

HEAVEN OR HELL?: THE PLIGHT OF FORMER WARTIME INTERPRETERS OF THE IRAQ AND AFGHANISTAN CONFLICTS LIVING IN THE U.S.

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*“Give me your tired, your poor, your huddled masses yearning to breathe
free.”¹*

INTRODUCTION

To respond to the need for communicating with civilians during the Iraq War, the United States military hired Iraqis to work as interpreters for troops on the ground.² These interpreters not only risked their own lives

1. EMMA LAZARUS, *The New Colossus*, in *SELECTED POEMS* 58 (John Hollander, ed., 2005).

2. See Maiken Scott, *Iraqi Interpreter’s Story Sheds Light on Plight of Those Left Behind*, NEWSWORKS (Sept. 16, 2011), <http://www.newsworks.org/index.php/health-science/item/26662-iraqi-interpreters-story-sheds-light-on-plight-of-those-left-behind> (last visited Apr. 4, 2012).

performing this task, but also the lives of their family members, because taking on this role was seen by many Iraqi extremists as collaborating with the enemy.³ To reward the sacrifices made by interpreters, Congress took action to authorize a significant number of Special Immigrant Visas (“SIVs”) to interpreters so that they could live comfortably in the U.S.⁴ Unfortunately, the effects of these actions have been minimal. Many former interpreters currently face the decision to either remain in the U.S. with little opportunity to support themselves and their families or to return to Iraq where they risk being murdered for their assistance to U.S. forces.⁵

To provide assistance to veterans of the Iraq and Afghanistan conflicts, Congress passed the Vow to Hire Heroes Act (“VHHA”) on November 10, 2011.⁶ The VHHA provides incentives to private businesses that hire veterans, issues grants to non-profit organizations that provide training and placement to veterans, and extends rehabilitation and vocational benefits to veterans with severe injuries or illnesses.⁷ Despite Congressional knowledge of the difficulties facing the former interpreters who were fortunate enough to obtain SIVs, the VHHA, however, provides no incentives to businesses that hire interpreters who served alongside U.S. troops during the conflicts in the Middle East. There is very limited data indicating intentional discrimination against the former interpreters. However, Congress’ actions show otherwise.

Because it is well-known that interpreters struggle to survive economically in the U.S., the VHHA is a violation of former interpreters’ equal protection and civil rights.⁸ Part I of this Note will explain the extreme sacrifices made by interpreters in the Middle East and Congress’ response to interpreters’ work for U.S. troops.⁹ Part II will discuss the history and Congressional intent behind the VHHA.¹⁰ Part III will explore

3. *Id.*

4. See National Defense Authorization Act of 2008, H.R. 1585, 110th Cong. §§ 1241- 49 (1st Sess. 2008); Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007, H.R. 3824, 110th Cong. §§ 3, 7 (2007); Deborah Amos, *Lawmakers Lobby to Bring Iraqi Translators to U.S.*, NPR (Nov. 27, 2007), <http://www.npr.org/templates/story/story.php?storyId=16650437>.

5. See Anna King, *Former Iraqi Interpreter Tries to Make It in a Down Economy*, OPB NEWS (Jan. 5, 2009, 10:09 PM), <http://news.opb.org/article/former-iraqi-interpreter-tries-make-it-down-economy>.

6. See Press Release, Senator Patty Murray, Veterans: Senator Murray’s Landmark Veterans Employment Bill Passes Senate (Nov. 10, 2011), available at http://www.murray.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=74ff2a37-d6a1-4387-87e2-81ad6016c766 [hereinafter Murray]; Repeal of Imposition of 3 Percent Withholding on Certain Payments Made to Vendors by Government Entities, H.R. Con. Res. 674, 112th Cong. (2011) (enacted) (pointing specifically to Title Two, “VOW to Hire Heroes Act of 2011”).

7. See H.R. Con. Res. 674 at §§ 225, 232, 234.

8. See *infra* pp. 10-22.

9. See *infra* pp. 2-5.

10. See *infra* pp. 5-9.

the Equal Protection Clause of the Fourteenth Amendment and describe how it applies to former interpreters.¹¹ Part III also discusses how the strict discriminatory purpose requirement to the Equal Protection Clause can be met to prove a violation of interpreters' rights. Finally, Part IV will discuss a potential civil rights claim that former interpreters could make against the government under Title VI of the 1964 Civil Rights Act.¹²

I. THE SACRIFICES OF MILITARY INTERPRETERS AND THEIR "REWARD"

*"[It's] like you live in heaven but you cannot touch anything in it, so what is the use of it?"*¹³

In order to rebuild Iraq and take on an insurgency, the U.S. military employed thousands of Iraqi interpreters to accompany U.S. troops on missions abroad.¹⁴ Iraqi interpreters operated alongside U.S. troops on every mission conducted outside American outposts.¹⁵ Without Iraqi interpreters, U.S. troops would have been "essentially blind to what [was] happening around them."¹⁶ Insurgents targeted interpreters, both men and women, because insurgents knew the American military would need Iraqi interpreters to build significant relationships among the populace if they wanted to win the hearts and minds of the Iraqi population.¹⁷ Because the U.S. needed interpreters on "forward" missions,¹⁸ they were exposed to more risk than many American servicemen and women who rarely left the comfort of American bases while serving in Iraq or Afghanistan.¹⁹ Furthermore, while military units rotate home after a tour of duty,

11. See *infra* pp. 9-21.

12. See 42 U.S.C. § 2000d-1 (2012); *infra* pp. 21-25.

13. King, *supra* note 5.

14. See T. Christian Miller, *U.S. Insurance Firm Neglects Survivors of Iraqi Translators, May Face Criminal Charges*, PROPUBLICA (May 23, 2011, 9:19 AM), <http://www.propublica.org/article/us-insurance-firm-neglects-survivors-of-iraqi-translators-may-face-criminal/single>.

15. Scott, *supra* note 2.

16. Thomas X. Hammes, *Lost in Translation*, N.Y. TIMES (Aug. 25, 2005), <http://query.nytimes.com/gst/fullpage.html?res=950DE4DB1E3EF936A1575BC0A9639C8B63&ref=interpreters#>.

17. Paul Thompson, *Current Development: Development in International Area: Iraqi Translators Face Difficulties Gaining Asylum in the United States*, 22 GEO. IMMIGR. L.J. 141, 142 (2007).

18. See John Koopman, *The Rough and the Smooth*, SFGATE (Mar. 20, 2006, 7:09 PM), <http://blog.sfgate.com/iraqjkcg/page/3/> (indicating that many troops serving in Iraq were removed from actual combat and were based in areas "with more security per square inch than the lobby of San Francisco's Hall of Justice."); Michael Doyle, *Courts Struggle to Decide Whether Civilians can be Court-martialed*, STARS AND STRIPES (Apr. 7, 2012), <http://www.stripes.com/news/us/courts-struggle-to-decide-whether-civilians-can-be-court-martialed-1.173815> (addressing the fact that interpreters work alongside troops located in areas where intense combat took place).

19. See John Koopman, *supra* note 18.

interpreters stay behind and provide assistance to the U.S. troops replacing the previous unit.²⁰ As a result, the interpreters' death toll was greater than any assisting country's military during the American-led coalition in Iraq.²¹ The role of the interpreter was crucial to U.S. success because as Michael Breen, a former infantry Captain in the U.S. Army stated, "a trusted interpreter [could have been] the difference between a successful patrol and body bag."²²

Though the U.S. considered interpreters to be contractors, they were under the supervision of military personnel while performing front-line military duties.²³ Furthermore, military commanders had final oversight over their actions just as military commanders have over American patrols on the ground in Iraq or Afghanistan.²⁴ The military even supplied interpreters with the necessary equipment and training to accompany soldiers on missions.²⁵ Thus, interpreters were essentially soldiers because they were subject to military regulations and endured the same risks as most service men and women.

A. The U.S. Response to Interpreter Benefits

After proposals by Massachusetts Senator Ted Kennedy and New York Congressman Steve Israel, Congress began to realize the importance of interpreters to U.S. troops overseas.²⁶ Senator Kennedy introduced the Refugee Crisis in Iraq Act in 2007, which President George W. Bush signed into law in 2008.²⁷ The Refugee Crisis in Iraq Act was included in the

20. See Conrad Mulcahy, *Officers Battle Visa Hurdles for Iraq Aides*, N.Y. TIMES (May 14, 2008), http://www.nytimes.com/2008/05/14/world/middleeast/14interpreters.html?_r=1&ref=interpreters (last visited Apr. 4, 2012).

21. See Miller, *supra* note 14.

22. Michael Breen, *The Debt We Owe Iraqi Interpreters*, THE CHRISTIAN SCIENCE MONITOR (Dec. 9, 2008), <http://www.csmonitor.com/Commentary/Opinion/2008/1209/p09s02-coop.html> (last visited May 12, 2012).

23. See *Id.*; see also Scott, *supra* note 2.

24. Kristin L. Richer, Note, *The Functional Political Question Doctrine and the Justiciability of Employee Tort Suits Against Military Service Contractors*, 85 N.Y.U. L. REV. 1694, 1720 (2010) (citing U.S. DEP'T OF THE ARMY, CONTRACTING SUPPORT ON THE BATTLEFIELD 2-10 (1999)). "The Head of the Contracting Activity (HCA), generally the head of command in the particular theater of combat, has ultimate authority over all decisions made regarding the contracting firm." *Id.* at 1720 n.132. Furthermore, "the commander bears complete responsibility for all actions of contractors taken under his command." *Id.*

25. *Id.* at 1721 n. 135. "Contractors should be assured that the government will provide equipment and training . . ." *Id.* (quoting U.S. Dep't of the Army, Army Regulation 700-137, Logistics Civil Augmentation Program (1985)).

26. See Amos, *supra* note 4; INT'L RESCUE COMM., FIVE YEARS LATER, A HIDDEN CRISIS 10 (2008), available at http://www.rescue.org/sites/default/files/migrated/resources/2008/iraq_report.pdf.

27. Ruthie Epstein, *U.S. Withdraws Troops from Iraq, But Must Not Abandon Its Refugees*, Human Rights First (Dec. 9, 2011), <http://www.humanrightsfirst.org/>

National Defense Authorization Act for the 2008 fiscal year.²⁸ This act allowed up to 5,000 Iraqis, employed by the U.S. government in Iraq, to obtain SIVs annually for five years.²⁹ In 2007, Representative Israel introduced the Relocation Empowerment and Placement Assistance for Iraqi Refugees Act (REPAIR).³⁰ This would have required “instruction in English as a second language, vocational training, computer training, employment services, and certain counseling services” to improve job opportunities for former interpreters entering the U.S.³¹

Unfortunately for Senator Kennedy and Representative Israel, neither of these proposals came to fruition. The Refugee Crisis in Iraq Act has not lived up to expectations. The process required for interpreters to apply for SIVs, which the Refugee Crisis in Iraq Act acknowledged, was difficult, confusing, and lined in red tape.³² Furthermore, former military officers have complained of roadblocks, such as requiring a General’s signature for the application to be complete.³³ This requirement is “like a junior associate at a Fortune 500 company asking the chief executive for a letter of recommendation.”³⁴ Due to these massive hurdles, only 3,415 former Iraqi interpreters received an SIV by the end of 2011.³⁵ This number is nearly 2,000 less than the amount authorized *per year* from 2008 to 2012, according to the Refugee Crisis in Iraq Act.³⁶

Even with Representative Israel’s strong support for providing former interpreters with SIVs opportunities in the U.S., the REPAIR Act failed to pass in the House of Representatives.³⁷ Representative Israel has expressed his disappointment with Congress’ inaction and failure to support his proposal: “Now there’s no agency to help find a job or a place to live. Once Iraqi translators arrive in the U.S., they’re on their own.”³⁸ Those fortunate enough to make it to the U.S. live lives fit for paupers. Most struggle to make ends meet and must even consider returning to Iraq.³⁹ Back in Iraq,

2011/12/09/u-s-withdraws-troops-from-iraq-but-must-not-abandon-its-refugees/; *see also* H.R. 1585, 110th Cong. §§ 1241- 49 (1st Sess. 2008).

28. H.R. 1585, 110th Cong. §§ 1241- 49 (1st Sess. 2008).

29. H.R. 1585, 110th Cong. § 1244(c)(2) (1st Sess. 2008).

30. Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007, H.R. 3824, 110th Cong. § 7 (2007).

31. *Id.*

32. Mulcahy, *supra* note 20.

33. *Id.*

34. *Id.*

35. Kevin Spak, *US Hangs Iraqi Translators Out to Dry*, NEWSER (Dec. 27, 2011 2:12 PM CST), <http://www.newser.com/story/136234/us-hangs-iraqi-translators-out-to-dry.html>.

36. H.R. 1585, 110th Cong. § 1244(c)(1) (1st Sess. 2008).

37. *Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/hr3824> (last visited May 13, 2012) (for an overview of House Bill 3824).

38. Amos, *supra* note 4.

39. *See* King, *supra* note 5; *see also* Mulcahy, *supra* note 20.

extremists will inevitably target interpreters and their families, now labeled as traitors, for their previous collaboration with the U.S.⁴⁰ Around the same time that Congress refused to provide assistance to these former interpreters living in the U.S., who were an integral part of the war effort, it enacted the VHHA, which ensures plentiful job opportunities for the 2.38 million Americans who served in Iraq and Afghanistan.⁴¹ Both houses of Congress passed the VHHA last fall.⁴²

II. THE VOW TO HIRE HEROES ACT

The VHHA was designed to combat the unemployment problem among American veterans by providing job training assistance.⁴³ Several of the benefits provided to veterans in the VHHA are strikingly similar to some of the potential benefits that would have been provided to former interpreters in the REPAIR Act. The VHHA provides a retraining program for veterans that will offer civilian training for veterans in their military profession.⁴⁴ In addition, the VHHA provides incentives to non-profit organizations that provide training and mentoring for unemployed veterans and rehabilitation and vocational benefits to veterans with injuries or illnesses.⁴⁵ Similarly, the REPAIR Act also called for employment training and mentoring for former interpreters in their search for employment in the U.S.⁴⁶

Representative Israel should be furious about the rejection of the REPAIR Act, considering the same benefits he wanted to extend to nearly 3,500 legal aliens in the U.S. were extended to over two million American citizens. Extending the same benefits to 3,500 former interpreters who risked just as much as the U.S. soldiers they worked alongside would only marginally diminish the entitlements to the 2.38 million veterans under the VHHA.

A. Interpreters as veterans under the Vow to Hire Heroes Act

The U.S. has defined a veteran of the current conflicts in the Middle East as an individual who

40. *Id.*

41. VOW to Hire Heroes Act of 2011, H.R. 674, 112th Cong. (1st Sess. 2011) (enacted); Associated Press, *Obama Salutes Iraq War Vets at White House Dinner*, LONGISLANDPRESS.COM (Feb. 29, 2012), <http://www.longislandpress.com/2012/02/29/obama-salutes-iraq-war-vets-at-white-house-dinner> [hereinafter LONGISLANDPRESS].

42. H.R. 674; LONGISLANDPRESS, *supra* note 41.

43. *See generally* H.R. 674, 112th Cong. (1st Sess. 2011); *see also* Murray, *supra* note 6.

44. H.R. 674, 112th Cong. § 211 (1st Sess. 2011).

45. H.R. 674, 112th Cong. §§ 225, 232, 234 (1st Sess. 2011).

46. Relocation Empowerment and Placement Assistance for Iraqi Refugees Act of 2007, H.R. 3824, 110th Cong. §§ 3, 7 (2007).

[s]erved on active duty at any time for a period of more than 180 consecutive days any part of which occurred during the period beginning on September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last date of Operation Iraqi Freedom. . . .⁴⁷

Moreover, the individual must have been “discharged or released from active duty in the armed forces under honorable conditions.”⁴⁸

The interpreters who enlisted their services to aid active duty service men and women in accomplishing military missions should fall within both of these definitions. First, interpreters fell under the command of military leaders.⁴⁹ Secondly the U.S. military provided them training and equipment to successfully assist the U.S. military in its operations in the Middle East.⁵⁰ The Refugee Crisis in Iraq Act required that interpreters work for the government for at least one year and receive a positive recommendation from a senior supervisor to obtain a SIV.⁵¹ This is evident because a military General was required to sign off on a letter for the interpreters in order to move to the U.S.⁵² The General’s signature was required to establish “faithful and valuable service to the U.S. government” just as an honorable discharge or release from the U.S. military is also intended to indicate faithful service to the government.⁵³

Another reason why these interpreters should be considered veterans under the VHHA is their importance in the war effort. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court conceded that veterans benefits have been extended under broad statutory definitions and that they do not show preference for men over women.⁵⁴ The statute referenced in *Feeney* also allowed any person with specified campaign awards to be considered a veteran.⁵⁵

For example, these interpreters’ presence in front line patrols in Iraq and Afghanistan were imperative to the success of American ground troop operations.⁵⁶ In some instances, their service was so exemplary that the military awarded them military honors.⁵⁷ When interpreters were killed in combat, many military units performed memorial ceremonies that replicated

47. 5 U.S.C. § 2108(1)(D) (2012).

48. 5 U.S.C. § 2108(1)(d) (2012).

49. Richer, *supra* note 24, at 1720 n.132.

50. *Id.* at 1721 n.135.

51. National Defense Authorization Act of 2008, H.R. 1585, 110th Cong. § 1244 (1st Sess. 2008).

52. Mulcahy, *supra* note 20.

53. H.R. 1585, 110th Cong. § 1244 (1st Sess. 2008).

54. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279-80 (1979).

55. *Id.* at 262 n.8.

56. *See* Breen, *supra* note 22.

57. Miller, *supra* note 14.

ceremonies for slain soldiers.⁵⁸ The Army has even tried interpreters in military court for violating the laws of the Uniform Code of Military Justice.⁵⁹ The justification is that interpreters, like soldiers, were “deeply embedded with the armed forces in an area of actual fighting” and “wore the same uniform, ate the same food, slept in the same tents, and faced the same constant dangers from the enemy.”⁶⁰ In sum, if the government treats interpreters like soldiers while at war, the government should treat interpreters as veterans once the conflict is over.

Veterans’ preference systems have traditionally been tailored “to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, [and] to encourage patriotic service.”⁶¹ The general objective of most veterans’ preference statutes is to reward former service members for the risks they endured.⁶² These preferences are problematic because they are offered at the expense of non-veterans.⁶³ However, excluding the former interpreters from the benefits of the VHHA is not simply an exclusion of non-veterans; it is an exclusion of individuals who fall within the definition of “veteran” according to Congress’ own definition.⁶⁴ Not only did the majority of these interpreters serve alongside U.S. forces for over 180 consecutive days following September 11, 2001—in accordance with the VHHA—they did so in the most hostile and dangerous zones of the conflicts in Iraq and Afghanistan.⁶⁵ Furthermore, providing similar benefits to interpreters and U.S. troops would send a message to future interpreters that their risks in assisting the American war effort will not go unrewarded.

Additionally, including interpreters in the veterans’ preference system would allow former interpreters to make a more seamless transition from the Middle East to the U.S, just as veterans’ preferences provide for a smooth transition from soldier to civilian life.⁶⁶ This is extremely significant considering that many former interpreters battle many of the same post-war effects as American soldiers. Some of these effects include physical injuries and psychological issues like post traumatic stress disorder.⁶⁷

The U.S. should take this opportunity to allow former interpreters to stand side by side with veterans in order to send a message to the rest of the

58. The Associated Press, *Translators Dying by the Dozens in Iraq*, USA TODAY (May 21, 2005, 3:58 PM), http://www.usatoday.com/news/world/iraq/2005-05-21-translator-deaths_x.htm.

59. See Doyle, *supra* note 18.

60. *Id.*

61. *Feeney*, 442 U.S. at 265.

62. See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 93 (2002).

63. *Id.*

64. See 5 U.S.C. § 2108(1)(D) (2012).

65. Scott, *supra* note 2.

66. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979).

67. Miller, *supra* note 14.

world. Former interpreters are facing difficulties with employment opportunities in other well-developed nations. For example, former interpreters in the United Kingdom complain of being treated as illegal immigrants when it comes to finding work.⁶⁸ Furthermore, as of June 2011, only nine of 223 former Iraqi interpreters living in Australia were employed full time.⁶⁹ However, Denmark, a country that only committed 480 troops to the war in Iraq, granted asylum to 228 interpreters and their families in 2008, and even provided employment training and language schooling for up to three years.⁷⁰ Denmark's treatment of former interpreters is remarkable when considering it was the U.S. that spearheaded the attack in Iraq.⁷¹ In light of Denmark's commitment to respecting the service of former interpreters, the U.S. should also honor their service by extending the VHHA benefits.

The reality is that the U.S. does not see these former interpreters as veterans under the VHHA, despite Congressional knowledge of their sacrifices with the failure of the REPAIR and Refugee Crisis in Iraq Acts. To overcome this Congressional neglect, former interpreters can take legal action to receive the government assistance they deserve or take legal action against the U.S. government. Of the legal remedies available, an Equal Protection claim would be the most plausible.

III. EQUAL PROTECTION

A. The Principles of an Equal Protection Violation

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying persons the equal protection of laws.⁷² "The Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from discriminating against individuals or groups."⁷³ A claim under the equal protection component of the Fifth Amendment could be made on behalf of legal aliens (former interpreters of the U.S. military) because Congress was well aware of their

68. Anushka Asthana, *Army's Iraqi interpreters face hardship after fleeing to UK*, THE GUARDIAN (Nov. 6, 2010), <http://www.guardian.co.uk/uk/2010/nov/07/iraqi-interpreter-refugees-jobless-britain>.

69. Ingrid Piller, *Patriots and traitors*, LANGUAGE ON THE MOVE (June 6, 2011), <http://www.languageonthemove.com/language-migration-social-justice/patriots-and-traitors>.

70. Walter Pincus, *Asylum Program Falls Short for Iraqis Aiding U.S. Forces*, WASH. POST (Jan. 22, 2008), <http://www.washingtonpost.com/wpdyn/content/article/2008/01/21/AR2008012102170.html>.

71. Ryan Chilcote, John King, & Barbara Starr, *U.S. Launches Cruise Missiles at Saddam*, CNN.COM (Mar. 20, 2003, 1:31 AM), <http://www.cnn.com/2003/WORLD/meast/03/19/sprj.iq.main>.

72. U.S. Const. amend. XIV § 1.

73. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

hardships at the time the VHHA was passed and still disregarded former interpreters.

1. *Prima Facie Case*

Regardless of whether or not a challenged statute is facially neutral or facially discriminatory toward a suspect class, such as race, legal alienage, and national origin,⁷⁴ or a “quasi suspect class, such as women or illegitimate children,”⁷⁵ a plaintiff must make a prima facie case of discrimination.⁷⁶ The presumption of constitutional validity disappears if a statute is facially discriminatory towards a suspect class or a quasi suspect class.⁷⁷ Once a statute is deemed discriminatory on its face, it is then presumed that there is a prima facie case of discriminatory purpose behind the statute.⁷⁸

2. *Discriminatory Impact*

In addition to a discriminatory purpose, the plaintiff must also prove the existence of a discriminatory impact.⁷⁹ If a plaintiff is able to successfully establish both a discriminatory purpose and a discriminatory impact, a prima facie case of discrimination against either the suspect class or the quasi suspect class has been made.⁸⁰ The burden of proof then shifts to the government to prove either there was no such discriminatory intent and impact,⁸¹ or there was a compelling government interest behind the statute.⁸² If the government fails to overcome this burden, a court will subject the statute to strict judicial scrutiny.⁸³ If the plaintiff fails to make a prima facie case of discrimination or the government rebuts a case of discrimination, the government simply has to show a rational relationship (rational basis test)

74. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. LAW 141, 159 (2001).

75. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 325 (1976); Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361, 392 n.147 (2012).

76. *Davis*, 426 U.S. at 241.

77. *Harris v. McRae*, 448 U.S. 297, 322 (1980).

78. *Id.*

79. *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971).

80. *Davis*, 426 U.S. at 239.

81. *Id.* at 241.

82. *Graham v. Richardson*, 403 U.S. 365, 371, 376 (1971); Daniel Eduardo Guzman, Note, *There Be No Shelter Here: Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J. L. & PUB. POL'Y 399, 426 (2010).

83. *Graham*, 403 U.S. at 376; For a more detailed analysis of the strict scrutiny test see *infra* pp. 20-21.

between the disparate treatment and legitimate government purpose behind the statute.⁸⁴

Federal courts also consider a specific group's political powerlessness in the political process when determining how much protection a particular class will receive.⁸⁵ Courts may allow such groups to obtain special protection because they are being denied the use of the political arena to fight legislation that is adversely affecting them.⁸⁶ The Supreme Court has held that "[a] desire to harm a politically unpopular group cannot constitute a legitimate government interest."⁸⁷

However, there are exceptions to alienage classifications. Strict scrutiny will not apply to classifications against lawful aliens where the restriction is to serve the process of self-government.⁸⁸ In *Cabell*, the Supreme Court held that restricting legal aliens from working as probation officers received the rational basis test because probation officers have the power to arrest and such coercive force should be limited to citizens.⁸⁹

B. The Vow to Hire Heroes Act as a Facially Discriminatory Statute

The VHHA is a federal act passed by Congress.⁹⁰ Because potential plaintiffs would have to make a claim against the U.S. to fight the unconstitutionality of the VHHA, the equal protection component of the Fifth Amendment could be used to make the interpreters' claim.

A plaintiff could argue the VHHA is facially discriminatory because it continuously uses terms such as "veterans" and "members of the armed forces" to describe the beneficiaries of the statute.⁹¹ A "veteran" of the recent "Operation Iraqi Freedom" is defined as any individual who served on active duty for 180 consecutive days after September 11, 2001 and was honorably released from active duty.⁹² Most interpreters fought alongside of American armed forces for years in hostile zones, far exceeding the 180 day requirement.⁹³ Further, the military granted SIVs to interpreters who

84. *Heller v. Doe*, 509 U.S. 312, 319 (1993); Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 589 (2005).

85. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

86. Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 509 (2003).

87. *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

88. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982).

89. *Id.* at 446, 457.

90. *See* VOW to Hire Heroes Act of 2011, H.R. 674, 112th Cong. (1st Sess. 2011) (enacted).

91. *See generally* H.R. 674, 112th Cong. (1st Sess. 2011).

92. 5 U.S.C. § 2108(1)(D) (2012).

93. Scott, *supra* note 2.

assisted the armed forces in their missions with distinction.⁹⁴ Thus, these interpreters have achieved “veteran” status.

Unfortunately, the federal government has refused to extend veteran benefits to interpreters. The government has come nowhere close to the 5,000 annual visa maximum for former interpreters as per the Refugee Crisis in Iraq Act.⁹⁵ Further, the Department of Labor has neglected to enforce the Defense Base Act.⁹⁶ This act required certain insurance companies to provide treatment payments to former interpreters battling physical or psychological injuries that resulted from fighting alongside American service men and women.⁹⁷ Although scarce data and recorded statements exist from lawmakers, indicating a refusal to consider former interpreters as veterans, the actions of the federal government show otherwise.

If this statute were found facially discriminatory against this class of legal aliens, then a prima facie case of discriminatory intent would be present.⁹⁸ A discriminatory impact could be proven with statistical analysis indicating the current economic suffering of former wartime interpreters. Even though such studies producing concrete numbers have not yet been conducted, unemployment statistics for current Iraqi refugees living in the U.S. reached 60 percent in 2009.⁹⁹ Moreover, many former interpreters are in such dire need of economic assistance that they are contemplating returning to their native countries where they face extreme danger.¹⁰⁰ A discriminatory purpose and impact would result in a court reviewing the VHHA with strict judicial scrutiny. Under a strict scrutiny review, the government would have to prove a compelling government interest existed

94. Mulcahy, *supra* note 20.

95. See National Defense Authorization Act of 2008, H.R. 1585, 110th Cong. § 1244(c)(1) (1st Sess. 2008). The Iraqi Refugee Crisis Act allows for up to 5,000 interpreter visas a year from 2008-2012, but only 3,415 had been granted as of December 2011. *Id.*; see also Spak, *supra* note 35.

96. Miller, *supra* note 14.

97. 42 U.S.C. §§ 1651(a)(2)-(4), 1652(a)-(b); Miller, *supra* note 14.

98. *Harris v. McRae*, 448 U.S. 297, 322 (1980).

99. See *Migration Policy Institute Releases Refugee Report*, IRAQI REFUGEE ASSISTANCE PROJECT (June 9, 2011), <http://refugeerights.org/migration-policy-institute-releases-refugee-report> [hereinafter IRAQI REFUGEE ASSISTANCE PROJECT] (indicating that a recent Migration Policy Institute Report showed employment rates to be at 40% in 2009); Amanda Ruggeri, *For Iraqi Refugees in America, the Recession Makes It Even Harder to Find Jobs*, US NEWS (Dec. 22, 2008), <http://www.usnews.com/news/national/articles/2008/12/22/for-iraqi-refugees-in-america-the-recession-makes-it-even-harder-to-find-jobs> (quoting the vice president of the International Rescue Committee’s resettlement and migration policy as seeing a 50% drop in job placements from 2007 to 2008); *Refugee Crisis in America: Iraqis and Their Resettlement Experience*, GEO. U. L. CTR., HUM. RTS. INST. 20 (2009), available at http://www.law.georgetown.edu/news/releases/documents/RefugeeCrisisinAmerica_000.pdf (explaining that the employment rate for Iraqi refugees in San Diego in 2008 was around 25%) [hereinafter GEO. U. L. CTR.].

100. King, *supra* note 5.

when Congress decided to exclude this class of legal aliens from the VHHA.¹⁰¹

C. The Vow to Hire Heroes Act as a Facially Neutral Discriminatory Statute

Facially neutral classifications make an inferential discrimination against suspect classes.¹⁰² Such legislation may not have had the direct intent to discriminate when they were passed.¹⁰³ By excluding former interpreters, the VHHA, at the very least, makes a facially neutral classification against legal aliens.¹⁰⁴ The interpreters fall within this suspect class because they are lawfully living in the U.S. on government issued SIVs.¹⁰⁵

Furthermore, the VHHA is not narrowly tailored to achieve the government's interests. As previously established, the men and women who served as interpreters for the U.S. military in the Middle East shared many of the same hardships and benefits of American soldiers they worked alongside.¹⁰⁶ Therefore, if the VHHA does not include former interpreters, it is simply not a preference for veterans over nonveterans like the preference at issue in *Feeney*.¹⁰⁷ Instead, it is a preference for American citizens over legal aliens.

Additionally, the VHHA does not meet the exception to avoid strict scrutiny by meeting the exception set forth in *Feeney*. The VHHA does not mention providing benefits to veterans that would allow easier access to law enforcement positions or other occupations that would serve the process of self-government.¹⁰⁸ The VHHA simply calls for tax incentives to businesses that hire veterans, increased job training to veterans, and educational benefits to veterans.¹⁰⁹

Further, the VHHA creates a discriminatory impact against former interpreters. Already faced with dismal job opportunities, the VHHA will ensure that former American soldiers will receive more opportunities than former interpreters. This diminishes the already low probability of former interpreters finding gainful employment in the U.S. The VHHA makes it far more difficult for former interpreters to receive aid from the government than the American citizens they served beside.

101. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); Guzman, *supra* note 82 at 426.

102. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

103. Sidney D. Watson, *Reinvigorating Title VI, Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 *FORDHAM L. REV.* 939, 942 (1990).

104. *Graham*, 403 U.S. at 372.

105. *Amos*, *supra* note 4.

106. *See infra* pp. 8-9.

107. *Feeney*, 442 U.S. at 280.

108. *See generally* H.R. 674, 112th Cong. (1st Sess. 2011).

109. *See* H.R. 674, 112th Cong. (1st Sess. 2011).

In addition to the legislation's discriminatory impact, interpreters would also be required to prove a discriminatory purpose.¹¹⁰ The standard has proven difficult to meet and has, often times, resulted in an absolute bar to specific equal protection claims concerning race neutral statutes.¹¹¹

D. Proving a Discriminatory Purpose

A plaintiff must show evidence of a discriminatory purpose independent of discriminatory impact to prove that a facially neutral law is in violation of the Equal Protection Clause.¹¹² However, a plaintiff can use other circumstantial evidence to show the totality of relevant facts, which produces an inference of a discriminatory purpose.¹¹³ Patterns of discriminatory conduct will also give rise to an inference of discriminatory purpose.¹¹⁴ In addition, courts can use statistics in certain cases to determine if they can infer a discriminatory purpose from the relevant facts.¹¹⁵

1. *Circumstantial Evidence of Government Intent to Discriminate*

Even though the VHHA may not discriminate against legal aliens (former wartime interpreters for the U.S. military) on its face, other circumstantial evidence may suffice to convince a court that a discriminatory purpose could be inferred.¹¹⁶ Other evidence of the government's intent to discriminate against this class of legal aliens has been evident in recent years. Studies have shown that Arabs have faced more discrimination in the U.S. than any class of individuals, other than homosexuals, since September 11, 2001.¹¹⁷ The 2009 Fort Hood killings by Nidal Malik Hasan and the 2009 attempted suicide bombing by Umar

110. *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971).

111. Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 *How. L.J.* 349, 381 (1998).

112. *Washington v. Davis*, 426 U.S. 229, 241-42 (1976); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 *COLUM. HUM. RTS. L. REV.* 202, 210-11 (2007) [hereinafter "*Racial Fairness*"].

113. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986); see Alice Kaswan, *Environmental Law: Grist for the Equal Protection Mill*, 70 *U. COLO. L. REV.* 387, 396 (1999).

114. See *Racial Fairness*, *supra* note 113, at 216.

115. See *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335, 337 (1977); Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 *B.C. L. REV.* 263, 287 (2008).

116. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

117. Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 *AM. U. J. GEN. SOC. POL'Y & L.* 411, 412 (2010) (citing PEW FORUM ON RELIGION AND PUB. AFFAIRS, THE NEW RESEARCH CTR., VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES: MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 4 (2009), available at <http://pewforum.org/newassets/images/reports/summer09/survey0909.pdf>).

Farouk Abdulmutallab on a Northwest Airlines flight have further fueled this intolerance.¹¹⁸ President Obama has even called for increased security measures, such as profiling individuals with “Muslim sounding names.”¹¹⁹ Also, two Congressmen, P. David Gaubatz and Paul Sperry, expressed their desire for a “professional and legal backlash against Muslims” while promoting their book on alleged Islamic conspiracies in the U.S.¹²⁰

An inference can also be made that Congress excluded former interpreters from the VHHA due to the actions of two Iraqi refugees last year. Federal officials arrested the refugees for attempting to provide weapons to al Qaeda from Kentucky.¹²¹ Following this incident, the Department of Homeland Security acknowledged that flaws exist in the standards it uses to screen refugees before entering the country.¹²² Though the two refugees were not former interpreters who risked their lives for an American cause, the government has slowly begun to lose interest in providing services to Iraqi refugees, regardless of whether they provided vital support to the military mission in the Middle East.¹²³

For example, the Defense Base Act requires certain insurance companies to compensate contractors, such as interpreters of the U.S. military, for injuries sustained in combat.¹²⁴ However, a number of allegations surfaced last year that the Department of Labor “has seldom [taken] any action to enforce [this] law” when dealing with former interpreters now living in the U.S.¹²⁵ Therefore, numerous former interpreters endure physical and psychological injuries resulting from their work as wartime interpreters without the proper reparations from the U.S. government.¹²⁶

Additionally, the National Defense Authorization Act of 2009 encouraged the Department of Defense and the Department of State to hire former interpreters as translators, interpreters, and cultural awareness instructors, even though many government agencies are restricted from

118. *Id.*

119. *Id.* at 412 n.3.

120. *Id.* (addressing the two Congressman’s anti-Islamic views and book entitled MUSLIM MAFIA: INSIDE THE SECRET UNDERWORLD THAT’S CONSPIRING TO ISLAMIZE AMERICA.(2009).

121. Terry Frieden, *2 Iraqis arrested in Kentucky, charged with aiding al Qaeda in Iraq*, CNN JUSTICE (Mar. 31, 2011), http://articles.cnn.com/2011-05-31/justice/kentucky.iraqis.arrested_1_qaeda-iraqi-authorities-weapons?_s=PM:CRIME.

122. Peter Smith & Andrew Wolfson, *Kentucky Terrorist Arrests Shouldn’t Jeopardize Refugee Program, Advocates Say*, COURIER-JOURNAL, Jun. 1, 2011, <http://www.courier-journal.com/article/20110601/NEWS01/306010147 /Kentucky-terrorist-arrests-shouldn-t-jeopardize-refugee-program-advocates-say>.

123. See Tim Arango, *Visa Delays Put Iraqis Who Aided U.S. in Fear*, N.Y. TIMES, July 12, 2011, http://www.nytimes.com/2011/07/13/world/middleeast/13baghdad.html?_r=1&pagewanted=all.

124. See 42 U.S.C.A. §§ 1651(a)(2)-(4), 1652(a)-(b) (West 2012); see also Miller, *supra* note 14.

125. Miller, *supra* note 14.

126. *Id.*

hiring noncitizens.¹²⁷ This authorization was part of the Refugee Crisis in Iraq Act.¹²⁸ However, neither agency has used the National Defense Authorization Act to hire former interpreters.¹²⁹ A committee report from 2010 indicated that former interpreters' "fluency in Arabic and knowledge of Iraq could be useful to the U.S. government."¹³⁰ The report even indicated the risk and sacrifices made by interpreters while serving with American service members.¹³¹ Even so, officials at the Departments of Defense and State have indicated they have no plan to establish such a program to employ former interpreters.¹³²

By and large, the government has failed to provide benefits to former interpreters, despite acknowledging the sacrifices made to assist the military mission in the Middle East.¹³³ Such exclusions would create an inference to any reasonable trier of fact that the government also purposely neglected former interpreters when devising the VHHA.

2. Statistical Evidence

Plaintiffs cannot rely on statistics alone to prove intentional governmental discrimination under the Equal Protection Clause.¹³⁴ If a court accepts statistics, there must be a link between the statistics and the alleged discrimination.¹³⁵ There is no shortage of statistical facts to link the government to discrimination with regard to the VHHA.

When examining the history of these legal aliens from the start of the Iraq war until the present day, there is a strong pattern of statistical discrimination. In 2005, two years into the Iraq war, the U.S. government paid interpreters working with U.S. troops \$400 a month (\$4,800 per year).¹³⁶ The U.S. government paid oil and security contractors around \$80,000 to \$100,000 per year, without requiring them to accompany

127. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-274, REPORT TO CONGRESSIONAL COMMITTEES: IRAQI REFUGEES AND SPECIAL IMMIGRANT VISA HOLDERS FACE CHALLENGES RESETTLING IN THE UNITED STATES AND OBTAINING U.S. GOVERNMENT EMPLOYMENT 18-19 (2010) [hereinafter REPORT TO CONGRESSIONAL COMMITTEES] (citing Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, S. 3001, 110th Cong. § 1235 (2008) enacted).

128. *Id.*

129. *Id.* at 19.

130. *Id.* at 19-20.

131. *Id.* at 20.

132. *See Id.*

133. *See* REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 20; Miller, *supra* note 14.

134. *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

135. Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. CIV. RTS. L.J. 219, 243 n.134 (2005).

136. Hammes, *supra* note 16.

frontline troops on combat patrols.¹³⁷ Such a variance in earnings between security contractors and interpreters provides strong enough statistical evidence to infer a discriminatory purpose. While interpreters' yearly wages were increased from \$4,800 to \$12,000 in 2009, a \$12,000 yearly salary would still put an interpreter in a desperate economic situation in the U.S.¹³⁸ In comparison, a brand new Army Private earns around \$18,000 a year.¹³⁹ This does not include extra pay, such as a basic housing allowance and hazardous duty pay if deployed overseas.¹⁴⁰ These numbers indicate that the U.S. saw interpreters merely as pieces of equipment soldiers were required to carry into combat.

Although no one has conducted an accurate study to determine the current employment rate of former interpreters, studies have been done to determine employment rates among Iraqi refugees. These studies have shown dangerously low numbers. For example, in 2008, the employment rate for Iraqi refugees in San Diego was around 25 percent.¹⁴¹ In 2009, another report showed employment rates for Iraqi refugees throughout the U.S. to be around 40 percent.¹⁴² Another telling figure is a United States Government Accountability Office Report where former interpreters were interviewed.¹⁴³ The interpreters disclosed they had interviewed for more than 30 low-skill cleaning jobs before finally receiving work from a former supervisor in Iraq.¹⁴⁴ These are just a few examples of the hardships facing former interpreters when it comes to finding gainful employment in the U.S.

Despite these alarming statistics, the federal government has failed to act. Congress has allowed the Departments of Defense and State to hire former interpreters to work as translators, interpreters, and instructors.¹⁴⁵ Although the federal government possesses knowledge of the current economic suffering of these legal aliens, its departments have failed to create programs that would allow former interpreters to take advantage of such jobs.¹⁴⁶

Thus, the government has had ample opportunity to extend benefits and rewards to this class of legal aliens, but has continued to exclude them. The VHHA was another wasted opportunity for the government to include the former interpreters in the benefits being allocated to American veterans who risked their lives to take on the U.S. military's mission in the Middle East.

137. *Fast Facts: Contractors in Iraq*, FOX NEWS.COM, July 6, 2005, <http://www.foxnews.com/story/0,2933,161208,00.html>; Hammes, *supra* note 16.

138. Miller, *supra* note 14.

139. *2012 Military Pay Scale Salary Chart*, MILITARY FACTORY, http://www.militaryfactory.com/military_pay_scale.asp (last visited May 14, 2012).

140. *Id.*

141. GEO. U. L. CNT., *supra* note 99, at 20-21.

142. IRAQI REFUGEE ASSISTANCE PROJECT, *supra* note 99.

143. REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 12.

144. *Id.*

145. *Id.* at 19.

146. *Id.* at 11, 19.

E. Strict Scrutiny

Whether the VHHA is seen as facially discriminatory or facially neutral, potential plaintiffs could find a discriminatory intent to exclude former military interpreters, legal aliens, who worked side by side with U.S. armed forces in Iraq and Afghanistan. Under the strict scrutiny standard, the burden will shift to the government to prove there was not a discriminatory purpose or impact.¹⁴⁷ Courts will not defer to a suspect classification in government legislation unless that classification is necessary to achieve a compelling government interest.¹⁴⁸ In addition, this legislation must be narrowly tailored to meet this compelling interest, which means the suspect groups that are excluded from the legislation must fit tightly with this interest.¹⁴⁹ To be narrowly tailored, the legislation must not be grossly underinclusive or overinclusive.¹⁵⁰ Underinclusive classifications fail to include all similarly situated people with regards to the legislation's purpose.¹⁵¹ In other words, some similarly situated individuals are included, whereas others are not.¹⁵² Overinclusiveness occurs when legislation extends beyond its purpose and affects people that lie outside of the statute's objective.¹⁵³

The VHHA may serve a compelling government interest because the goal of most veterans' preference programs is to reward the risk of military service.¹⁵⁴ The President signed the VHHA into law with hope that the country would fulfill an obligation to servicemen and servicewomen.¹⁵⁵ Even if the VHHA is found to be a compelling government interest, it fails the narrowly tailored test. Congress and the President had other options to provide job benefits to those who served the military during the recent conflicts in the Middle East, without discriminating against the legal alien interpreters who served with American troops. Because the government's objective was to reward those who served the U.S. overseas, it would have

147. *Washington v. Davis*, 426 U.S. 229, 241 (1976).

148. RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 15 (2d ed. 1992).

149. Inimai M. Chettiar, Comment, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867, 1892 (2002).

150. Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 564 (2011).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Murray*, *supra* note 62, at 93; *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979).

155. Matt Compton, *President Obama: "Hire a Veteran,"* THE WHITE HOUSE (Nov. 21, 2011, 5:51 PM EDT), <http://www.whitehouse.gov/blog/2011/11/21/president-obama-hire-veteran>.

made sense to reward the interpreters who accompanied frontline troops on every patrol and mission.¹⁵⁶

As a result, the VHHA is underinclusive. The VHHA protects a group of individuals (U.S. citizen soldiers) who greatly assisted in the U.S. government's military mission in the Middle East, but not a separate group of individuals (legal alien interpreters) who assisted equally in support of that mission.¹⁵⁷ There is no explanation as to how the government can send interpreters on the same dangerous assignments,¹⁵⁸ provide them with the same equipment as service members,¹⁵⁹ award them with military honors for heroism,¹⁶⁰ and even punish them in the same manner as service members¹⁶¹ without providing them the same benefits after their service.

In addition to being underinclusiveness, the VHHA possesses a desire to discriminate against a politically powerless group of legal aliens that has been consistently unpopular with the federal government. Therefore, the VHHA does not serve a compelling government interest.¹⁶² The Department of Labor has refused to enforce the Defense Base Act which would require specified insurance companies to provide financing for injuries suffered while serving as interpreters in the Middle East.¹⁶³ The Departments of Defense and State have refused to open up jobs for former interpreters even though these departments have had the opportunity to do so.¹⁶⁴ The VHHA is another example of a government decision to neglect legal alien interpreters who put their lives at risk to support the U.S. government's military mission in the Middle East.

IV. CIVIL RIGHTS VIOLATION

If interpreters fail to achieve the strict burden of discriminatory purpose in an equal protection claim, a civil rights claim can also be made against the government under Title VI section 2000d of the Civil Rights Act of 1964. Title VI section 2000d states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁶⁵

156. See generally Scott, *supra* note 2.

157. Doyle, *supra* note 18; Breen, *supra* note 22.

158. *Id.*

159. Richer, *supra* note 24, at 1720 n.132, 1721 n.135.

160. See generally Miller, *supra* note 14.

161. Doyle, *supra* note 18.

162. See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

163. See Miller, *supra* note 14.

164. REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 18-19.

165. 42 U.S.C. § 2000d (2012).

This prohibits the government from awarding federal funding to programs that discriminate.¹⁶⁶

A. Requirements for a Claim Under Title VI

Title VI claims can be made for claims against racial classifications that would violate either the Equal Protection Clause or the Fifth Amendment.¹⁶⁷ A plaintiff does not have to prove a discriminatory intent to make a claim under Title VI of the Civil Rights Act of 1964.¹⁶⁸ In cases where injunctive relief is sought, a showing of unintentional discrimination or discriminatory impact will suffice for a valid Title VI claim.¹⁶⁹

A plaintiff must prove by “a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI.”¹⁷⁰ Once this burden is met, a *prima facie* showing of discriminatory impact is established and the burden then shifts to the government to show that the impact does not exist.¹⁷¹ The government can rebut this by proving that a “substantial legitimate justification” is present as a result of its practice.¹⁷² However, a plaintiff will still prevail if he or she can reveal that “a comparably effective alternative practice which would result in less disproportionality” is present.¹⁷³

To prove a discriminatory impact, a plaintiff must prove three elements: first, a facially neutral policy has an effect on a protected class of individuals; second, the effect must be adverse; and finally, the effect must be disproportionate.¹⁷⁴ Statistics can be used to establish this discriminatory impact.¹⁷⁵ Thus, the burden of proof under a Title VI claim is much lower than a claim under the Equal Protection Clause.

Federal courts have held that plaintiffs met the burden of proving a discriminatory impact in numerous circumstances. For example, in *Sandoval*, the Eleventh Circuit found Alabama’s policy of administering its driver’s license exam only in English was a facially neutral classification that resulted in an adverse discriminatory impact on applicants of foreign

166. Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1271 n.266 (1998).

167. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

168. *Guardians Ass’n. v. Civil Serv. Comm’n of New York*, 463 U.S. 582, 584, 593 (1983).

169. *Id.*

170. *Sandoval v. Hagan*, 197 F.3d 484, 507 (11th Cir. 1999), *rev’d sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 508.

175. Justin Florence & Robert Friedman, *Profiles in Terror: A Legal Framework for the Behavioral Profiling Paradigm*, 17 GEO. MASON L. REV. 423, 446 (2010) (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 324 (1977)).

descent.¹⁷⁶ In *Guardians Association*, applicants were appointed to entry-level positions with the New York City Police Department according to their score on several written police examinations.¹⁷⁷ As a result, African and Hispanic Americans were appointed after white applicants who had received higher test scores.¹⁷⁸ Also, African and Hispanic American officers were laid off before similarly-situated white employees because the Department had a “last-hired, first-fired” policy.¹⁷⁹ The Court held this examination procedure was not job related and resulted in a discriminatory impact.¹⁸⁰

A potential remedy for the government’s failure to comply with section 2000d-1 of Title VI is the refusal to grant continued financial assistance to businesses that hire veterans under VHHA.¹⁸¹ Unless there is clear congressional intent to discriminate against a class protected by Title VI, the relief in private actions is solely limited to declaratory or injunctive relief ordering subsequent compliance with the statutory obligations at issue.¹⁸² Other forms of relief, such as compensatory or punitive damages will not be awarded in a case where only a discriminatory impact is present.¹⁸³ Intentional discrimination must be shown.¹⁸⁴

B. Title VI Applied to the Vow to Hire Heroes Act

Former military interpreters working beside the U.S. military in the Middle East have a valid claim under Title VI under the Civil Rights Act of 1964. Former interpreters are being denied the benefits of the VHHA, which provides federal financial assistance to employers who hire American born veterans and job training to these veterans.¹⁸⁵ The former interpreters who are the collateral victims of the VHHA are part of a suspect classification (legal aliens) under the Equal Protection Clause and the Fifth Amendment.¹⁸⁶

Additionally, interpreters can show they are suffering from a discriminatory impact resulting from the VHHA: the American service men and women they worked beside in the Middle East receive government benefits for contributing to the military mission while the interpreters do

176. *Sandoval*, 197 F.3d at 511.

177. *Guardians Ass’n. v. Civil Serv. Comm’n of New York*, 463 U.S. 582, 585 (1983).

178. *Id.*

179. *Id.* at 582, 585.

180. *Id.* at 598.

181. 42 U.S.C.A § 2000d-2 (West 2012).

182. *Guardians Ass’n*, 463 U.S. at 598.

183. *Id.*

184. *Id.*

185. See H.R. 674, 112th Cong. (1st Sess. 2011).

186. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

not.¹⁸⁷ Although an accurate study has not been conducted on the current employment rates of these former interpreters, an adverse, disproportionate effect is inferred when looking at the current employment rates among Iraqi refugees currently living in the U.S. and the U.S. Government Accountability Office's finding that former interpreters currently struggle to find relevant work.¹⁸⁸ Even if the government can prove there is a reasonable justification for the VHHA, interpreters can simply demonstrate that opening the benefits of the VHHA to former interpreters would eliminate the disproportionality. Moreover, providing the same benefits to interpreters would have little to no impact on American veterans because there are only approximately 3,500 former interpreters currently living in the U.S., compared with the 2.38 million American veterans living in the U.S.¹⁸⁹

Therefore, former interpreters would have a valid claim under Title VI of the Civil Rights Act of 1964. Although money damages could not be awarded unless plaintiffs can prove a discriminatory purpose, interpreters would be entitled to declaratory relief. As a result, the government would be forced to comply with Title VI, and Congress would have to extend the VHHA benefits to former interpreters. If Congress failed to do so, the VHHA would be stuck down as unconstitutional.

CONCLUSION

Congress has ignored the sacrifices made by interpreters overseas. This is evident when considering the government's reluctance to fully comply with the Refugee Crisis in Iraq Act of 2007 and its failure to pass the REPAIR Act, which would have provided the former interpreters similar benefits to the VHHA. Further, governmental branches, such as the departments of State and Defense failed to enact programs in accordance with the Defense Authorization Act of 2009. This act would have allowed the State and Defense departments to hire former interpreters to provide essential services.¹⁹⁰ As a result, former interpreters who share the same risks as American soldiers receive little in return for their service and sacrifice.

Based on Congress' decision to remain apathetic to the current suffering of the former interpreters in the U.S., intentional discrimination can be inferred from the VHHA, which fails to provide assistance to former interpreters. Therefore, a valid equal protection claim can be brought against the government for passing the VHHA. If a discriminatory purpose

187. See generally VOW to Hire Heroes Act of 2011, H.R. 674, 112th Cong. (1st Sess. 2011) (enacted).

188. IRAQI REFUGEE ASSISTANCE PROJECT, *supra* note 99; Piller, *supra* note 69; REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 11.

189. Spak, *supra* note 35; LONGISLANDPRESS, *supra* note 41.

190. REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 127, at 18-19.

cannot be shown, a valid claim under Title VI of the Civil Rights Act of 1964 could provide the former interpreters with declaratory relief against the government.

The former military interpreters are poor, tired, and hungry from years of fighting for the success of the U.S. military operations in the Middle East. They arrive in the U.S. and find the employment prospects and government support more closely resemble hell than heaven. Inaction by U.S. lawmakers in not extending VHHA benefits to former interpreters has left them with a troublesome decision: either continue life as paupers in the U.S. or return home where murderous extremists anxiously await.



