administrative leave to travel to another jurisdiction and get married.

That decision was a demonstration of the DoD's supreme commitment to "taking care of its people" and ensuring that every person who puts on a uniform is treated the same—as are their loved ones. This echoes the principled position behind the repeal of "Don't Ask, Don't Tell" in 2010: that those "who volunteer to serve our Nation . . . should be treated with equal dignity and respect, regardless of their sexual orientation."

In September 2013, following Secretary of Defense's policy announcement and, just a few short months after the Supreme Court's decision, the DoD extended hundreds of benefits to same-sex spouses. Principal among them, and perhaps the truest example of the DoD's commitment to implementing the promise of the Court's ruling, was the decision to issue DoD identification cards equally to same-sex and opposite-sex spouses. I don't have to tell you that the identification card is the gateway to DoD services for dependents, providing family members base access, legal and financial counseling, some health benefits, all Morale, Welfare, and Recreation privileges, and so much else. One could say it makes you a part of the DoD family.

Unfortunately, many years ago, the Defense Enrollment Eligibility Reporting System was programmed to prevent issuance of an identification card to a spouse of the same sex. While the DoD has always been the global leader in technological innovation in combat and intelligence capabilities, I'm told that, like the DOJ, when it comes to

information-technology fixes for administrative systems, things proceed at a much more leisurely pace. But, in this situation, the DoD developed a technological fix for the identification card system in less than six months, and rolled it out at every American military base worldwide simultaneously.

In doing so, the DoD continued its commitment that, while you are serving, you do not have to worry about your family back home. And its commitment to ensuring that all servicemembers should be treated as equally as possible.

This implementation process unfolded in similar fashion across the federal government and is a tribute to the power of collaboration and a demonstration of the ability of government to act quickly and efficiently. So many agencies, like the DoD, rolled up their sleeves and dug in—to make sure that the promise of the *Windsor* decision becomes real.

Our successes in all of these areas would not have been possible without the tremendous cooperation and assistance we have received from our DoD colleagues. This partnership between the DOJ and our Armed Services is highlighted by the fact that, for more than twenty years, the Army has detailed one of its own to work in and with the Civil Division as a Fellow, including the current Judge Advocate General of the U.S. Army, General Flora Darpino, who served as the Fellow in 2004–2005, and later was the Commander of this school, as well as your own Colonel Sharon Riley, who followed General Darpino as a Fellow and is currently head of the Legal Center here. Our current Fellow from the Army War College, Colonel Tony Febbo (who is here with us today), has been a tremendous asset and wonderful colleague this year.

I would like to close with a final observation: it is critical for those of us on the civilian side of the government who deal with the military to do more to understand its culture and traditions, its unique needs and pressures. The Supreme Court has noted that the military is "by necessity, a specialized society separate from civilian society," and that it has, "by necessity, developed laws and traditions of its own during its long history."

This has certainly been true over the past decade, as our all-volunteer force has deployed repeatedly to fight two wars. I have often thought about a statement that former Secretary Gates made a few years ago. He said,

> [W]hatever their fond sentiments for men and women in uniform, for most Americans the wars remain an abstraction. A distant and unpleasant series of news items that does not affect them personally. Even after 9/11 . . . for a growing number of Americans, service in the military, no matter how laudable, has become something for other people to do.

This issue is an important issue for us to confront in society as a whole. But it has special resonance for government lawyers if we are to be effective in doing our job to represent the interests of our men and women in uniform.

And that is why I believe that interactions between the military and civilian leaders at the DoD and those of us at the DOJ are so important. Given the role we play in defending actions of national security agencies, including the military and intelligence community, we need to bridge any divide between DOJ lawyers and our clients. It is why we value the Army Fellows we have in the Civil Division each year. And it is why I appreciate the invitation to be here today.

Thank you very much, and I would be pleased to take some questions from this very distinguished group.