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IMMIGRATION CHALLENGES FOR OUR CITIES

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Honorable Alberto R. Gonzales
Waller Lansden Dortch & Davis, LLP
511 Union Street, Suite 2700
Nashville, TN 37219

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IMMIGRATION CHALLENGES FOR OUR CITIES

I am often asked, "What's it like?"

What is it like to drive your car through four security checkpoints every day to go to work in the White House?

What is it like to have walk-in privileges into the Oval Office and advise the President of the United States on a Supreme Court nominee?

What is it like to be in the White House Situation Room with the National Security Council and witness the President give the order to General Tommy Franks to commence Operation Iraqi Freedom?

What is it like? It is exciting, rewarding, challenging and humbling.

People travel from all over the world to see the White House, the most recognizable 18 acres in the world – an American symbol, like the American flag, of hope and opportunity.

I have yet to meet an American who is not in awe when they step into the White House for the first time. It takes your breath away, because history is made there every day by the decisions and pronouncements of the leader of the free world.

Whenever I ask a West Wing visitor what made the greatest impression, some say the Oval Office of course, others the Rose Garden, but most visitors confess it is watching Marine One take off and land on the South Lawn. You can hear the President's helicopter approach from a distance; however, because of trees, you can't see it until it appears suddenly just above the Washington Monument from the south as it glides toward its landing. The noise is deafening – heard from the farthest corner of the 18-acre compound.

Normally, there is an appreciative group of visitors on the South Lawn fortunate to have received an invitation to view a Marine One movement, and there is a bank of news cameras and reporters to capture historic moments. On the evening of September 11, 2001 it was different.

Everyone had been ordered off the grounds except for a single cameraman to record the arrival of the President and a circle of agents in black uniforms with machine guns forming a protective perimeter as Marine One landed that historic day. I stood on the Oval Office portico watching and ready to greet the President. This was an extraordinary moment in the history of our country, and extraordinary in my own life. At that moment, on that day, my role as White House counsel was transformed from a legal counsel to a President to an advisor for a wartime Commander in Chief.

During my service at the White House and the Justice Department, much of my personal focus as a lawyer was on protecting our country and issues relating to terrorism. But there were other important issues to address - many of which remain today:

- how do we stop Iran from becoming a nuclear power?

- how do we deal with the growing influence of China?
- what should we do to get more Americans back to work?
- how do we sustain the hard fought gains in Afghanistan and Iraq and continue the momentum of the Arab spring?
- what role should we play in dealing with Europe's debt crisis?
- how will we resolve our own deficit problems?
- when and how will our military be deployed and used around the world?
- how do we reduce our dependency on foreign oil and lower the price of gasoline?

We are reminded every day of these incredible challenges through the coverage of the ongoing presidential campaigns. Today, I want to share some thoughts with you about another important challenge - immigration, an issue that I believe deserves special attention in a post 911 world and during a time of a economic uncertainty.

I spoke earlier about our efforts to protect America. In the decade since the 911 attacks, our government has spent hundreds of millions of dollars securing the different modes of transportation in our country . . . but we cannot have true security if we do not secure our borders . . . and this requires an effective comprehensive immigration policy. Admittedly, security on our border with Mexico has improved in the past decade, but it remains inadequate in a post 9/11 world when we should know who is in our country and why. Border security against gang members and drug traffickers has also been elusive, and we have failed at a spectacular level in preventing the illegal flow of guns from the United States into Mexico.

Those who resist tougher border security measures point to recent numbers that indicate illegal immigration has slowed dramatically recently – some argue it has actually declined -- and they claim there is no proof that foreign terrorists want to use our southern border as a gateway into the United States. The real threat, they say, is from people already in America. Even so, we cannot discount the vulnerability of our southern border.

During my first visit to Mexico as Attorney General in 2005, I met with top Mexican intelligence and law enforcement officials who confessed their nightmare scenario was a member of al Qaeda crossing illegally from Mexico to the United States and orchestrating another 9/11 scale attack. They believed such an event would affect dramatically the relationship between our two countries, forcing the United States to take protective measures restricting travel and trade – steps that would hurt the Mexican economy. I am not suggesting that immigrants crossing illegally into the United States are terrorists. I am saying Mexican officials worry about border security . . . and our government should as well.

Like most Americans, I am a descendant of immigrants and a grateful beneficiary of the opportunities available to our nation's citizens. My grandparents came from Mexico in the early 20th century seeking a better life, and they found it working in the fields and farms of Texas.

Diversity is one of the great strengths of the United States – diversity by the migration of ethnicities, culture, and ideas.

However, there is almost universal agreement that our immigration process is broken and that our immigration strategy is, at best, outdated and, at worse, ineffective. Every sovereign nation has the authority to determine who can be a citizen and who can lawfully be present within its borders. Today, many Americans believe our federal government has abandoned that responsibility.

Achieving the right immigration policy has been difficult because it impacts families, our foreign policy, national security, and our economy . . . it affects the very essence of who we are as a country. President George W. Bush understood the responsibility of the federal government to address this challenge, but he was unsuccessful persuading a Republican controlled Congress to do its job.

State and local governments have responded differently to the failure of our current President and the Congress to act. Concerned about the financial drain from providing basic services to undocumented immigrants, some governments have tried to require service providers - even schools and hospitals - to maintain records of the cost of services provided to undocumented immigrants. Others have tried to require a notation on a birth certificate that a child is born to undocumented immigrants. Still others have attempted to deny certain privileges - such as in-state tuition - to children of undocumented immigrants.

The most publicly watched efforts relate to state and local government action to enforce federal immigration law. The Obama Administration went to court to stop Arizona from enforcing immigration law through Arizona SB 1070. SB 1070 required state and local law enforcement to make a reasonable attempt to determine the immigration status of a person during routine stops, detentions or arrests if "reasonable suspicion exists that the person is an alien who is unlawfully present in the United States."[1] Earlier this year, the U.S. Supreme Court sided with the federal government, basically holding that Congress had pre-empted the field of immigration.[2] The Supreme Court did allow one provision of the Arizona law to stand; however, the decision left little room for states to operate following the Court's finding of federal preemption.

Opposition from local government leaders to the presence of undocumented immigrants has certainly not been universal. To the contrary, certain states and cities have been proactive in passing measures to make life easier for undocumented immigrants. Some have resisted pressure to help the federal government enforce immigration laws. Since it appears unlikely that the federal government will deal with immigration in a comprehensive manner any time soon, the repercussions of a failed federal policy will likely continue to burden cities for the foreseeable future. Solutions - to the extent there are any - for the challenges of dealing with undocumented immigrants will depend for the present upon state and local leaders.

To properly assess the legality of any law, ordinance or regulation with respect to undocumented immigrants, a municipal lawyer or city official must first understand the degree to

[1] SB 1070 § 2B.
[2] *Arizona v. United States*, 567 U.S. ___ (2012)

which undocumented immigrants have constitutional rights, and whether they are entitled as a matter of right to certain local services otherwise available to citizens.

The short answer is that undocumented immigrants do not enjoy all of the rights granted to citizens by the U.S. Constitution, such as the right to vote or the right to bear arms. As we know, even U.S. citizens can forfeit these fundamental rights if they are convicted of a felony. Additionally, an undocumented immigrant has no constitutional right of entry into the United States. However, once that immigrant gains entry, no matter the method, then certain constitutional rights do attach. Courts have ruled that when within the borders of the United States, undocumented immigrants enjoy many of the same fundamental, undeniable constitutional rights granted to citizens - particularly in our criminal justice system. The equal protection clause disables any state or municipality from depriving not merely a citizen of the United States, but any person, of life, liberty, or property without due process of law or from denying to that person the equal protection of the laws of the state. In other words, undocumented immigrants are entitled to their day in court.

Consequently, city policy must both accommodate the values and desires of city residents, as well as satisfy the legal rights of undocumented immigrants. Governments are not unrestrained in what they choose to do with undocumented immigrants, nor are governments required to provide them all the benefits and privileges enjoyed by American citizens.

Assuming that some rights exist, let's examine briefly several areas in which municipal power and responsibility collide with the rights of undocumented immigrants. Before doing so, however, it is important to remember that there is great uncertainty about the size of the undocumented immigrant population and the burden their presence imposes upon state and local governments. No one knows with certainty the costs of various policies. What is certain is that government measures dealing with undocumented immigrants usually have hidden costs that cannot be ignored, such as adverse publicity, public demonstrations and litigation.

The first area of contention relates to attempts to restrict benefits or restrict conduct, beginning with "English Only" laws.[3] These ordinances seek to make English the "official" or the only language that people may speak. It is beyond argument that English is the dominant and preferred language in this country. Virtually all business and governance is facilitated through the English language. Proficiency in English represents freedom, and affords more opportunity in America. However, in a global world, I question the wisdom of a policy that discourages efforts to promote fluency in multiple languages.

"English only" laws may appeal to our sense of tradition and history. However, such laws will likely be subject to attack under the First Amendment right to petition government and express views and opinions,[4] and under the Due Process Clause of the Fourteenth Amendment.[5] Opponents will likely argue that such laws frustrate, if not prevent, entirely those who cannot speak English from communicating and asserting their fundamental rights. These types of laws

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[3] See *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, by Kristina M. Campbell, 84 Denv. U.L. Review 1041 (2006-2007) for a good discussion of potential challenges to local ordinances. Various paragraphs in this paper are based on this article.

[4] See, e.g. *McDonald v. Smith*, 472 U.S. 479 (1985).

[5] See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

are also subject to attack under Title VI of the Civil Rights Act of 1964. Finally, these ordinances may have the unintended consequence of making communities less safe. An "English Only" ordinance may intimidate non-English speakers from coming forward and reporting crime or cooperating with local police.

To further discourage undocumented immigrants from settling in their city, some city leaders have attempted to restrict business permits, grants and contracts to private businesses who hire undocumented immigrants. Because the Immigration Naturalization Act (INA) arguably includes a general prohibition against hiring, or continued employment of illegal aliens, opponents will likely challenge such restrictions arguing the INA expressly preempts any state or local law imposing sanctions on businesses who employ undocumented immigrants.

Relatedly, certain cities have explored the possibility of forbidding property owners from renting or leasing property to illegal immigrants. Opponents will likely challenge such ordinances claiming they violate the Fair Housing Act. Such ordinances may also be challenged as being unenforceable and void for vagueness. Additionally, they may have the unintended result of encouraging racial and ethnic profiling.

As I alluded to earlier, it is virtually impossible to know with certainty how much money is spent on city services to undocumented immigrants. We know they pay some taxes (sales taxes on purchases) that can be offset against the costs of services. However, many experts agree that the cost of providing services to undocumented immigrants is a net loss for cities. Undocumented immigrants are not entitled to an education beyond high school. Cities and towns, however, have no choice but to provide for a basic education for undocumented immigrant children if they are providing it for the children of citizens. In 1982, the Supreme Court in *Pyler v. Doe*[6] imposed a duty upon the states to provide public education to students K-12, regardless of their immigration status. This cost, including basic instruction, English as a second language and capital expenditures, is estimated to be over $100 billion nationwide.

Contrary to popular myth, undocumented immigrants are generally ineligible to receive many welfare benefits. However, much of the concern over the growing number of undocumented immigrants flows from the rising costs of providing emergency medical services. The Emergency Medical Treatment and Active Labor Act of 1986 obligates Medicaid participating hospitals that have emergency departments to provide emergency medical care to individuals who have an emergency, without regard to the individual's ability to pay. So this is a cost that the cities and counties will continue to bear for services provided by their hospitals.

A second common area of controversy relates to agreements between the federal government with cities and counties to help enforce federal immigration law. There are approximately 200,000 people employed at the Department of Homeland Security and 120,000 people employed at the Department of Justice. Those numbers pale in comparison to the millions of local and state law enforcement officers. For this reason, as many know, the federal government often solicits the help of local law enforcement in enforcing federal immigration laws through a 287(g) delegation of authority agreement with Immigration and Customs

[6] *Plyler v. Doe*, 457 U.S. 202 (1982).

Enforcement (ICE).[7] As of this writing, ICE has 68 active Memorandum of Agreements in 24 states. Typically under these arrangements, the federal government provides training (four-week course), resources and money; and the cities provide manpower, jails and their street knowledge of the community. These kinds of arrangements have not been without controversy. Many city police chiefs have no interest in helping federal officials enforce our federal immigration laws. First, many would prefer to use their own limited resources to investigate and arrest drug dealers, car thieves, bank robbers, and murderers, not hard working families here without papers. Second, many have found that undocumented immigrants are less likely to cooperate with local police and report crime if they are suspicious the local police is working with the federal government in enforcing immigration laws. Since there is no legal obligation to cooperate with the federal government, many cities with large undocumented populations are now choosing not to participate in this program.

A third common area of contention relates to city-issued identification cards. Part of the challenge for any undocumented immigrant to exist comfortably in your city is the ability to access places, to travel, and to make purchases. These are all facilitated by having some form of identification. In many areas across the United States, cities are issuing municipal ID cards for that purpose.[8] In communities like Trenton, San Francisco, New Haven and Princeton, with this card undocumented immigrants can open a bank account, apply for city services at the hospital, check out library books, and access the city pool or beach. While municipal ID cards do not grant legal residency or the right to work, these cards have made life much easier for undocumented immigrants to live and function in America. It allows them to come out of the shadows. Not surprisingly, this has proven controversial. A city issued card may make it easier to get a driver's license and other forms of identification. Americans, who believe our government should be doing more to crack down on illegal immigration, see the municipal ID card as both an additional inducement for more illegal immigration, and as a reward for past law breaking.

A fourth and final area of discussion is sanctuary cities, or municipalities that provide sanctuary or safe havens to undocumented immigrants. The typical scenario includes a city leadership that may be sympathetic to the needs of the federal government, but unwilling to help. They decide to implement a policy that no city services will be denied to undocumented immigrants. Police officers are directed not to check on the basis of citizenship, nor to enforce immigration laws nor cooperate with federal immigration officials. More than 70 cities and states have adopted policies to protect undocumented immigrants.[9]

I believe in the power of local and state governments to make local decisions, and in the right of the people to hold local officials accountable for those decisions. However, many cities intent on flexing their muscle relative to immigration policy also receive federal dollars. Sometimes those federal dollars are tied to costs incurred by cities for housing undocumented immigrants. Some cities have decided not to turn over these undocumented immigrants to federal officials, raising the possibility the federal government will cut off funding, and that it will sue the city for control of undocumented immigrants in its custody.

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[7] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 added Section 287(g), performance of immigration officer functions by state officers and employees to the INA.

[8] "*In Trenton, Issuing IDs for Illegal Immigrants*," The New York Times, www.NYTimes.com, May 17, 2010.

[9] For list of cities, see "*The Original List of Sanctuary Cities, USA*," http://www.ojpac.org/sanctuary.asp.

An example is Cook County, Illinois.[10] Cook County officials elected recently to stop providing information to federal officials about undocumented immigrants in the county jails. The Director of U.S. Immigration and Customs Enforcement has asked the Justice Department to take legal action against Cook County to force it to turn over illegal immigrants for removal. Not surprisingly, some federal officials have questioned why the federal government is sending federal dollars to a city that does not cooperate with the federal government. It remains to be seen whether the federal government will sue, whether it will stop awarding federal dollars to Cook County, and whether this is the first skirmish in a broader war between the federal and local governments.

In closing, we have major challenges in this country. Some should rightly be resolved at the local level - others, however, can only be addressed by the federal government. I worry whether we as a country have the discipline and political will to do what is necessary with respect to immigration reform. I worry that we forget we are a nation of immigrants and that some seem incapable of discussing this issue in a compassionate and respectful tone. I worry that we forget sometimes that we are America. Then I look at my sons and think about my experiences, and I am reminded that I am the child of a Mexican carpenter and cotton picker. My father did not go to school beyond the second grade, and yet I served as the Attorney General of the United States.

We live in a country where dreams still come true. For this and many other reasons, America is worth fighting for; she is worth dying for. She is worth the sacrifice. My public service was hard; it was difficult on my family. But we would do it again in a heartbeat, because we love America.

I know what is possible here – faith and freedom – you and I share the same vision, the same hope, the same love for our country. I know you have the same hope for your neighborhood, for your community. Working together, we can keep our Republic strong.

You have honored me with your invitation to be with you today. Thank you all for your service. As a former government lawyer, I know the difficulty and sensitivity of your work in the public arena. And as a former government official, I know the value of a good lawyer.

Thank you, and God bless the United States of America.

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[10] *Sanctuary Cities May Be Facing Legal Action*, Washington Times, http://www.washingtontimes.com/news/2012/jul/10/sanctuary-cities-may-be-facing-legal-action

Alberto R. Gonzales



Alberto R. Gonzales served as the 80th Attorney General of the United States from 2005-2007. President George W. Bush appointed Judge Gonzales to lead the Department of Justice, stating that "Al has been a model of courage and character to his fellow citizens. I've witnessed his integrity, his decency, his deep dedication to the cause of justice. Now he will advance that cause as the Attorney General and ensure that more Americans have the opportunity to achieve their dreams."

Before entering public service, Judge Gonzales practiced business law for 13 years at the Houston law firm of Vinson & Elkins. In 1995, he resigned his law partnership to serve as General Counsel to the Governor of Texas. After three years, the Governor appointed Judge Gonzales as Texas Secretary of State. He was appointed to the Texas Supreme Court in 1999 and elected by the citizens of Texas to serve a full six-year term in the November 2000 general election. He served in the White House as Counsel to the President from 2001-2005.

Judge Gonzales is an Air Force veteran, and attended the U.S. Air Force Academy. He is a graduate of Rice University and Harvard Law School. Presently he holds the Doyle Rogers Distinguished Chair of Law at Belmont University and he is Counsel at the Nashville law firm of Waller Lansden.