

"In Pursuit of Justice"



PREPARED REMARKS BY FORMER ATTORNEY GENERAL ALBERTO R. GONZALES,

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Our People

- Alberto R. Gonzales

Legal Services

- Government Investigations
- Crisis Management
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I am often asked, "What is it like?"

What is it like to drive your car through four Secret Service 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 situation room with the National Security Council and witness the President give the order to General Tommy Franks to commence Operation Iraqi Freedom in 2003?

What is it like? Every day in America's service produces a treasure trove of memories. It is special, it is exciting, and to borrow a phrase from my sons, it is incredibly cool!

People travel from all over the world to see the White House just a few blocks down the street from here, 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 Marine One approach from a distance; however, because of trees you cannot see the majestic helicopter 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 a fortunate group of visitors on the South Lawn to view a Marine One movement, and 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 advisor to a president to an advisor for a wartime Commander in Chief. For the next three years, most of my service in the White House – most of my personal attention, most of my legal advice-related to the war on terror.

In 2005, I was appointed Attorney General, and I continued focusing on terrorism issues. However, I also directed the Department to step up our efforts to prosecute child predators and gangs, and to stem the tide of violent crime, public corruption and fraud. During my tenure, the Department also increased investigations under the Foreign Corrupt Practices Act (FCPA), which as this audience knows was passed by Congress in 1977 in essence to outlaw the payment by U.S. companies of foreign bribes to obtain and retain business.

President Bush supported the FCPA work of the Justice Department and the SEC. He was, and remains, a champion of less government regulation on businesses, believing this would encourage creative entrepreneurs and companies to invest capital and take risks. But, he also understood the importance of enforcing the rule of law in order to raise the confidence of the business community that the federal government understood the necessity of consistency and predictability in law enforcement decisions. In the last two decades, there has been an explosion of American investment and business in foreign countries in which corruption and bribes are a routine part of doing business. An ironic result of using the FCPA to try to level the playing field among U.S. companies doing business abroad has been the complaint that the

statute has placed U.S. companies at a disadvantage with respect to their foreign competitors.

I will address this issue of competitiveness in a moment and explain why I support changes to the law. But first a snapshot of where we are today. Because of the increased American business activity overseas, we made a conscious decision during the Bush Administration to allocate more time and resources to FCPA enforcement. And we quickly discovered two important truths. One, the FCPA gives prosecutors tremendous discretion in defining its scope, and, thus, tremendous leverage in charging decisions. Two, corporations do not like to be investigated by the Justice Department or the SEC for violations of the FCPA. It's bad for business. So, these cases often settled, charges were dropped in exchange for either non-prosecution or deferred prosecution agreements. In an ironic twist, the more that American companies elect to settle and not force the DOJ to defend its aggressive interpretation of the Act, the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions.

Because there are provisions in the Act that are undefined or not well defined, there is great uncertainty, thus great risks to a company that elects to fight charges. In 2008, based on investigations during my tenure, and those of my predecessor, John Ashcroft, and my successor, Mike Mukasey, DOJ began to string together a series of FCPA triumphs against companies like Siemens (\$450 million), KRB/Halliburton (\$579 million), and BAE Systems (\$400 million).

It is no secret that in 2008, the Department began to target individuals, in addition to targeting parent companies and their subsidiaries, believing that these types of prosecutions would be most effective to discourage violations of the FCPA. Evidence of the new strategy was quickly apparent. Individual indictments rose from six in 2006 to 48 in 2010. However, because individual defendants are less likely than corporate defendants to settle or plead if it means jail time, the Department found itself going to trial in these cases, and this is when these prosecutions ran into trouble. -- Three examples:

Based on the testimony of a cooperating witness, twenty two individuals were indicted in 2010 in a government sting operation known as the Las Vegas "Shot Show" case. The trials were a disaster for DOJ. The first resulted in a hung jury, the second resulted in the dismissal of a conspiracy charge and outright acquittal of one defendant; and the third led to two at the close of the government's case, followed by two more acquittals by jury and another hung jury for the remaining defendants. In the end, the government not only dismissed pending indictments against those who had not yet gone to trial, but shortly thereafter also agreed to vacate the convictions of those who had already plead guilty in the case. Losses at trial are uncommon, but not rare. What is virtually unheard of is for the government to abandon a case in such a comprehensive fashion. This underscores what a tremendous failure this was for the

government, and suggests that DOJ will be hesitant to rely on a cooperating witness in the near future without a thorough vetting to ensure that a sufficient quantum of independent evidence exists to support a conviction in the event the jury finds the cooperator wholly untrustworthy.

During the same period, the Department suffered another blow in a Los Angeles case where DOJ charged Lindsey Manufacturing and two of its senior officers with violating the FCPA in connection with efforts to secure contracts from the Mexican state-owned utility. The government obtained convictions for all three defendants in May 2011. However, the defendants filed post-trial motions seeking to vacate their convictions, claiming the government had engaged in a pattern of misconduct. The court agreed to vacate the convictions and dismissed the indictment with prejudice.

Finally, in January 2012, the government embarked on the trial of John O'Shea in Houston. The alleged bribes in this case were paid via a questionable intermediary. When the government rested its case, the defendant filed a motion for judgment of acquittal. In granting the motion, the judge disparaged the government's case.

These unfavorable outcomes caused speculation the government may either abandon its new strategy of targeting individuals and refocus on its corporate targets or scale back its FCPA efforts altogether. That has not happened, nor do I believe it will happen for three reasons. One, the law enforcement priorities of the Department of Justice reflect those of the President and the Attorney General. If they want to highlight corporate wrong doing, the Department - and the SEC for that matter - will continue to push these prosecutions. From my perspective, this Administration has not been shy about taking on big business. Look at the current policies in areas such as antitrust, tax and environmental enforcement. I am not commenting on the wisdom of the policies, just making the point that this Administration is not likely to give corporations the benefit of the doubt when it comes to FCPA investigations.

The second reason that the FCPA prosecution strategy is not likely to change is because the problems that plagued some of these cases are problems that either have been or can be corrected. While every setback is painful, they can also be a learning experience. When I was at Justice, the prosecution of FCPA cases was centralized in the Fraud Section of the Criminal Division to maximize resources and develop special expertise. Mistakes and lessons learned from one case are institutionalized in the prosecution play book for the next FCPA case.

Third, and finally, I believe that FCPA prosecutions will continue, because of cases like Wal-Mart. As I am sure many of you read, a few weeks ago the New York Times published an article detailing Wal-Mart's apparent systematic plan to aid its expansion efforts in Mexico in the mid-

2000s by making approximately \$24 million in payments to local officials in order to obtain necessary construction licenses and permits. Let me say at the outset that I rarely pay attention to what the NY Times writes. The reporting is, in my humble opinion, biased and often inaccurate. So I read this story with skepticism, and I am going to be measured in my remarks today. However, if the major premise of the story is true (an assumption that is necessary since Wal-Mart has apparently not conducted nor permitted a full investigation) Wal-Mart has a problem. Because the FCPA contains an exception for payments which merely speed government action, as opposed to influencing the exercise of discretionary authority, there remains some question about whether the payments themselves actually violated the statute. Nevertheless, the surrounding circumstances – including alleged efforts to conceal the payments and to stymie a subsequent internal investigation – suggest that knowing violations occurred, and many experts expect massive government-imposed sanctions.

At this point, Wal-Mart has a significant credibility problem in eyes of government FCPA enforcers. The government's perception right now is that the company not only failed to take adequate measures to prevent violations of the FCPA by its employees, but also allowed for an investigative whitewash once those apparent violations came to the attention of senior management. Together, those factors suggest that a deliberate and concerted effort to violate the law. While it is likely too late for Wal-Mart to avoid government sanctions, the company maintains the ability to limit those penalties to a substantial degree by demonstrating just the opposite: a genuine commitment to FCPA compliance. This means determining what happened in Mexico, finding out who authorized the conduct in question, taking appropriate disciplinary actions against those individuals, and installing measures to minimize the risk of future violations. This process starts with an independent and thorough investigation – a real investigation – into the activity, and includes disclosure of its unvarnished results to the government, as well as a comprehensive plan for the future compliance.

Not surprising, the Wal-Mart stock was off 5% the first trading day after the NYT article. The decrease reflects not simply the potential cost of the investigation, but also possible sanctions, shareholder litigation and the public relations hit, but also the market's recognition of one of the hidden dangers of a company dealing with an FCPA problem – the concern that some members of senior management will be terminated, thus negatively impacting the company's future prospects.

The government will expect the company to conduct a “where else” investigation, i.e., undertake to determine whether and to what extent similar conduct has occurred in other parts of the world. The rationale underlying this obligation is that if this conduct occurred as a result of failures of internal controls, the existence of similar lack of controls elsewhere in the world makes them equally susceptible. This is also another manifestation of the credibility problem:

the government will suspect that if management concealed the conduct in Mexico, it's entirely possible violations elsewhere were also concealed. This obligation to look beyond Mexico will lengthen and increase the cost of the investigation and, if conduct is uncovered showing additional violations, more sanctions will likely result.

Plaintiff law firms representing shareholders will likely source Wal-Mart's SEC filings and other statements in bringing derivative claims alleging breach of fiduciary duty and potential claims based on material omissions.

Wal-Mart highlights the risks that companies face when they decide not to self-disclose FCPA problems. Historically, the analysis has been limited to the possibility that the government may not uncover the conduct. The limited amount of government resources dedicated to FCPA issues at one time served to suppress the risk of detection, and thus often tipped the scales in the decision not to self-disclose. In recent years, however, several factors have combined to alter the calculus by increasing the chances that the conduct will come to light if not disclosed. These include more resources as I discussed earlier, potential whistleblowers incentivized by bounties now available under Dodd Frank and, as was the case with Wal-Mart, media outlets now sensitized to these issues

The Wal-Mart case is also an example of what is at stake for a company and its officers when the company elects to do nothing when confronted with news about potential wrongdoing. An example of a different response is Morgan Stanley. Announced recently, Garth Peterson was the former director of Morgan Stanley's real estate department in China. He violated the FCPA by encouraging Morgan Stanley to sell its interest in a piece of property to a state-owned entity in China when in fact the interest was to be conveyed to a shell company owned by Peterson and a Chinese official. This allowed them to buy the property at a \$2.5 million discount. This case is notable because Morgan Stanley was not charged, likely for two reasons. First, the Company discovered and self-disclosed the violation, and cooperated in the government's investigation. Second, Morgan Stanley was able to offer tangible proof of its FCPA compliance efforts. From its press release:

"Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments."

This case demonstrates that a genuine effort to ensure compliance with the FCPA on the front

end can pay dividends, because it enhances the possibility that a company can walk away even if one of its employees violates the statute. The difference in the manner that Wal-Mart and Morgan Stanley reacted to news of possible wrongdoing is remarkable. I suspect the response of the regulators and prosecutors will be equally as stark.

No one knows with certainty, of course, what the DOJ, the SEC or Wal-Mart will do ultimately. However, I will share for you my perspective having sat in the Attorney General's chair. A significant part of the job was to develop relationships with my foreign counterparts in order to develop better coordination, communication and consultation on law enforcement issues. I spoke often about the poison of public corruption and for other countries to address their internal corruption.

It appears that Wal-Mart may have contributed to that corruption, raising questions whether competitors were forced to do the same in Mexico and around the world. If I were Attorney General, I would want to know the answer to that question.

If the reported facts are true, much of this activity occurred while I was in office. Candidly, when I read the NY Times story, I became angry. The payments by Wal-Mart may be lawful as facilitating payments, although I do not believe the Department has ever agreed to facilitating payments in this amount, and the 2004 Fifth Circuit decision in *U.S. v. Kay* provides a window for prosecutors to attack the payments as falling within the context of foreign government procurement (i.e., court was convinced that Congress intended to prohibit a range of payments wider than those that only directly influence the acquisition or retention of government contracts). However, perhaps most worrisome for the company, (i) it appears that Wal-Mart representatives went through elaborate steps to hide the payments—raising warning signs that the payments resulted in violations of the books and records requirements, and (ii) the company ignored a 2005 Kroll Audit that its internal controls were ineffective. The Company has thousands of great employees and overall good management. But if the reported facts are true, lawyers at the DOJ will conclude that some key individuals at Wal-Mart are more concerned about the bottom line for the Company than they do about following the law.

The FCPA was amended in 1988 during a tough economic climate for the reason that American companies needed help to compete worldwide. We are in another tough economic environment, but relief is unlikely given this news about Wal-Mart.

I think that companies have an obligation of due diligence and should have in place a strong compliance program – particularly when doing business in countries where corruption is routine and expected. Companies cannot purposefully remain ignorant. The question is how

much do they have to do? I think if the company follows the DOJ Principles of Prosecution:

- 1) makes a voluntary disclosure of wrongdoing,
- 2) if there was no participation in the illegal conduct by senior management,
- 3) if there is full cooperation with the government, including providing evidence and information against employees, officers, directors, and agents of the company,
- 4) if the company implements remedial measures to prevent future violations, including disciplining culpable employees, implementing internal controls, and improving anti-corruption training, and
- 5) if the company has in place a strong compliance program before the alleged behavior happened,

then I question the fairness in going after the company for the unknown violations by an agent in a foreign land.

I do not support bribery, but I support reforms to the FCPA that adds a compliance defense and a willfulness requirement for corporate criminal liability. More needs to be done to keep our companies competitive. I think the U.S. should continue its efforts to get other countries to stop corruption. I favor that over allowing U.S. companies to bribe foreign officials without consequences. But, there is clearly more that can be done to help our companies. Unfortunately, as I said, reforms are unlikely any time soon at the congressional level. However, I encourage continued efforts by groups like this one to push for reasonable measured reforms or changes in prosecution policy.

I close by reminding everyone today, we live in a complicated world where our enemies are more dangerous, the threats more serious, than the ones we faced just a decade ago.

We are reminded of these challenges often during this presidential campaign. The person we choose to work in the Oval Office for the next four years will have to work with Congress to resolve a staggering array of issues:

- How do we stop Iran from becoming a nuclear power?
- When do we risk the lives of our American soldiers to help an ally like Israel?
- How do we sustain the hard fought gains in Afghanistan and Iraq and continue the momentum of the Arab spring?
- What should we do to get more Americans back to work?
- What role should we play in dealing with Europe's debt crisis and will we resolve our own deficit problems?
- How do we reduce our dependency on foreign oil and lower the price of gasoline?
- In a global economy, what can be done to help American businesses remain competitive?
- Will we, as a country of immigrants, find the courage to pass comprehensive federal immigration legislation that sustains our economy and compliments our national security objectives?

Finding solutions will take leadership. Every presidential election provides an opportunity for leadership, for change, the next chapter in the American story. However, today's problems feel different, more serious.

All of you are leaders in your companies and firms, as well as leaders in your communities. I encourage you to become informed of the challenges that face all of us, step into the arena of service and lend your talents and creativity to this country that has given you so much opportunity.

I am the son 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 do 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.

You have honored me by your invitation to be with you today. I believe in God's goodness, and every day I see His grace in my life and on our country. In your work and in your home, I pray that God shows you the miracles He has provided. May He bless this community, and may He continue to bless the United States of America.

Thank you.

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