IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*, *

Plaintiffs, *

v. * Civil Action No. AW-08-3444

JANET NAPOLITANO, *et al.*, *

Defendants. *

* * * * *

PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

APA	Administrative Procedure Act
AR	Administrative Record
CICA	Competition in Contracting Act of 1984
FAR	Federal Acquisition Regulation
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
MOU	Memorandum of Understanding
RFA	Regulatory Flexibility Act

Plaintiffs Chamber of Commerce of the United States of America; Associated Builders and Contractors, Inc.; Society for Human Resource Management; American Council on International Personnel; and HR Policy Association (collectively, "Plaintiffs") respectfully submit this Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment.[1]

PRELIMINARY STATEMENT

Plaintiffs agree with Defendants' contention (Defs.' Mem. at 1) that when boiled down to its essential elements, this case is strikingly simple. Congress has created an experimental pilot program known as E-Verify, authorized its use with respect to new employees, and entrusted administration of that program to one federal official: the Secretary of Homeland Security ("Secretary"). In doing so, Congress enumerated three specific categories of employers that could be required to participate in the experimental pilot program: federal agencies, the Legislative Branch, and private employers who have violated immigration laws. With respect to everyone else, however, Congress instructed that no other person or entity could be required to participate in the experimental pilot program.

The Executive Branch has since disregarded this statutory prohibition through the issuance of an Executive Order and regulations that seek to require government contractors and subcontractors to participate in the experimental pilot program. This, Defendants contend, is perfectly reasonable because all Congress has done is place a limitation on the Secretary's authority. Citing certain inapposite, nonbind-

[1] Plaintiffs' Complaint for Declaratory and Injunctive Relief named three defendants: Michael Chertoff, in his official capacity as Secretary of Homeland Security; Albert Matera, in his official capacity as Chairman of the Civilian Agency Acquisition Council; and the United States of America (collectively, "Defendants"). Mr. Chertoff is no longer Secretary of Homeland Security. After Plaintiffs filed their motion for summary judgment, Janet Napolitano received Senate confirmation as the new Secretary of Homeland Security. *See* 155 Cong. Rec. S671 (daily ed. Jan. 20, 2009). Rule 25(d) of the Federal Rules of Civil Procedure instructs that Secretary Napolitano is automatically substituted in place of Mr. Chertoff.

ing and unpersuasive authorities, Defendants ask this Court to bless the Executive Branch's disregard of a congressional command. Binding precedent tells us that Defendants' request should be rejected, as should Defendants' assertion that some of the statutes at issue in this case are merely "technical" and can be violated with impunity.

The requirements imposed by the Executive Order and regulations at issue in this case are illegal and must be set aside. First, the Secretary violated federal law by publishing a notice in the *Federal Register* designating E-Verify as the electronic employment eligibility verification system required to be used by government contractors and subcontractors. Second, the Executive Order and regulations in question violate federal law by requiring participation in an experimental pilot program. Third, even if the Executive Order and regulations are held not to violate the statutory prohibition against requiring anyone to participate in an experimental pilot program, the Executive Order and regulations are still unlawful because they exceed the President's statutory authority in the procurement arena. Fourth, by requiring that government contractors and subcontractors use E-Verify to reverify existing employees, the Executive Order and regulations exceed the scope of the limited license Congress has given the Executive Branch to use experimental pilot programs such as E-Verify. Fifth, the regulations were promulgated without observance of procedure required by law.

ARGUMENT

I. THE SECRETARY VIOLATED IIRIRA § 402(a) BY ISSUING THE E-VERIFY DESIGNATION NOTICE

Section 402(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") provides that

> any person or other entity that conducts any hiring (or recruitment or referral) in a State in which a pilot program is operating *may* elect to participate in that pilot program. Except as specifically provided in subsection (e) [referring to the required use of E-Verify

> by federal agencies, the Legislative Branch and certain immigration law violators], *the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program.*

Pub. L. No. 104-208, div. C, § 402(a), 110 Stat. 3009-546, 3009-655 (codified as amended at 8 U.S.C. § 1324a note) (emphasis added). As Plaintiffs explained in their moving brief (at 26-28), the Secretary's E-Verify Designation Notice[2] violated IIRIRA § 402(a) regardless of whether the Secretary was following instructions from the President. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838) (holding that Congress can "impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution, and, in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President"). Without the E-Verify Designation Notice, Executive Order 13,465[3] and the Final Rule[4] are inoperative because they both rely on the E-Verify Designation Notice to identify which "electronic employment eligibility verification system" government contractors and subcontractors are required to use.

In response, Defendants claim that the E-Verify Designation Notice only reflected the Secretary's "technical judgment" as to which "electronic employment eligibility verification system" best served the President's needs under Executive Order 13,465. *See* Defs.' Mem. at 27-28. Regardless of whether this is true or not—as Defendants themselves acknowledge (Defs.' Mem. at 5), the Secretary's choice was not a difficult one to make since E-Verify is the *only* "electronic employment eligibility veri-

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[2] Notice of Designation of the Electronic Employment Eligibility Verification System Under Executive Order 12989, 73 Fed. Reg. 33,837 (June 13, 2008) (Tab 3 of Plaintiffs' Appendix of Exhibits).

[3] 73 Fed. Reg. 33,285 (June 11, 2008) (Tab 2 of Plaintiffs' Appendix of Exhibits).

[4] Final Employment Eligibility Verification Rule, 73 Fed. Reg. 67,651 (Nov. 14, 2008) (Tab 6 of Plaintiffs' Appendix of Exhibits).

fication system" available for use—the simple fact remains that the Secretary violated IIRIRA § 402(a) by taking official action to require participation in E-Verify and that, without the E-Verify Designation Notice, Executive Order 13,465 and the Final Rule are inoperative.

Defendants also attempt to marginalize the Secretary's E-Verify Designation Notice by seeking to extricate the Secretary from this case altogether. Defendants claim that the Secretary is not a proper defendant in this action because she was not directly responsible for the Final Rule's promulgation. *See* Defs.' Mem. at 4 n.1. Defendants disregard the fact that Plaintiffs challenge discrete agency action taken by the Secretary: namely, the Secretary's issuance of the E-Verify Designation Notice. The Administrative Procedure Act ("APA") provides that a reviewing court shall hold unlawful and set aside "agency action" found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The term "agency action" includes "the whole or a part of an agency rule." § 701(b)(2) (incorporating § 551(13)'s definition of "agency action"). A "rule," in turn, means "the whole or a part of an agency statement of general or particular applicability and future effect *designed to implement . . . law or policy*." *Id.* (incorporating § 551(4)'s definition of "rule") (emphasis added). The APA expressly provides that an "action for judicial review may be brought against the United States, the agency by its official title, *or the appropriate officer*." § 703 (emphasis added).

Accordingly, the Secretary's issuance of the E-Verify Designation Notice easily qualifies as "agency action" for which the Secretary must answer in this Court. That the Final Rule was ostensibly written without the Secretary's involvement is immaterial. *See* Final Rule, 73 Fed. Reg. at 67,656 (arguing that the Secretary took no part in the Final Rule's promulgation and that IIRIRA § 402(a) applies

"only to the Secretary of Homeland Security and does not apply to the President or the Councils").[5] The same logic applies to Mr. Matera, who in his official capacity as Chairman of the Civilian Agency Acquisition Council, signed and submitted the Proposed Rule and the Final Rule for publication in the *Federal Register*. *See* Proposed Employment Eligibility Verification Rule, 73 Fed. Reg. 33,374, 33,380 (June 12, 2008) (Tab 4 of Plaintiffs' Appendix of Exhibits); Final Rule, 73 Fed. Reg. at 67,703; *see also* Administrative Record ("AR") at 7193 (cover letter signed by Mr. Matera transmitting to the Office of the Federal Register the Final Rule for publication and requesting "emergency" publication because the Bush Administration was coming to an end). Defendants' suggestion (Defs.' Mem. at 4 n.1) that Mr. Matera is not a proper defendant disregards the plain language of 5 U.S.C. § 703, which provides that an "action for judicial review" under the APA may be brought against an "appropriate officer."

* * *

By publishing a notice in the *Federal Register* designating E-Verify as the electronic employment eligibility verification system required to be used by government contractors and subcontractors, the Secretary took agency action in violation of IIRIRA § 402(a). Accordingly, Plaintiffs are entitled to summary judgment on Count I of their Complaint.

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[5] A press release issued on July 8, 2009, supports the conclusion that the Secretary is more involved than Defendants' brief and the Administrative Record suggest. *See* Press Release, Dep't of Homeland Security, Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify (July 8, 2009) (copy attached as Exhibit A), available at http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm (last visited Aug. 3, 2009) ("July 8 Press Release"). In the July 8 Press Release, the Secretary explained that *she* had "strengthened employment eligibility verification by announcing the Administration's support for a regulation that will award federal contracts only to employers who use E-Verify to check employee work authorization." The press release went on to quote the Secretary as saying: "'Requiring those who seek federal contracts to use this system will create a more reliable and legal workforce.'" *Id.* Of course, the press release made no mention of IIRIRA § 402(a)'s prohibition against requiring any person or entity to participate in E-Verify. The rapid-fire succession in which Executive Order 13,465, the E-Verify Designation Notice and the Proposed Rule were issued, *see* Pls.' Mem. at 8-11, also supports the conclusion that the Secretary was more involved than Defendants' brief suggests.

II. THE REQUIREMENTS IMPOSED BY EXECUTIVE ORDER 13,465 AND THE FINAL RULE VIOLATE IIRIRA § 402(a)

E-Verify is an experimental pilot program created by Congress and funded by monies appropriated by Congress. Congress has every right to place restrictions on the use of that experimental program by the Executive Branch and has done so in the form of IIRIRA § 402(a). Defendants' arguments for how Executive Order 13,465 and the Final Rule circumvent IIRIRA § 402(a) are meritless.

A. Executive Order 13,465 and the Final Rule "Require" Participation in a Pilot Program by Requiring Government Contractors and Subcontractors To Participate in E-Verify

A heading in Defendants' brief asserts that "[t]he Executive Order and [Final] Rule Do Not Require Anyone To Use E-Verify." Defs.' Mem. at 25. "No one is required to use E-Verify," Defendants reason, "because no one is required to bid for a government contract." *Id.* Defendants' argument, which simply repeats the Councils' argument set forth in the Final Rule, was discredited in Plaintiffs' moving brief (at 32-34) and need not be repeated here. As the Secretary herself announced on July 8, 2009: "*Requiring* those who seek federal contracts to use [E-Verify] will create a more reliable and legal workforce." July 8 Press Release (emphasis added). Regardless of whether the Secretary's prediction is accurate regarding the effects of requiring government contractors and subcontractors to participate in E-Verify, her statement—like the Final Rule itself, *see* 73 Fed. Reg. at 67,651 ("The [Councils] have agreed on a final rule amending the [Federal Acquisition Regulation ("FAR")] to *require* certain contractors and subcontractors to use the E-Verify system . . . .") (emphasis added)—belie the simple truth that Executive Order 13,465 and the Final Rule require participation in E-Verify in any reasonable sense of the word "require."

Nor is Defendants' moving brief correct in suggesting (at 19) that if the Court determines that the word "require" is somehow ambiguous, Defendants' interpretation is subject to the "utmost deference"

simply because IIRIRA is an immigration statute. It is unclear whether Defendants argue for *Chevron*-style deference or some other form of deference. Be that as it may, the word "require" is not ambiguous. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning . . . of certain words or phrases may only become evident when placed in context."). Even if it were, Defendants' interpretation is not entitled to deference because the only federal official entrusted with the authority to administer IIRIRA, the Secretary, has done nothing more than state her position in a legal brief. *Cf. Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). The Supreme Court decision cited by Defendants—*INS v. Abudu*, 485 U.S. 94 (1998)—not only fails to contain the quotation attributed to it by Defendants, *see* Defs.' Mem. at 19, the decision Defendants meant to cite—*INS v. Aguirre-Aguirre*, 526 U.S. 415 (1998)—does not support Defendants' request for the "utmost deference" since the Secretary here has not purported to interpret the word "require" via formal adjudication or notice-and-comment rulemaking. *See* 526 U.S. at 425 ("In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context *where officials* '*exercise especially sensitive political functions that implicate questions of foreign relations.*'") (quoting *Abudu*, 485 U.S. at 110) (emphasis added). No such "sensitive political functions" are at issue in this case. As Defendants' own brief makes clear (at 29), this case is not about immigration, it is about government procurement.

Furthermore, noticeably absent from Defendants' moving brief is any substantive discussion of IIRIRA § 402(e), which provides the only exception to the thou-shalt-not-require prohibition established

by § 402(a). Again, subsection (e) provides that only three categories of persons or entities may be required to participate in an experimental pilot program such as E-Verify. First, subsection (e) instructs that "[e]ach Department of the Federal Government shall elect to participate in a pilot program and shall comply with the terms and conditions of such an election." IIRIRA § 402(e)(1)(A)(i). Second, subsection (e) provides that "[e]ach Member of Congress, each officer of Congress, and the head of each agency of the legislative branch, that conducts hiring in a State in which a pilot program is operating shall elect to participate in a pilot program . . . ." IIRIRA § 402(e)(1)(B). Third, subsection (e) instructs that certain immigration law violators may be required to participate in a pilot program. *See* IIRIRA § 402(e)(2). Government contractors and subcontractors are not included in the class of persons or entities that may be required to participate in E-Verify under subsection (e).

B. Congress Has Consistently Rejected Efforts To Require Government Contractors To Participate in E-Verify

According to Defendants, it "strains credulity to maintain that the basic pilot provisions of IIRIRA bars [sic] the Executive Order and rule, when Congress, after promulgation of the Executive Order, extended the basic pilot program and system twice and appears poised to extend it yet again." Defs.' Mem. at 24. Defendants incorrectly assert that congressional action during the past few months supports Defendants' argument. As set forth below, Congress has consistently rejected efforts to require government contractors to participate in E-Verify.

As Plaintiffs explained in their moving brief (at 6), E-Verify has always been authorized on a temporary basis. Approximately two months before the Final Rule was issued, Congress enacted legislation extending the life of E-Verify into March, 2009. *See* Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, §§ 106(3), 143, 122 Stat. 3574, 3580 (2008). Efforts to add language to that bill, which would have required government contractors to par-

ticipate in E-Verify, had previously been defeated. *See* 153 Cong. Rec. S9903 (daily ed. July 25, 2007) (Senate Amendment 2444 to H.R. 2638, 110th Cong. (Sen. Grassley), stating, in relevant part: "None of the funds made available under this Act may be available to enter into a contract with a person, employer, or other entity that does not participate in [E-Verify]."). *But see* 153 Cong. Rec. S10,083 (daily ed. July 26, 2007) (stripping the foregoing contractor language from the Grassley Amendment); *see also* Pub. L. No. 110-329, § 534, 122 Stat. at 3686 (language of the as-modified Grassley Amendment in the final statute).

Similarly, on February 17, 2009, Congress enacted a sweeping piece of stimulus legislation. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115. A proposed amendment to that statute, which would have required contractors to participate in E-Verify, did not even receive an up or down vote. *See* 155 Cong. Rec. S1458-59 (daily ed. Feb. 3, 2009) (Senate Amendment 165 to H.R. 1, 111th Cong. (Sen. Sessions), stating, in relevant part: "None of the funds made available in this Act may be used to enter into a contract with a person that does not participate in [E-Verify].").

Then, on March 11, 2009, Congress extended the life of E-Verify until September 30, 2009. *See* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. J, § 101, 123 Stat. 524, 988. In doing so, Congress yet again rejected efforts to require government contractors to participate in E-Verify. *See* 155 Cong. Rec. S2643 (daily ed. Mar. 2, 2009) (Senate Amendment 605 to H.R. 1105, 111th Cong. (Sen. Sessions), stating, in relevant part: "The head of each agency or department of the United States that enters into a contract shall require, as a condition of the contract, that the contractor participate in [E-Verify] to verify the employment eligibility of—(1) all individuals hired during the term of the contract by the contractor to perform employment duties within the United States; and (2) all individuals as-

signed by the contractor to perform work within the United States the under such contract."); 155 Cong. Rec. S2643 (daily ed. Mar. 2, 2009) (Senate Amendment 606 to H.R. 1105, 111th Cong. (Sen. Sessions), stating, in relevant part: "None of the funds made available in the Emergency Economic Stabilization Act of 2008 . . . or in the American Recovery and Reinvestment Act of 2009 . . . may be used to provide funds to a person under a contract with an agency or department of the United States if—(1) the person does not participate in [E-Verify]; and (2) the contract was entered into on or after the date of the enactment of this Act."). Congress rejected both amendments.

Finally, Congress is currently considering appropriations legislation that would not only extend the life of E-Verify, but would require government contractors to participate in E-Verify. *See* H.R. 2892, 111th Cong. § 545 (as passed by the Senate on July 9, 2009). What Defendants neglect to mention in citing this pending legislation is that the version of House Bill 2892 that previously passed the House of Representatives does not include language requiring contractors to participate in E-Verify. *See* H.R. 2892, 111th Cong. (as passed by the House on June 24, 2009). Efforts to include such language in the House version of the bill were defeated. *See* H.R. Rep. No. 111-157, at 228 (2009) (additional views of Reps. Lewis and Rogers) ("[W]e are supportive of efforts to mandate the Federal Government to require its contractors to participate in E-Verify and fail to understand why the current Administration has postponed implementation of such a requirement three times in the last five months. Another thoughtful amendment was offered during the Committee's consideration of the bill that would have required all DHS contractors to participate in E-Verify. Unfortunately, this amendment was also defeated on a party-line vote.").

The Senate has requested a conference with the House to resolve differences in the two different versions of House Bill 2892 and appointed conferees for that purpose. *See* 155 Cong. Rec. S7311-12

(daily ed. July 8, 2009). The House, meanwhile, has not yet appointed conferees. It remains to be seen how the differences between the two versions of House Bill 2892 will be reconciled by a conference committee this September. Additional bills were recently introduced in Congress that would require government contractors to participate in E-Verify. *See* H.R. 3308, 111th Cong. § 201(b)(2)(B) (introduced July 23, 2009); S. 1505, 111th Cong. (introduced July 23, 2009). Be that as it may, the fact that the congressional debate still rages completely undercuts Defendants' argument that Congress, simply by extending the life of E-Verify, has somehow ratified the Executive Branch's effort to require government contractors and subcontractors to participate in E-Verify. Indeed, the flurry of legislative activity makes it clear that Congress does not believe there is current statutory authority for Defendants to require contractors and subcontractors to participate in E-Verify.

If anything, this case presents a factual situation similar to *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1951). There, the Supreme Court held that it was unconstitutional for President Truman to issue an Executive Order directing the Secretary of Commerce to take possession of the Nation's steel mills. *See id.* at 582. A dispute had arisen between steel companies and their employees over the terms and conditions of collective bargaining agreements. *See id.* The employees threatened a nationwide strike, and President Truman issued an Executive Order directing the Secretary of Commerce to seize the Nation's steel mills in an effort to avoid any stoppage of war production during the Korean Conflict. *See id.* at 583. The steel companies then filed suit claiming that the seizure was not authorized by an act of Congress or by any constitutional provision. *Id.*

In determining whether the President was authorized to seize the steel mills, the Court recognized that "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. The Court could not find any statute that "expressly author-

ize[d]" the President's action or any act of Congress from which presidential power to seize steel mills could "fairly be implied." *Id.* Similar to the situation that currently faces this Court, the Supreme Court paid particular attention to the fact that, when it passed the Taft-Hartley Act several years earlier, Congress had refused to adopt an amendment supporting the seizure technique later used by President Truman. *Id.* at 586. The method passed by Congress "did not provide for seizure under any circumstances," the Court explained. *Id.*

As in *Youngstown*, Congress has consistently rejected legislative efforts to require government contractors to participate in E-Verify. Defendants' effort to convert Congress's temporary extension of the voluntary E-Verify program into a congressional ratification of Executive Order 13,465 and the Final Rule has no basis in law or fact. *Cf. Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 172 (4th Cir. 1981) (rejecting defendants' assertion that Congress "ratified" an Executive Order simply by rejecting statutory amendments that would have limited the Executive Order program, explaining: "Even if 'ratification' by such a process might in some circumstances be properly found—a matter of some general dubiety when its potential effect upon the dynamics of the legislative process is carefully considered—we do not think it can properly be found here.") (footnote omitted).

* * *

Executive Order 13,465 and the Final Rule require participation in an experimental pilot program in violation of IIRIRA § 402(a). Accordingly, Plaintiffs are entitled to summary judgment on Count II of their Complaint.

III. EVEN IF THE REQUIREMENTS IMPOSED BY EXECUTIVE ORDER 13,465 AND THE FINAL RULE DO NOT VIOLATE IIRIRA § 402(a), THOSE REQUIREMENTS ARE NONETHELESS INVALID BECAUSE THEY ARE NOT AUTHORIZED BY THE PROCUREMENT ACT

Defendants do not dispute the fact that the "exercise of any governmental power . . . 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) (quoting *Youngstown*, 343 U.S. at 585). The Fourth Circuit has explained that, although a "congressional grant of legislative authority need not be specific in order to sustain the validity of regulations promulgated pursuant to" that grant of legislative authority, "a court must 'reasonably be able to conclude that the grant of authority contemplates the regulations issued.'" *Liberty Mutual*, 639 F.2d at 169 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979)). As detailed in Plaintiffs' moving brief (at 37-41), the principal grant of legislative authority cited by the Final Rule—the Federal Property and Administrative Services Act of 1949 ("Procurement Act"), 40 U.S.C. §§ 101-1315—does not authorize the requirements imposed by Executive Order 13,465 and the Final Rule. Therefore, even if this Court were to hold that Defendants have not violated IIRIRA § 402(a), the requirements imposed by Executive Order 13,465 and the Final Rule are still invalid and must be set aside.

A. Defendants Cannot Satisfy the *Liberty Mutual* Standard

Liberty Mutual requires that there be "findings in the record which tend[] to show a demonstrable relationship between" Executive Order 13,465, on the one hand, and the goals of promoting efficiency and economy in government procurement. *Liberty Mutual*, 639 F.2d at 170. Defendants seek to avoid the *Liberty Mutual* standard by quoting a D.C. Circuit decision for the proposition that only an "attenuated" link need be shown. *See* Defs.' Mem. at 9 (quoting *UAW-Labor Employment & Trading Corp. v. Chao*, 325 F.3d 360, 366-67 (D.C. Cir. 2003)). *But see UAW*, 325 F.3d at 367 (Rogers, J., dissenting) (concluding that the Executive Order in question was unlawful because it conflicted with the

National Labor Relations Act). As Plaintiffs' demonstrated in their moving brief (at 38-40), the law of the Fourth Circuit as established by *Liberty Mutual* requires much more.[6]

The only "evidence" Defendants can muster in support of the attenuated link at issue in this case are the handful of newspaper articles cited by the Final Rule, *see* Defs.' Mem. at 11 (citing Final Rule, 73 Fed. Reg. at 67,653), copies of which have been placed in the Administrative Record, *see* AR 3246-59 (copy attached as Exhibit B). As Plaintiffs explained in their moving brief (at 40 n.7), *Liberty Mutual* teaches that the newspaper articles are an insufficient basis upon which to uphold the attenuated link between Executive Order 13,465's required use of an "electronic employment eligibility verification system designated by the Secretary," on the one hand, and efficiency and economy in government procurement. Defendants do not dispute the fact that the articles cited by the Final Rule say nothing of (1) whether the Federal Government's contracting costs were increased by a few employers' alleged use of illegal labor, or (2) whether use of E-Verify by those employers would have succeeded in detecting the employees in question. *See also* Final Rule, 73 Fed. Reg. at 67,686 ("The Councils concur that this rule may result in additional compliance costs for contractors, and these additional costs could be passed back to the Government."). If anything, the newspaper articles cited by the Final Rule highlight the fact

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[6] Defendants also cite a Tenth Circuit decision in support of their argument that all that is needed is an "attenuated link." *See* Defs.' Mem. at 9 (citing *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901 (10th Cir. 2004)). Unlike this case, however, *City of Albuquerque* did not involve a challenge to the lawfulness of an Executive Order. Instead, the agency-defendant argued that the city-plaintiff did not have prudential standing because neither the Executive Order in question nor the Procurement Act evidenced congressional intent authorizing a private right of action. *See* 379 F.3d at 913-14. The Tenth Circuit carefully noted that no claim had been made that the Executive Order exceeded the President's authority under the Procurement Act. *Id.* at 914 n.8. The same thing is true of the one Fourth Circuit decision Defendants cite in addition to *Liberty Mutual* relative to the Procurement Act—*Trinity Industries v. Herman*, 173 F.3d 527 (4th Cir. 1999)—a fact evidenced by Defendants' own use of the "*cf.*" signal. *See* Defs.' Mem. at 14 n.2. *Trinity Industries* involved a contractor's lawsuit challenging a determination that certain affirmative-action requirements covered all of the contractor's facilities. *See* 173 F.3d at 528. The contractor did not challenge the legality of the Executive Order in question. *See id.* at 529 (explaining that the plaintiff "concede[d] that these affirmative action reporting requirements generally apply to its operations").

that Congress has expressly stated that immigration law violators of the type described in those articles *can be* required to participate in a pilot program such as E-Verify. *See* IIRIRA § 402(a), (e)(2). Defendants also present no evidence that President Bush considered the newspaper articles prior to issuing Executive Order 13,465.

Recognizing that *Liberty Mutual* forecloses their reliance on the attenuated link at issue in this case, Defendants accuse Plaintiffs of having engaged in improper forum-shopping by deciding to file suit in this Court rather than in the United States District Court for the District of Columbia, which Defendants suggest is better equipped to handle the administrative law issues raised by this case. *See* Defs.' Mem. at 27. However, Defendants stop short of arguing that this venue is inconvenient or improper under 28 U.S.C. § 1391(e), nor can they. Plaintiff Associated Builders and Contractors, Inc. is a Maryland corporation, thereby making venue appropriate in this district under § 1391(e)(3). Plaintiffs have also shown how the executive action at issue in this case, which has nationwide effect, has and will continue to harm Maryland-based businesses like Quality Control, Inc. in the absence of timely judicial relief. *See* Pls.' Mem. at 18-21 (discussing the Declaration of Mario A. DiFranco (Jan. 9, 2009)). Despite Defendants' suggestion to the contrary, this Court is fully capable of deciding the legal issues raised by this case.[7]

A. *Kahn* Is Nonbinding, Inapposite and Unpersuasive

As was done in the Final Rule, Defendants rely primarily on the majority opinion from the D.C. Circuit's splintered, en banc decision in *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979). Plaintiffs

[7] Defendants themselves suggest (Defs.' Mem. at 4 n.1) that they be allowed to substitute a federal official into this case (the Secretary of Defense) who, because of his Arlington, Virginia headquarters, would make venue proper in another court in which *Liberty Mutual* is binding precedent: the United States District Court for the Eastern District of Virginia.

showed in their moving brief (at 34-36) that *Kahn*'s majority opinion provides no assistance to Defendants, who themselves concede (Defs.' Mem. at 26-27) that *Kahn* is not binding authority in this Court. Defendants nonetheless argue that *Kahn*'s analysis should persuade this Court to side with Defendants. However, in doing so, Defendants do not rebut the argument set forth in Plaintiffs' moving brief. Plaintiffs will not burden the Court by repeating Plaintiffs' previous explanation of *Kahn*.

A. Defendants Mistakenly Suggest That Plaintiffs Have Made a Non-Delegation Doctrine Argument

Defendants' assertion (Defs.' Mem. at 17-18) that Plaintiffs believe the Procurement Act violates the non-delegation doctrine is incorrect as Plaintiffs have not made such an argument. Instead, Plaintiffs correctly point out that under *Liberty Mutual*, an Executive Order and regulations such as those at issue here, when found to have no authority in the Procurement Act, are deemed legislative in nature and therefore illegal. *See Liberty Mutual*, 639 F.2d at 172 n.13.

According to Defendants, the "Executive Branch's actions are authorized by legislation and not a claimed inherent constitutional power." Defs.' Mem. at 17. At the same time, Defendants' brief includes a footnote, which reads: "It is likely that the Executive Order could lawfully have been based on the President's inherent power to exercise general administrative control 'throughout the Executive Branch of government of which he is the head,' *Building & Construction Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), or on 'implied authority' from Congress, *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 171 (3d Cir. 1971)." Defs. Mem. at 17 n.4. The law of the Fourth Circuit precludes Defendants' argument that the President has inherent power to require government contractors to participate in E-Verify. *See Liberty Mutual*, 639 F.2d at 172 n.13. As for Defendants' "implied authority from Congress" argument, it cannot stand in light of IIRIRA § 402(a)'s prohibition against requiring any person or entity to participate in an experimental pilot program such as E-Verify. *See Medellin*, 128

S. Ct. at 1368 ("'When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'") (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)).

* * *

Because the requirements imposed by Executive Order 13,465 and the Final Rule are not authorized by the Procurement Act, *Liberty Mutual* teaches that Plaintiffs are entitled to summary judgment on Count III of their Complaint.

IV. THE ELECTRONIC-REVERIFICATION-OF-EXISTING-EMPLOYEES REQUIREMENT IS UNLAWFUL

As Defendants themselves recognize (Defs.' Mem. at 30-31), IIRIRA does not expressly authorize E-Verify to be used in "reverifying" the employment eligibility of existing employees. However, because IIRIRA does not expressly *preclude* reverification, Defendants argue that it is appropriate for them to commandeer E-Verify under the Procurement Act and use E-Verify in a manner that exceeds its congressionally authorized uses. Defendants' argument overlooks the fact that E-Verify is an experimental pilot program created by Congress for a limited purpose. Congress has every right to specify how that program can be used and has done so. It is unreasonable to suggest that Congress must list every imaginable use of an experimental pilot program that Congress seeks to *preclude*. *Cf. Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 222 (D.C. Cir. 2001) (finding that, although a statute authorized the Secretary of Health and Human Services to waive certain statutory requirements for the purpose of allowing States to operate pilot programs, the Secretary could not waive statutory requirements that were not specifically listed even though the statute did not expressly preclude his doing so).

That Congress did not foresee the Executive Branch's expansive interpretation of its Procurement Act authority in this case more than a decade after Congress enacted IIRIRA does not change the fact that it is unreasonable to suggest that Congress must list every use of an experimental pilot program that Congress seeks to preclude. Defendants also do not address the fact that, as pointed out in Plaintiffs' moving brief (at 42), federal immigration law generally does not give the Executive Branch the authority to require reverification of existing employees.

Federal law does not authorize the use of an experimental pilot program such as E-Verify to reverify the employment eligibility of existing employees. Executive Order 13,465 and the Final Rule require employers to use E-Verify to reverify the employment eligibility of existing employees. Therefore, Plaintiffs are entitled to summary judgment on Count IV of their Complaint.

V. THE FINAL RULE IS UNLAWFUL AND MUST BE SET ASIDE BECAUSE DEFENDANTS FAILED TO COMPLY WITH THE PROCUREMENT POLICY ACT'S NOTICE-AND-COMMENT REQUIREMENTS

The Office of Federal Procurement Policy Act ("Procurement Policy Act"), 41 U.S.C. §§ 403-438, instructs that "no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register . . . ." 41 U.S.C. § 418b(a). Among other things, the notice of a proposed procurement policy, regulation, procedure or form must include the "text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and a statement specify-

ing the name, address, and telephone number of the officer or employee of the executive agency from whom the full text may be obtained." § 418b(c)(1).

Plaintiffs demonstrated in their moving brief (at 42-48) that by failing to publish the full text of the revised Memorandum of Understanding ("MOU") in the *Federal Register* and by failing to actively solicit comments on the revised MOU, the Councils violated the Procurement Policy Act's notice-and-comment requirements. Defendants have two primary responses to this argument. First, they contend that the revised MOU is not subject to the Procurement Policy Act's notice-and-comment requirements because the revised MOU is not a "procurement policy, regulation, procedure, or form." Second, Defendants use language in their brief suggesting that, even if the revised MOU is subject to the Procurement Policy Act's notice-and-comment requirements, those provisions are mere "technical requirements" that are somehow inferior to other statutory commands. Neither argument has merit.

A. The Revised MOU Is Subject To the Procurement Policy Act

Defendants begin and end their Procurement Policy Act argument by pointing out that the district-court decision cited by Plaintiffs' moving brief—*Munitions Carriers Conference, Inc. v. United States*, 932 F. Supp. 334 (D.D.C. 1996)—was reversed on appeal. *See* Defs.' Mem. at 32, 35. Defendants fail to explain that, as Plaintiffs pointed out in their moving brief (at 48), the relevant ruling of the district court, which held that the defendant-agency violated the Procurement Policy Act's notice-and-comment requirements, was *not* disturbed on appeal.

In a ruling unrelated to the plaintiff-associations' Procurement Policy Act argument in *Munitions Carriers Conference*, the district court also held that the defendant-agency's policy was substantively invalid. *See* 932 F. Supp. at 341. After the district court issued its ruling, the defendant-agency filed a motion for reconsideration. While that motion was pending, the defendant-agency published a watered-

down version of its policy in the *Federal Register*, explained that it would go into effect 60 days after publication, and solicited comments from the public. *See* Movement of Foreign Military Sales Material, 61 Fed. Reg. 58,679 (Nov. 18, 1996). The district court later denied the defendant-agency's motion for reconsideration in an unpublished ruling. *See Munitions Carriers Conf., Inc. v. United States*, Civil Action No. 97-56 (TFH), slip op. (D.D.C. Mar. 4, 1997). The defendant-agency subsequently appealed only the substantive component of the district court's ruling. While that appeal was pending, the defendant-agency republished its initial policy in the *Federal Register*, solicited comments from the public, and explained that the initial policy would go into effect if the district court's substantive ruling was reversed on appeal, but in no event would it go into effect earlier than 60 days after publication. *See* Movement of Foreign Military Sales (FMS) Shipments—Proposed Policy Change, 62 Fed. Reg. 58,946 (Oct. 31, 1997). The district court's holding that the Procurement Policy Act's notice-and-comment requirements had been violated was not overturned on appeal. *See Munitions Carriers Conf., Inc. v. United States*, 147 F.3d 1027, 1030 (D.C. Cir. 1998).

With respect to the substance of their argument, Defendants do not challenge, and therefore concede, Plaintiffs' assertion (Pls.' Mem. at 44) that the revised MOU satisfies both the significant-effect and significant-cost triggers located in paragraphs (1) and (2) of 41 U.S.C. § 418b(a), nor do Defendants contend it was impracticable for the Councils to publish the full text of the revised MOU in compliance with § 418b(c)(1). Instead, Defendants' only argument is that the revised MOU is not a "procurement policy, regulation, procedure, or form" within the meaning of § 418b(a) because the revised MOU "does not address any step in the process of the government's acquisition of property or services." Defs.' Mem. at 33.

Defendants' overly narrow interpretation of the Procurement Policy Act cannot be squared with the statute's broad language. *See Munitions Carriers Conference*, 932 F. Supp. at 338 (taking note of the Procurement Policy Act's broad language). Although the Procurement Policy Act does not define the phrase "procurement policy, regulation, procedure, or form," it defines the word "procurement" as "includ[ing] *all* stages of the process of *acquiring* property or services, beginning with the process for determining a need for property or services *and ending with contract completion and closeout*." 41 U.S.C. § 403(2) (emphasis added). The word "acquisition," which Defendants' brief fails to address altogether, is broadly defined to include "contract performance" and "management and measurement of contract performance through final delivery and payment." § 403(16)(B). As the foregoing definitions make clear, the phrase "procurement policy, regulation, procedure, or form" is to be given a broad interpretation, a conclusion reinforced by the fact that the statute even requires the publication of "form[s]." *See, e.g.*, Federal Acquisition Regulation; Acquisition of Commercial Items, 60 Fed. Reg. 11,198, 11,218 (Mar. 1, 1995) (publishing standardized one-page form for commercial-item contracts).

Not only does the Final Rule provide that the revised MOU is a required, legally binding agreement between the contractor/subcontractor and the Federal Government, the contractor/subcontractor must comply with the revised MOU or risk contract termination, suspension or debarment. *See* Final Rule, 73 Fed. Reg. at 67,705 ("The Contractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.") (to be codified at 48 C.F.R. § 52.222-54 as subsection (b)(5) of the required E-Verify contract provision). If the Federal Government terminates a contractor's MOU, the Final Rule instructs that the contractor must be referred "to a suspension or debarment official for possible suspension or debarment action." Final Rule, 73 Fed. Reg. at 67,704 (to be codified at 48 C.F.R. § 22.1802(e)). Clearly, a document of such importance, dealing as it does with

"contract performance" and "management and measurement of contract performance through final delivery and payment," 41 U.S.C. § 403(16)(B), qualifies as a "procurement policy, regulation, procedure, or form" within the meaning of § 418b(a).

The only decisional support Defendants cite to support their narrow interpretation of the Procurement Policy Act actually demonstrates that their reading of the statute cannot be reconciled with the Procurement Policy Act's broad language. Specifically, Defendants quote language from two decisions involving the Competition in Contracting Act of 1984 ("CICA"), 31 U.S.C. §§ 3551-3557. *See* Defs.' Mem. at 33 (quoting *Rapides Reg'l Med. Ctr. v. Sec'y, Dep't of Veteran Affairs*, 974 F.2d 565 (5th Cir. 1992), and *In re Crystal Cruises, Inc.*, No. B-238347, 1990 WL 278100 (Comp. Gen. June 14, 1990)). Among other things, CICA creates a bid-protest system whereby federal contractors can challenge an agency's alleged violation of procurement statutes and regulations. *See* 31 U.S.C. § 3552(a). CICA defines a "protest" as, among other things, a written objection to a solicitation by a federal agency "for the procurement of property or services." § 3551(1). Importantly, unlike the Procurement Policy Act, CICA does not contain broad definitions of the words "procurement" and "acquisition."

In *Rapides Regional Medical Center*, the Fifth Circuit paid particular attention to the fact that the Procurement Policy Act's broad definition of the word "procurement" did *not* apply to the CICA. "It stands to reason," the court of appeals explained, "that the definition of procurement [in the Procurement Policy Act], which establishes an agency in the executive branch whose mission is to oversee federal procurement policy, is considerably broader than the definition of procurement subject to the particularized bidding and negotiation requirements specified by CICA." 974 F.2d at 573. Therefore, the Fifth Circuit looked to a dictionary definition of the word "procurement," something that the Procurement Policy Act's expansive definition of "procurement" renders unnecessary in this case. *See id.*; *see also*

Crystal Cruises, 1990 WL 278100, at *2 (describing the Comptroller General's limited jurisdiction to adjudicate bid protests under the CICA and finding that the Comptroller General did not have jurisdiction because the dispute in question involved the *sale* of a permit by a federal agency to private parties, not a *purchase* of goods or services by a federal agency from private parties).[8]

B. The Procurement Policy Act's Requirements Are Not Mere "Technical" Requirements To be Disregarded for the Convenience of the Executive Branch

Throughout their moving brief, Defendants characterize the requirements of the Procurement Policy Act and the Regulatory Flexibility Act as mere "technical" requirements that are somehow not worthy of judicial enforcement. *See* Defs.' Mem. at 1, 31-37. However, the Constitution does not supply the Executive Branch with discretion to pick and choose which laws are substantive and to be strictly observed, and which laws are "technical" and to be observed only when convenient. The Executive Branch has the constitutional responsibility to faithfully execute *all* laws unless it thinks them unconstitutional. *See* U.S. Const. art. II, § 3 (Take Care Clause). Defendants do not suggest, nor can they, that the Procurement Policy Act's notice-and-comment requirements unconstitutionally infringe upon any Executive Branch prerogative. Therefore, the Court should soundly reject Defendants' suggestion that the Procurement Policy Act's notice-and-comment requirements are only "technical."

* * *

The revised MOU is a "procurement policy, regulation, procedure, or form" subject to the Procurement Policy Act's notice-and-comment requirements. Because Defendants failed to comply with

[8] Defendants' assertion (Defs.' Mem. at 34) that Plaintiffs' interpretation of the Procurement Policy Act would lead to absurd results—such as requiring *Federal Register* publication of "state and municipal laws" or "federal labor laws" anytime compliance with such laws is required by contract—is incorrect. Unlike statutes, standard contracts like the revised MOU may be unilaterally amended by the Executive Branch, and are not published in proposed form prior to their effective date and later changed in response to public comments unless agencies comply with the Procurement Policy Act's notice-and-comment requirements.

the Procurement Policy Act's notice-and-comment requirements, Plaintiffs are entitled to summary judgment on Count VI of their Complaint.

VI. PLAINTIFFS' CAUSE OF ACTION UNDER THE REGULATORY FLEXIBILITY ACT IS NOT "MORALLY DUBIOUS"

Finally, in Count VII of the Complaint, Plaintiffs allege that the Final Rule violated the procedural requirements of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612, because the Final Rule failed to "account for the significant costs to employers who, although they have previously complied in good faith with all existing immigration laws, must replace workers who become unauthorized to work solely by operation of the requirements imposed by Executive Order 13,465." Compl. ¶ 97. In moving for summary judgment on this count, Defendants do not challenge the fact that the Final Rule will have significant financial consequences for small entities, many of whom will be required to participate in E-Verify because of the Final Rule's $3,000 subcontracting threshold. Defendants rightly note (Defs.' Mem. at 35) that Plaintiffs did not include this issue in their moving brief, which was filed on an expedited basis shortly after this action was commenced. At the time Plaintiffs filed their moving brief, for example, they did not have access to the 22-volume, 7378-page Administrative Record, which Defendants did not file in this case until the day they filed their cross-motion for summary judgment. Because the Councils violated the procedural requirements of the RFA by failing to take into account the true cost of the Final Rule, the Court should deny Defendants' motion for summary judgment on Count VII.

According to Defendants, the Complaint's RFA cause of action is "morally dubious" because "[c]osts associated with the termination of unauthorized workers are a direct result, not of this rule, but of the Immigration and Nationality Act which expressly prohibits employers from knowingly continuing to employ any non-citizen who is not authorized to work in the United States." Defs.' Mem. at 36-37.

Defendants characterize Plaintiffs' cause of action as saying the RFA required the Councils to "take into account the costs of replacing unauthorized workers whom plaintiffs's members never should have employed in the first place, but whose illegal status they might have remained ignorant of but for the more effective screening provided by the E-Verify system." *Id.* at 36.

Not only is this a mischaracterization of Plaintiffs' argument, Defendants overlook the simple fact that persons can and have been terminated from their employment, not because of the correct operation of the Immigration and Nationality Act, but because of E-Verify error. *See, e.g.*, H.R. Rep. No. 111-157, at 131 (2009) ("The most recent audit [of E-Verify], which is nearly two years old, shows an unacceptably high rate of individuals falsely identified as ineligible to work. Of particular concern is the report's conclusion that nearly 1 in 10 naturalized citizens is reported by Basic Pilot/E-Verify as non-work authorized."). Defendants do not argue that the Final Rule took into account the significant costs to employers associated with this congressionally recognized phenomenon; instead, they argue that such "secondary" effects need not be included in a final regulatory flexibility analysis. *See* Defs.' Mem. at 36-37.

Defendants are mistaken, and since the Councils do not administer the RFA, their interpretation of the statute is not entitled to deference. *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 176-77 (D.C. Cir. 2007) (finding that agency violated the RFA because a rule amending the agency's drug-and-alcohol-testing regulations to expressly mandate that large air carriers require their contractors to perform such testing, including employees of subcontractors at any tier, imposed direct costs on small entities). Furthermore, Defendants' suggestion that the procedural requirements imposed by the RFA are mere "technical" requirements should be rejected. *See id*. at 178 ("The RFA is a procedural statute setting out precise, specific steps an agency must take. The [agency-defendant] offers no authority to

support its 'substantial compliance' theory and we are aware of none. Accordingly we reject this argument as well.").

Defendants have mischaracterized Plaintiffs' RFA cause of action and refused to acknowledge the real-world consequences of requiring government contractors and subcontractors to participate in E-Verify, a program that Congress has recognized has a history of false positives. Defendants are therefore not entitled to summary judgment on Count VII of the Complaint.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' moving brief, the Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Cross-Motion for Summary Judgment.

Dated: August 3, 2009

Respectfully submitted,

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EXHIBIT A

Press Release, Dep't of Homeland Security, Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify (July 8, 2009)

Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment

Chamber of Commerce of the United States of America, et al. v. Janet Napolitano, et al.
Civil Action No. AW-08-3444

Homeland Security

Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify

SHARE

Release Date: July 8, 2009

For Immediate Release
Office of the Press Secretary
Contact: 202-282-8010

Department of Homeland Security (DHS) Secretary Janet Napolitano today strengthened employment eligibility verification by announcing the Administration's support for a regulation that will award federal contracts only to employers who use E-Verify to check employee work authorization. The declaration came as Secretary Napolitano announced the Department's intention to rescind the Social Security No-Match Rule, which has never been implemented and has been blocked by court order, in favor of the more modern and effective E-Verify system.

"E-Verify is a smart, simple and effective tool that reflects our continued commitment to working with employers to maintain a legal workforce," said Secretary Napolitano. "Requiring those who seek federal contracts to use this system will create a more reliable and legal workforce. The rule complements our Department's continued efforts to strengthen immigration law enforcement and protect critical employment opportunities. As Senator Schumer and others have recognized, we need to continue to work to improve E-Verify, and we will."

E-Verify, which compares information from the Employment Eligibility Verification Form (I-9) against federal government databases to verify workers' employment eligibility, is a free web-based system operated by DHS in partnership with the Social Security Administration (SSA). The system facilitates compliance with federal immigration laws and helps to deter unauthorized individuals from attempting to work and also helps employers avoid employing unauthorized aliens.

The federal contractor rule extends use of the E-Verify system to covered federal contractors and subcontractors, including those who receive American Recovery and Reinvestment Act funds. After a careful review, the Administration will push ahead with full implementation of the rule, which will apply to federal solicitations and contract awards Government-wide starting on September 8, 2009.

On average, one thousand employers sign up for E-Verify each week, totaling more than 134,000 employers representing more than half a million locations nationwide. Westat, an independent research firm, found that 96.9 percent of all queries run through E-Verify are automatically confirmed work-authorized within 24 hours. The figure is based on statistics gathered from October through December 2008. Since October 1, 2008, E-Verify has processed more than six million queries. In an April 2009 American Customer Satisfaction Index Survey of over a thousand E-Verify participants, E-Verify scored 83 out of a possible 100 points—well above the latest federal government satisfaction index of 69 percent.

In addition to expanding participation, DHS continues to enhance E-Verify in order to guard against errors, enforce compliance, promote proper usage, and enhance security. Recent E-Verify advancements include new processes to reduce typographical errors and new features to reduce initial mismatches. In May 2008, DHS added access to naturalization database records which increased the program's ability to automatically verify naturalized citizens' status, reducing citizenship-related mismatches by 39 percent. Additionally, in February 2009, the agency incorporated Department of State passport data in the E-Verify process to reduce mismatches among foreign-born citizens. Other initiatives underway will bring further improvements to Federal database accuracy; add new tools to prevent fraud, misuse, and discrimination; strengthen training, monitoring, and compliance; and enhance privacy protections.

DHS will be proposing a new regulation rescinding the 2007 No-Match Rule, which was blocked by court order

shortly after issuance and has never taken effect. That rule established procedures that employers could follow if they receive SSA No-Match letters or notices from DHS that call into question work eligibility information provided by employees. These notices most often inform an employer many months or even a year later that an employee's name and Social Security Number provided for a W-2 earnings report do not match SSA records—often due to typographical errors or unreported name changes. E-Verify addresses data inaccuracies that can result in No-Match letters in a more timely manner and provides a more robust tool for identifying unauthorized individuals and combating illegal employment.

As Governor of Arizona, Secretary Napolitano signed legislation mandating all employers in the State use E-Verify. Implementation of this legislation has received high marks from employers across Arizona and the USCIS Ombudsman (in a December 2008 report).

For more information on E-Verify, visit www.uscis.gov/everify.

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This page was last reviewed/modified on July 8, 2009.

EXHIBIT B

Administrative Record Pages 3246-59

Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment

Chamber of Commerce of the United States of America, et al. v. Janet Napolitano, et al.
Civil Action No. AW-08-3444

3/29/07 L.A. Times 4
2007 WLNR 5904436

Los Angeles Times

March 29, 2007

Section: California Metro

2 sentenced for hiring illegal migrants

Golden State Fence executives get probation and fines, and the company is ordered to forfeit $4.7million in profits.

Tami Abdollah
Times Staff Writer

In a rare criminal prosecution of an employer in California, two executives of a fence building company were sentenced in federal court in San Diego on Wednesday to three years' probation for knowingly hiring illegal immigrants, officials said.

U.S. District Judge Barry T. Moskowitz also sentenced Melvin Kay, president of the Riverside-based Golden State Fence Co., and Vice President Michael McLaughlin to 180 days of home confinement and 1,040 hours of community service, and fined each $200,000 and $100,000, respectively.

In addition, Golden State was ordered to forfeit $4.7 million in profits earned with illegal workers to the federal government.

On Dec. 14, Kay and McLaughlin pleaded guilty to the felony charge and admitted hiring 10 or more illegal workers between January 1999 and November 2005.

The prosecution had urged six months of prison time for the executives. But the judge opted for probation, citing the company's good treatment of its employees, including providing fair wages and benefits, said officials and attorneys for both sides.

Golden State had a history of warnings from Immigration and Customs Enforcement. In July 1999, an inspection of the company's Oceanside office, which is north of San Diego, found at least 15 undocumented workers. The company responded in a letter that it had terminated their employment.

In September 2004, ICE officials found that at least 49 employees at the Oceanside office were illegal immigrant workers. In August 2005, officials found at least three illegal workers in the Riverside office found previously in the 1999 inspection. In November 2005, ICE executed search warrants for both offices and arrested 16 undocumented workers. The arrested workers were placed in removal proceedings,

officials said.

"This is the first criminal prosecution of an employer for violating hiring laws of illegal aliens in San Diego," said Michael Carney, acting special agent in charge for ICE in San Diego. "Hopefully the word will get out after this case, and after a few other cases, that will have a deterrent effect."

The criminal prosecution of Golden State executives is the latest example of tougher enforcement sought by the Bush administration, said Mark Krikorian, executive director of the Center for Immigration Studies in Washington, D.C., a think tank that supports tighter controls on immigration.

But Krikorian said he believes that the administration "gave the green light" to step up enforcement of immigration laws to build up political credibility so that Congress would approve an amnesty for illegal immigrants.

"I describe it as a spoonful of enforcement will help the amnesty go down," Krikorian said. "It burnishes the administration's credentials as being tough on enforcement."

According to ICE, in 2002 there were 25 criminal arrests nationwide in workplace enforcement cases, which include hiring illegal immigrants, money laundering and other charges. In 2006, there were 716.

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---- INDEX REFERENCES ----

NEWS SUBJECT: (Crime (1CR87); Fraud Report (1FR30); Social Issues (1SO05); Government (1GO80))

INDUSTRY: (Smuggling & Illegal Trade (1SM35))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39); California (1CA98))

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OTHER INDEXING: (CONGRESS; GOLDEN STATE; GOLDEN STATE FENCE; GOLDEN STATE FENCE CO; ICE; IMMIGRATION AND CUSTOMS ENFORCEMENT; IMMIGRATION STUDIES; OCEANSIDE) (Barry T. Moskowitz; Bush; Kay; Krikorian; Mark Krikorian; McLaughlin; Melvin Kay; Michael Carney; Michael McLaughlin)

KEYWORDS: CALIFORNIA; EMPLOYERS; ILLEGAL IMMIGRANTS; HIRING; SENTENCING

EDITION: Home Edition

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8/4/07 Providence J.-Bull. (R.I.) A3
2007 WLNR 15199437

Providence Journal Bulletin (RI)

August 4, 2007

Section: News

3 at Bianco plant indicted on immigration charges

Karen Lee Ziner; Journal Staff Writer

The New Bedford company's president and two managers could each face 10 years in prison and a $250,000 fine.

* * *

Five months after a sweeping immigration raid at the Michael Bianco Inc. plant in New Bedford, company president Francesco Insolia and two of his top managers have been indicted on charges of conspiring to harbor and hire illegal immigrants, to fulfill almost $230 million in government contracts.

U.S. Attorney Michael J. Sullivan said the indictment "should send a clear message to all employers that hiring illegal or unauthorized aliens, or conspiring to shield them from detection, will not be tolerated."

Sullivan, the U.S. Attorney for Massachusetts, said the alleged conduct by Insolia and his managers "undermines the integrity of our immigration system and could place legally operating businesses at a competitive disadvantage."

Insolia and the other two defendants will be arraigned Aug. 9.

Insolia, of Pembroke, Mass., had no comment yesterday. He remained on the job, according to a spokesman.

The indictment was announced Thursday by Sullivan and Bruce M. Foucart, special agent in charge for the U.S. Immigration and Customs Enforcement office of investigations in Boston.

The Bianco company, which produces rucksacks and other military gear for U.S. soldiers in Iraq and Afghanistan, is operating on a reduced production schedule agreed to by the Department of Defense, said spokesman Doug Bailey, of Rasky Baerlein Strategic Communications of Boston.

The two-count indictment names Insolia, 50; production manager Dilia Costa, 55, of New Bedford; and contracts specialist Gloria Melo, 41, of Fall River. They are each charged with conspiring to harbor or conceal or shield illegal aliens from detection, or to encourage and in duce aliens to come to, enter and reside in the United States; and with conspiring to hire and continue to employ unauthorized aliens.

A third manager, Ana Figueroa, who was charged in March after the raid, was not named in the indictment.

If convicted of the charge of conspiring to hire illegal aliens, Insolia, Costa and Melo each face maximum sentences of 10 years in prison, a $250,000 fine and a $100 special assessment, plus at least two years of supervised release. They face months in prison, a $100 special assessment, and a $10,000 fine for each illegal alien hired by the Bianco company on the charge of conspiracy to hire illegal aliens.

The indictment stems from an ongoing investigation that started last year and culminated with a March 6 raid at the plant at 89 West Rodney French Blvd., during which 361 illegal immigrants were detained.

The raid sparked widespread community outrage. Social service agencies, immigrant advocacy groups and public officials decried a "humanitarian crisis" that disrupted the lives of families.

After the raid, workers accused Insolia and his managers of maintaining "sweatshop" conditions referenced in the affidavit. They said Insolia fined workers $25 for arriving more than a minute late, or staying too long in the restrooms, and charged them for aspirin. They also said that the front door was the sole entrance and exit.

Last month, the Bianco company agreed to pay a reduced fine of $37,500 after the federal Occupational Safety and Health Administration cited the company for 15 alleged serious violations of workplace health and safety standards, including mechanical, electrical and chemical violations.

Left uncorrected, those conditions expose employees to the hazards of lacerations, amputation, burns, electrocution, eye and face injuries and to being caught in moving machine parts or struck by machinery, said Robert B. Hooper, OSHA's acting area director for Southeastern Massachusetts.

Bailey, the Bianco spokesman, said OSHA reduced the proposed $45,000 fine after the company remedied the conditions cited in the inspection.

ICE is continuing its investigation with assistance from the Social Security Administration's Office of Inspector General; the Department of Defense's Criminal Investigative Service; the U.S. Department of Labor's Office of Inspector General; the Massachusetts Insurance Fraud Bureau and the U.S. Postal Inspection Service.

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---- INDEX REFERENCES ----

COMPANY: MICHAEL BIANCO INC; SOCIAL SECURITY ADMINISTRATION

NEWS SUBJECT: (HR & Labor Management (1HR87); Legal (1LE33); Business Management (1BU42); Occupational Safety (1WO89); Health & Family (1HE30); Government (1GO80); Government Litigation (1GO18); Health & Safety (1HE24))

INDUSTRY: (Aerospace & Defense (1AE96); Defense (1DE43))

REGION: (Americas (1AM92); North America (1NO39); New England (1NE37); Massachusetts (1MA15); USA (1US73))

Language: EN

OTHER INDEXING: (BIANCO; DEPARTMENT OF DEFENSE; FEDERAL OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; ICE; MASSACHUSETTS INSURANCE FRAUD BUREAU; MICHAEL BIANCO INC; OSHA; RASKY BAERLEIN STRATEGIC COMMUNICATIONS; SOCIAL SECURITY ADMINISTRATION; SOUTHEASTERN MASSACHUSETTS; US DEPARTMENT OF LABOR; US IMMIGRATION; US POSTAL INSPECTION) (Ana Figueroa; Bailey; Bruce M. Foucart; Costa; Dilia Costa; Doug Bailey; Francesco Insolia; Gloria Melo; Insolia; Melo; Michael J. Sullivan; Robert B. Hooper; Sullivan)

KEYWORDS: CRIMES; FACTORIES; &; MILLS; IMMIGRATION

EDITION: All

Word Count: 839
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END OF DOCUMENT

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2008 WLNR 8805254

Richmond Times Dispatch (VA)

May 8, 2008

Section: Area/State

U.S. immigration agents arrest 33: Workers at Richmond site of new federal courthouse alleged to be here illegally

MARK BOWES

Federal immigration officials yesterday raided the construction site for the new federal courthouse in downtown Richmond and arrested 33 immigrant workers from six Central and South American countries.

Immigration and Customs Enforcement agents, assisted by Virginia State Police, rounded up 29 men and four women working at the site who were allegedly residing here illegally.

They were each charged with administrative immigration violations and are being detained for further processing, said Ernestine Fobbs, a spokeswoman for ICE in Washington.

The workers' native countries included Mexico, Honduras, Guatemala, El Salvador, Nicaragua and Peru, Fobbs said.

Fobbs said the investigation is ongoing.

State police did not participate directly in the raid. Four state troopers were on site to assist traffic flow, spokesman Sgt. Tom Cunningham said.

Fobbs said the workers could face additional charges if authorities determine they violated any laws.

"It could be for re-entering the country after deportation, it could be identity fraud, anything like that," Fobbs said.

Criminal charges against the workers would be referred to the U.S. attorney's office for the Eastern District of Virginia for prosecution, she said.

Fobbs declined to say what sparked the investigation and raid.

"I know the workplace is cooperating . . . with us in this investigation," she said of courthouse contractors.

The builder for the project is Tompkins Builders Inc., based in Washington, which does private- and public-sector construction. Other projects handled by Tompkins include the Gaylord National Resort and Convention Center just outside Washington and the National World War II Memorial.

James Tolbert, the company's vice president for business development and marketing, referred questions to Turner Construction Co., Tompkins' parent company.

"We are cooperating with authorities on an investigation of subcontractors on the Richmond federal courthouse job site," said Chris McFadden, a Turner spokesman. "The investigation does not involve any employees of Tompkins Builders, or its parent company, Turner Construction Co."

McFadden said the number of subcontractors at the site changes periodically, depending on the type of work being done, and that he couldn't provide how many were currently under contract or their names. He said he didn't know which contractor or contractors employed the arrested workers.

Several workers who witnessed yesterday's raid were willing to talk about what happened but not give their names out of fear of being fired.

They said the day began as usual but that at one point, workers were told to leave their equipment outside and enter the building for a safety meeting.

When they went to the second floor, they saw a number of immigration agents in hard hats waiting for them, the workers said, and everyone was asked to provide a legal ID.

Those with legal IDs were given red plastic bracelets and told to wear them all day. Two workers said they saw agents load four vans with men and one van with women.

Carl Tobias, a professor at the University of Richmond law school, said the case could prove similar to the federal prosecution of Michael Vick on dogfighting charges.

"This use of prosecutorial power really sends a strong message," Tobias said. "Other construction operations - federal or not - will sit up and take note when they see even the federal courthouse doesn't give you any immunity."

Coincidentally, he said, if the courthouse opens soon enough, it's possible some of those charged could be tried in the building they helped construct.

The courthouse building at Seventh and Broad streets is in the final stages of construction and is expected to open this summer.

The $104 million courthouse, developed by the federal General Services Administration, will replace the federal court building at 10th and Main streets, parts of which date to before the Civil War.

Yesterday's raid was the second major immigration crackdown in the Richmond area in two years. In April 2006, immigration agents arrested 21 workers at the IFCO Systems of North America plant in eastern Henrico County.

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Staff writers Frank Green and Linda Dunham contributed to this report.

---- INDEX REFERENCES ----

COMPANY: TURNER CONSTRUCTION CO; TOMPKINS BUILDERS INC; TURNER CORP

NEWS SUBJECT: (Social Issues (1SO05); Crime (1CR87); Economics & Trade (1EC26))

REGION: (Latin America (1LA15); Americas (1AM92))

Language: EN

OTHER INDEXING: (COINCIDENTALLY; GAYLORD NATIONAL RESORT AND CONVENTION CENTER; NATIONAL WORLD WAR; SEVENTH; UNIVERSITY (THE); TOMPKINS; TOMPKINS BUILDERS; TOMPKINS BUILDERS INC; TURNER; TURNER CONSTRUCTION CO; VIRGINIA STATE POLICE) (Carl Tobias; Chris McFadden; Contact Mark Bowes; Ernestine Fobbs; Fobbs; Frank Green; James Tolbert; Linda Dunham; McFadden; Staff; Tobias; Tom Cunningham)

KEYWORDS: IMMIGRATION; EMPLOYMENT; VIOLATION; GOVERNMENT; COURT; BUILDING; CONSTRUCTION

EDITION: State

Word Count: 849
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January 20, 2007

Section: B

Illegal immigrants arrested at military bases

GIOVANNA DELL'ORTO
Associated Press Writer

Illegal immigrants arrested at military bases

Workers were charged at installations in Georgia, Virginia and Nevada

By GIOVANNA DELL'ORTO

Associated Press Writer

ATLANTA - About 40 illegal immigrants hired by contractors working on three military bases in Georgia, Virginia and Nevada were arrested over the last three days by U.S. Immigration and Customs Enforcement agents, the agency said Friday.

In the largest arrest, 21 illegal immigrant workers were charged with identity theft and immigration violations for attempting to enter Fort Benning, Ga., said agency spokesman Richard Rocha. They were among 24 workers arrested Wednesday while trying to enter the base to do construction work on soldiers' barracks. The three workers who are not facing criminal charges will be placed in immigration removal proceedings.

Similar raids at military installations in Nevada and Virginia on Thursday also netted 18 other arrests, Immigration and Customs Enforcement spokesman Marc Raimondi said.

One of those arrested, a Nicaraguan man employed by a company doing construction at Creech Air Force Base in Indian Springs, Nev., was a member of MS-13, which the government considers one of the most dangerous gangs in the U.S., Raimondi said. None of the others arrested posed a direct security threat, Raimondi said, though he added that it's critical that authorities have real identifications for those entering military bases.

The group arrested in Georgia includes 20 Mexican nationals, three Guatemalans and an Italian. Nine of the 21 are charged with either possessing or using fraudulent identity documents, and another was accused of re-entering the country after deportation. The remaining 11 defendants are accused of entering the country illegally.

Immigration and Customs Enforcement spokesman Richard Rocha on Friday declined to provide details, including the names of the arrested workers. Rocha said the workers worked for different subcontractors, who are not currently facing any charges from federal officials.

Many of the workers used counterfeit identity documents to obtain jobs and three had entered the United States legally but their eligibility to stay in the country had expired, the news release said. It also said the arrests resulted from a seven-month, multi-agency investigation.

The 16 people arrested in Virginia include 14 undocumented workers who are not facing criminal charges, including three arrested at the Quantico Marine Base. Two men, an American a Mexican, were arrested at an apartment complex in nearby Dumfries, Va., and charged with conspiracy to harbor illegal aliens, whom they are accused of then hiring for work on the Marine base.

Military installations and other structures considered critical to national security have been a high priority for immigration officials as they have stepped up efforts to crack down on illegal workers over ther last year, said Assistant Secretary for Immigration and Customs Enforcement Julie Myers.

In July, the agency arrested nearly 60 illegal immigrants at Fort Bragg in North Carolina.

(Associated Press Writer Daniel Yee contributed to this report from Atlanta.)

---- INDEX REFERENCES ----

NEWS SUBJECT: (Crime (1CR87); Social Issues (1SO05))

INDUSTRY: (Smuggling & Illegal Trade (1SM35))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39); Nevada (1NE81); Georgia (1GE15))

Language: EN

OTHER INDEXING: (CREECH AIR FORCE BASE; CUSTOMS ENFORCEMENT; CUSTOMS ENFORCEMENT JULIE MYERS; IMMIGRATION; QUANTICO MARINE BASE; US IMMIGRATION) (GIOVANNA DELL; Marc Raimondi; Nevada; Raimondi; Richard Rocha; Rocha; Similar; Virginia; Writer Daniel Yee)

EDITION: 01

Word Count: 627

1/20/07 MOBILEREG B12
END OF DOCUMENT

Mills Manufacturing Corporation raided by ICE

Friday, 15 August 2008

by Rob Bell

CONTRIBUTOR • ROBB@WCBJ.BIZ

Immigration and Customs Enforcement raided Woodfin’s Mills Manufacturing Corporation (MMC) on the morning of August 12; arresting 57 workers on charges involving immigration issues.

ICE Officials said Mills Manufacturing Corp. has been fully cooperative and is not a target of the ICE investigation. Workers had obtained jobs using fraudulent documents to gain employment at the government defense contractor that manufactures parachutes. According to officials, this raid is the largest of its kind in Western North Carolina.

Carl Mumpower, Republican candidate for the U.S. House of Representatives, 11th District, said he contacted ICE agents in Charlotte about Mills Manufacturing after receiving calls from a MMC employee concerned that most production workers only spoke Spanish. Mumpower said he also complained about other local businesses that may be employing illegal workers. Other companies reported were Arvato Digital Services (Sonopress) in Weaverville, Van Wingerden Greenhouses in Henderson County, and various construction projects for the City of Asheville and Buncombe County currently under construction in downtown Asheville.

The 57 MMC workers arrested by ICE were transported to the Henderson County Detention Center for processing. “We have 57 illegal aliens from Mill Manufacturing Corp.,” U.S. Immigration Customs Enforcement agency spokesman Ivan Ortiz said. “Twenty-nine of the people have qualified to be released, and will be given a notice to appear before an immigration judge to determine their status. The remaining people will be taken to Charlotte or Georgia to be detained.”

The 29 were released for humanitarian reasons and cited. They were not fugitives, Ortiz said, nor did they have criminal records.

Ortiz said that none of the illegal immigrants would be housed in the Henderson County Jail.

During the raid at MMC, rumors began to circulate at nearby Arvato Digital Services. Within minutes approximately 50 workers left their jobs and rushed to the parking lot. Most Arvato workers returned to work by days’ end.

John Oswald, executive vice president and chief executive officer of Mills Manufacturing, addressed the raid, and said MMC had not knowingly hired workers who were not authorized to work in the U.S. Oswald stated reviews all employees’ documents. He said MMC’s human resources department inspects driver’s licenses, Social Security cards, or Green Cards, but they are not experts in forged documents.

Employers have to walk a fine line “between discriminating and making sure we get documented employees,” Oswald said, “… [MMC] does everything required by law and everything allowed by the law to prevent the hiring of undocumented workers.

“We reject a lot of people for false documents—a lot of them we are able to reject on their face value,” Oswald said. “But some are so perfect, the forgeries are so perfect, it’s very difficult to tell.”

New workers will be screened using the E-Verify system.

“Anyone with a criminal charge against them will have to stand trial for that charge,” Ortiz said. “If they are convicted they will have to serve their sentence. Then they will be deported.” Those without criminal charges will be deported following their hearing in Atlanta, or after any appeals.

Many of the workers arrested at MMC had been employed by the company for five years. Salaries for the positions range from $9 to $14 per hour, Oswald said.

MMC employs 175 people in all, and the removal of 57 workers will impact the plant’s delivery schedule. The raid will not affect production. The company remains viable and has sufficient contracts right now, Oswald said.

WCBJ