

Edward TEMENGIL, et al.
vs.
TRUST TERRITORY OF THE
PACIFIC ISLANDS, et al.

Civil Action No. 81-0006
District Court NMI

Decided June 6, 1986

1. Constitutional Law - Equal Protection

Official action can transcend the bounds of equal protection in two ways. It can be "facially discriminatory" in that it "explicitly classifies or distinguishes among persons by reference to criteria - such as race, sex, religion or ancestry - which have been improper bases for differentiation. Or, an action which is facially neutral may nonetheless produce results which demonstrate a disproportionate impact on a class of persons identifiable by similar traits or characteristics.

2. Constitutional Law - Equal Protection

Not all classifications, overt or covert, violate principles of equal protection; rather, it is only those which cannot be explained in terms of "noninvidious purposes."

3. Constitutional Law - Equal Protection - Suspect Classes

A classification which is based on race, national origin or other such class is itself "immediately suspect" and subject "to the most rigid scrutiny" and the subject classification will survive only upon the government's demonstration that the categories drawn are necessary to meet an overriding state interest.

4. Constitutional Law - Equal

Protection - Alienage

Where a state classifies on the basis of alienage, strict judicial review is the rule, other standards of review the exception.

5. Constitutional Law - Equal Protection - Alienage

Where a core governmental function is involved, the Court will examine a state classification based on alienage only to ensure that it is rationally related to the state's legitimate objective.

6. Constitutional Law - Equal Protection - Alienage

The right to govern is a right uniquely reserved to citizens. States may accordingly retain distinctions between citizens and aliens where it is "fundamental to the definition and government of a State".

7. Constitutional Law - Equal Protection - Alienage

Unlike the strict review of state action based on alienage, courts will examine for sufficient justification federal classifications which do not touch on aliens as aliens.

8. Trusteeship - Fiduciary Relationship

The Trust Territory government stands in a fiduciary relationship to the inhabitants of the Micronesian islands and carries with it the duties and obligations of a trustee to a beneficiary.

9. Trust Territory - High Commissioner

In establishing or perpetuating wage scales, the Trust Territory High Commissioner was not acting pursuant to an authority so plenary and unique as to be virtually political and free from judicial oversight; rather, the High Commissioner was acting under a purely domestic

administrative authority generally not shielded from judicial scrutiny.

**10. Constitutional Law -
Justiciability - Political
Questions**

At issue in political question cases is not an absence of subject matter jurisdiction but justiciability, which refers to a discretionary deference to avoid deciding certain controversies.

**11. Constitutional Law -
Justiciability - Political
Questions**

An action challenging the Trust Territory government's employee compensation plan on the ground of equal protection does not present a political question.

**12. Constitutional Law - Equal
Protection - Alienage**

Courts will not readily defer to governmental justifications where alienage is used as a pretext for race or national origin discrimination.

**13. Constitutional Law - Equal
Protection -**

Wage classifications which discriminate against "Trust Territory citizens" inherently discriminate on national origin and for that reason will be strictly reviewed.

**14. Constitutional Law - Equal
Protection - Suspect Classes**

In order to justify the use of a suspect classification, a government must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest.

**15. Constitutional Law - Equal
Protection - Suspect Classes**

In order to determine whether the Trust Territory's tripartite wage scales pass constitutional scrutiny, it is necessary to determine whether: (1) the employment of "foreign" personnel was compelling as a goal; and (2) it was a necessary means to the goal of economic advancement; and (3) the wage scales were necessary to each of these goals.

**16. Constitutional Law - Equal
Protection - Suspect Classes**

In reviewing a classification which touches on an individual's race or ethnic background, the person challenging the classification is entitled to a judicial determination that the classification is precisely tailored to serve a compelling governmental interest.

**17. Constitutional Law - Equal
Protection - Particular Cases**

The Trust Territory employee compensation scales, set on the basis of citizenship, are not necessary to meet compelling governmental interests and violate principles of equal protection.

**18. Constitutional Law - Equal
Protection**

Under more traditional doctrine, the central prohibition of the equal protection clause is directed against the government's deliberate use of race as a criterion of selection.

**19. Constitutional Law - Equal
Protection - Strict Scrutiny**

A law that seeks a goal that is not race-related will nonetheless be subject to strict scrutiny if it is based on racial or like characteristics.

**20. Constitutional Law - Equal
Protection - Intent**

A facially neutral statute or regulation which disproportionately disadvantages a

suspect or less than suspect class of persons or which infringes upon a fundamental right or important interest will not, standing alone, be found violate the equal protection clause. Plaintiff must also prove that the disproportionate effect is the result of racially discriminatory purpose or intent.

21. Constitutional Law - Equal Protection - Disproportionate Impact

Under disproportionate impact analysis, the burden rests with the challenger to show that the government action was taken to some extent "because of" the adverse impact and not just "in spite" of it.

22. Constitutional Law - Equal Protection - Intent

Under intentional discrimination analysis the plaintiff need not demonstrate that an unlawful intent was the sole purpose of the action; rather, it must be shown to have been a substantial or motivating factor.

23. Constitutional Law - Equal Protection - Suspect Classes

The class of Micronesians is a class defined by ancestry or ethnic origin and as such is a "suspect class deserving of heightened judicial scrutiny.

24. Constitutional Law - Equal Protection - Discriminatory Intent Purpose and intent must be determined from the cumulative impact of the evidence.

25. Constitutional Law - Equal Protection - Disproportionate Impact

Disproportionate impact is by no means irrelevant to the question of discriminatory intent; actions having foreseeable and

anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.

26. Constitutional Law - Equal Protection - Disproportionate Impact

In situations where the disproportionate impact is as inevitable as the burdens placed on Micronesians under the Trust Territory's tripartite wage scales, the Supreme Court has recognized that a strong inference that the adverse effects were desired can reasonably be drawn.

27. Constitutional Law - Equal Protection - Discriminatory Intent

The historical background of the challenged action may be useful in determining discriminatory intent particularly if it reveals a series of official actions taken for invidious purposes.

28. Trust Territory - United States

The Trust Territory was merely a conduit through which to implement United States policy in Micronesia.

29. Evidence - Judicial Notice

Generally, a district court may utilize the doctrines underlying judicial notice in hearing a motion for summary judgment substantially as they would be utilized at trial.

30. Evidence - Judicial Notice

District court would take judicial notice of report commissioned by the White House known as the Soloman Report.

31. Constitutional Law - Equal Protection - Intent

The intent to discriminate does not necessarily mean an intent to harm; even a well meaning intention to adopt and retain

procedures that have a segregative effect are violative of equal protection.

32. Constitutional Law - Equal Protection - Intent

The history of the Trust Territory tripartite pay scales, which included the failure of the United States administration to carry out its own pledges, the refusal to adopt alternative pay plans with less discriminatory impact, and the implementation of a grossly disproportionate wage schedule which afforded preferential treatment to United States citizens, made out a prima facie case of intentional discrimination.

33. Constitutional Law - Equal Protection - Intent

The presumption of intentional discrimination becomes proof unless the defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

34. Constitutional Law - Equal Protection - Intent

Once a prima facie case of intentional discrimination is made out by the plaintiffs, the burden shifts to the defendant to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.

35. Constitutional Law - Equal Protection

The rule that a law or other government action which classifies on national origin requires an extraordinary justification applies as well to a classification that is ostensibly neutral but is an obvious pretext for discrimination.

36. Constitutional Law - Equal Protection - Governmental Justifications

The Trust Territory government's justifications for the tripartite wage scale, which compensated employees at a wage according to their citizenship, are not sufficient to rebut an intent to discriminate against Micronesians, and therefore they violate the guaranty of the equal protection of the laws.

37. Constitutional Law - Equal Protection - Trust Territory Code

At a minimum, the equal protection clause of the Trust Territory Code prohibits conduct which violates principles of equal protection embodied in the United States Constitution.

38. Trusteeship - Agreement

The Trusteeship Agreement creates direct and affirmative rights which are judicially enforceable in federal courts.

39. Trusteeship - Agreement

The Trusteeship Agreement created a fiduciary relationship between the United States and the people of the Trust Territory in which the interests of the inhabitants of the territory become paramount.

40. Trusteeship - Agreement

The terms and principles of the Trusteeship Agreement govern the conduct of the United States and the Trust Territory governments alike; each are subject to liability for the breach of duties and obligations created thereunder.

41. Trusteeship - Agreement

The contours and delineations of the covenants against discrimination embodied in the Trusteeship Agreement are found in and derived from relevant principles of international law which have achieved a

substantial degree of codification and consensus.

42. Trusteeship - Breach

The Trust Territory, in promulgating wage scales that classify on citizenship and national origin, and the United States in allowing the implementation of such compensation policies, have violated the solemn obligations imposed upon them by the Trusteeship Agreement.

43. Trusteeship

Under the Trusteeship Agreement, the United States is imbued with affirmative fiduciary obligations which cannot be delegated; where a delegation has been made, the United States remains liable for resulting breaches of those obligations.

44. Trusts

Where a trustee has properly delegated duties to agents, it is under a duty to the beneficiary to exercise a general supervision over their conduct.

FILED
Clerk
District Court

JUN 06 1986

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN MARIANA ISLANDS

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

4 EDWARD TEMENGIL, et al.,) CIVIL ACTION NO. 81-0006
5 Plaintiffs,)
6 vs.)
7 TRUST TERRITORY OF THE PACIFIC)
8 ISLANDS; JANET McCOY, High)
9 Commissioner of the Trust)
10 Territory of the Pacific)
11 Islands; UNITED STATES)
12 DEPARTMENT OF THE INTERIOR;)
13 DONALD HODEL, Secretary of the)
14 Interior; UNITED STATES OF)
15 AMERICA,)
16 Defendants.)

DECISION

17 Before the Court are cross motions for summary judgment
18 brought on behalf of the plaintiff class, the Trust Territory of
19 the Pacific Islands and the United States.^{1/} The issues
20 presented for decision by the motions concern the Trust
21 Territory's practices governing the compensation of its employees

22 ^{1/} Also named as defendants in this action are the High Commis-
23 sioner, the United States Department of the Interior and its
24 Secretary. It has already been determined that the defendant
25 officials are sued in their official capacity only making the
26 action one properly against the two governments. See Temengil v. Trust Territory of the Pacific Islands, 33 FEP Cases 1027, 1029 n.5 (D.N.M.I. 1983)(Temengil I). Accordingly, throughout this decision, the defendants will be referred to only as the Trust Territory and the United States.

1 in the Northern Mariana Islands on and after January 9, 1978.
2 Specifically, at issue are the plaintiffs' claims that the
3 defendants' actions : 1) violate the Equal Protection Clause of
4 the Fourteenth Amendment to the United States Constitution; 2)
5 transcend similar guaranties embodied in the Trust Territory Bill
6 of Rights; and 3) constitute a breach of fiduciary obligations
7 set forth in the Trusteeship Agreement between the United States
8 and the United Nations Security Council. The instant motions, by
9 stipulation of the parties, address only the issue of liability.
10 Questions of damages will be addressed if and when necessary.
11 After thorough consideration of the factual matters presented and
12 legal theories advanced, this Court concludes that the
13 promulgation, ratification and/or maintenance of the disputed
14 wage scales violates principles of equal protection and breaches
15 the fiduciary responsibilities embodied in the Trusteeship
16 Agreement. Accordingly, summary judgment in favor of the
17 plaintiffs is granted.

18
19 I. FACTUAL BACKGROUND

20 A. Historical

21 The material facts on the issue of liability are not in
22 dispute. Although the factual background has been extensively
23 reviewed in previous decisions of this Court in this matter, the
24 sequence of events leading up to this dispute will be briefly set
25 forth.

26 Following the eviction of the Japanese Imperial forces

1 by the combined Armed Forces of the United States in 1944, the
2 United States assumed control over the northern islands of the
3 Marianas archipelago.^{2/} The islands were governed by the United
4 States Navy in the immediately ensuing years.^{3/} In 1947, the
5 Security Council approved, and the United States Congress
6 ratified, the Trusteeship Agreement for the Former Japanese
7 Mandated Islands.^{4/} This agreement created the Trust Territory
8 of the Pacific Islands consisting of the islands formerly held by
9 Japan under mandate of the League of Nations.

10 Pursuant to the Trusteeship Agreement, the United
11 States as administering authority assumed full powers of
12 "administration, legislation and jurisdiction" over the
13 territory. Trusteeship Agreement, Art. 3. The United States
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16 ^{2/} Guam, the southern-most island in the Marianas chain, has
17 been under the sovereignty of the United States since 1898,
18 with the exception of a brief Japanese occupation between 1942
19 and 1944. R. Gale, The Americanization of Micronesia: A Study
20 of the Consolidation of U.S. Rule in the Pacific, 31 (1979)
21 (Gale); D. Farrell, Liberation-1944, 157-169 (1984).

22 ^{3/} The former Japanese Mandated Islands were under the juris-
23 diction of the United States Naval Military government immedi-
24 ately following the defeat of the Japanese forces. D. Richard,
25 United States Naval Administration of the Trust Territory of
26 the Pacific Islands, 3 (1957). Following the approval of the
Trusteeship Agreement by Congress, the Navy established a
civilian government. Id.

^{4/} 61 Stat. 3301, T.I.A.S. No. 1605; Congress approved the
Trusteeship Agreement on July 18, 1947 by Joint Resolution
H.J.Res. 233, 61 Stat. 397 (1947).

1 pledged to "promote the development of the inhabitants of the
2 trust territory toward self-government or independence" as the
3 people so desired and agreed to promote the "economic advancement
4 and self-sufficiency of the inhabitants." Trusteeship Agreement,
5 Art. 6(1) and 6(2). Importantly, the United States committed
6 itself to

7 "promote the social advancement of the
8 inhabitants and to this end... protect the
9 rights and fundamental freedoms of all
elements of the population without discrimi-
nation."

10 Trusteeship Agreement, Art. 6(3).

11 Over the course of the next fifteen years, the trust
12 territory was governed by the Navy and by the Department of the
13 Interior pursuant to a series of executive orders.^{5/} In 1962,
14 President Kennedy delegated full authority over the trust
15 territory to the Department of the Interior.^{6/} Pursuant to this
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18 ^{5/} President Truman initially delegated administrative respon-
19 sibility for the Trust Territory civilian government to the
20 Secretary of the Navy pursuant to Executive Order No. 9875. In
21 1951, this authority was transferred to the Secretary of the
22 Interior under Executive Order No. 10265, 16 Fed.Reg. 6419
23 (1951), reprinted in 1951 U.S. Code Cong. & Ad.News 1053.
24 Pursuant to Executive Order No. 10408, 17 Fed.Reg. 10277
(1952), reprinted in 1952 U.S. Code Cong. & Ad.News 1105 and
Executive Order No. 10470, 18 Fed.Reg. 4231 (1953), reprinted
in 1953 U.S. Code Cong. & Ad.News 1030, the Navy was again
delegated authority over what is now known as the Northern
Mariana Islands, with the exception of Rota, authority over
which remained with the Secretary of the Interior.

25 ^{6/} Exec. Order No. 11021, 27 Fed.Reg. 4409 (1962), reprinted
26 in 1962 U.S. Code Cong. & Ad.News 4338.

1 delegation, the Interior Secretary vested governing authority in
2 a High Commissioner and judicial authority in a High Court.^{7/} In
3 1964 the Interior Secretary issued Secretarial Order No. 2682
4 creating the Congress of Micronesia, a popularly elected
5 bicameral body with authority over legislative matters. The High
6 Commissioner and the Secretary retained veto authority. See
7 S.Rep.No. 433, 94th Cong.1st Sess. 29 (1975).

8 In the late 1960's the inhabitants of the territory
9 began assertively pressing their demands for future status
10 negotiations.^{8/} While initially the representatives of the
11 people collectively pursued avenues of independence or free
12 association, eventually negotiations deteriorated. The people of
13 the Northern Mariana Islands desired a closer political associ-
14 ation with the United States and entered into separate negotia-
15 tions.^{9/} The culmination of these separate talks was the Covenant
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18 ^{7/} Initially, the High Commissioner was appointed and served
19 at the will of the Secretary of the Interior. Since 1967, the
20 High Commissioner has been appointed by the President with the
21 advice and consent of the Senate pursuant to 48 U.S.C. §1681
22 (a); the Interior Secretary retains authority over the justices
23 of the High Court. See Temengil I, 33 FEP Cases 1033 n.22.

24 ^{8/} See Temengil I, 33 FEP Cases at 1033 notes 24-25 and
25 accompanying text.

26 ^{9/} See generally, A. Leibowitz, The Marianas Covenant Negotiations, 4 Fordham Int'l. L.J. 19, 19-22 (1981)(Leibowitz); P. Leary, The Northern Marianas Covenant and American Territorial Relations, Institute of Governmental Studies Research Report 80-1, 5-11 (Berkeley 1980).

1 to Establish the Commonwealth of the Northern Mariana Islands in
2 Political Union with the United States.^{10/} Essentially, the
3 Covenant preserves for the people of the Northern Mariana Islands
4 the right to local self-government while delegating to the United
5 States "complete responsibility for and authority with respect to
6 matters relating to foreign affairs and defense". Covenant §104.
7 The Covenant was ratified by the people of the Northern Marianas
8 in a plebiscite held on June 17, 1975 and received Congressional
9 approval by joint resolution on March 24, 1976.^{11/} Several of
10 the Covenant's provisions became operative upon approval by
11 Congress, while others became effective on January 9, 1978, the
12 effective date of the Constitution of the Northern Mariana
13 Islands^{12/} The balance will be triggered by the declaration of
14 the President of the United States regarding the termination of
15 the Trusteeship. Covenant §1003. Since January 9, 1978, the
16 Commonwealth has been governed internally by a three-branch
17 government established by a locally drafted and promulgated
18 Constitution.^{13/}

20 ^{10/} P.L. No. 94-241, 90 Stat. 263, (1976) reprinted in 48
21 U.S.C.A. §1681 note.

22 ^{11/} Ibid.

23 ^{12/} Covenant § 1003. The Commonwealth Constitution became
24 operative by Presidential Proclamation No. 4534. 42 Fed.Reg.
56593 (1977), reprinted in 1977 U.S. Code Cong. & Ad.News
4600.

25 ^{13/} See Temengil I, 33 FEP Cases at 1033 note 28 and accompa-
26 nying text.

1 Following Congressional approval of the Covenant, the
2 Secretary promulgated Secretarial Order No. 2989^{14/} which
3 administratively segregated the Northern Mariana Islands from the
4 rest of the Trust Territory. Created under the Order was the
5 Northern Mariana Islands Legislature and the Office of the
6 Resident Commissioner. The High Commissioner retained limited
7 residual authority during the effectiveness of the Order. On
8 January 9, 1978, the effective date of the Commonwealth
9 Constitution, the provisions of the Covenant and the Commonwealth
10 Constitution superceded the Trust Territory's -secretarily-
11 conferred authority over the Northern Mariana Islands.^{15/}

12 However, the Trust Territory Headquarters remains on
13 Saipan.^{16/} Even though legislative, executive, and judicial
14 matters are carried out by the constitutional governments of the
15 four evolved entities,^{17/} the Trust Territory government retains

17 14/ 41 Fed.Reg. 15892 (1976).

18 15/ See Temengil I, 33 FEP Cases at 1036.

19 16/ Repeated plans to relocate the Headquarters were never
20 implemented. Temengil I, 33 FEP Cases at 1034.

21 17/ The status negotiations for the rest of the Trust Terri-
22 tory resulted in the creation of three separate states: the
23 Republic of Palau; the Federated States of Micronesia
24 (composed of the former districts of Pohnpei, Truk, Yap and
25 Kosrae) and the Republic of the Marshall Islands. These newly
26 created entities have negotiated separate Compacts of Free
Association with the United States all of which have received
majorities in respective plebiscites. The Compacts for the
Federated States of Micronesia and for the Marshall Islands
have been approved by Congress. P.L. 99-239, 99 Stat. 1770
(Jan. 14, 1986). Palau's Compact is now being reviewed by
Congress.

1 some administrative authority related primarily to "budgeting and
2 accounting responsibilities for monies the Trust Territory
3 government transfers from the United States to the governments of
4 [the Marshalls, the Federated States of Micronesia and
5 Palau]."^{18/} Accordingly, even beyond January 9, 1978, it was
6 necessary to staff the Trust Territory Headquarters which
7 remained on Saipan. Nearly all of the employees of the Trust
8 Territory Government employed since 1979 have been stationed on
9 Saipan. Stipulated Fact No. 9 (S.F.9).^{19/}

11 2. The Wage Scales

12 The United States' administration of the Trust
13 Territory produced a rapid change in the economy of the islands,
14 substituting a money economy for the subsistence economy familiar
15 to the people. The post-war money economy has been heavily
16 dependent on government employment.^{20/} The employment and
17 compensation of government employees proceeded in haphazard and

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20 ^{18/} Secretarial Order No. 3039, 44 Fed.Reg. 28116 (1979). De-
21 fendant United States Memorandum in Support of Defendants'
Motion to Dismiss (filed Mar. 5, 1981) at 7.

22 ^{19/} The parties have stipulated to a set of facts and a
23 series of documents for the purposes of these motions.
24 Stipulated facts will be referred as "S.F." followed by the
appropriate number; likewise, Stipulated Documents will be
identified by name and by "S.D." followed by the corresponding
number.

25 ^{20/} In 1973, 41.2% of those employed in the money economy
26 were on the government payroll. Congress of Micronesia, Five-

1 confused fashion. There is no evidence to suggest that any
2 substantial efforts were made prior to 1969 to establish a
3 uniform, consistent compensation practice. The result was an
4 utterly chaotic personnel policy. By 1969, the government work
5 force was composed of roughly 5,000 Micronesian employees, 300
6 United States Civil Service employees and 400 United States
7 contract employees.^{21//} Employees in each of these three
8 categories operated under a wage plan unique to their particular
9 category. Within each category, there was inconsistency,
10 confusion and inequity. As a result, there were over 1,300
11 position titles, many of which were duplicative or overlapping.
12 EMS Report, supra, note 21, at 11. The position classifications
13 had no common standard since there was no description and
14 definition of the range and limits of duties and responsibilities
15 covered by the job titles. This state of affairs created "a
16 fertile ground for discrimination."^{22//}

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18 (Con't. of footnote 20):

19 Year Indicative Development Plan (1976-1981) 7 (1976) (Five-
20 Year Development Plan). See generally, Department of
21 Education, "Proposal for a Single Salary Schedule for
22 Certified Personnel," at Part III (July 1969) (DOE
Report)(S.D.34); A. Spoehr, Ethnology of a War Devastated
Island, 41 Fieldiana: Anthropology 5, 125-126 (1952) (Spoehr).

23 ^{21//} Executive Management Service, "Report and Recommendations
24 on the Position Classification and Salary Plans," 3 (1969) (EMS
25 Report) (S.D.33).

26 ^{22//} EMS Report, supra note 21, at 1.

1 Realizing this, the Trust Territory Government and the
2 Congress of Micronesia set out to review pay practices and to
3 recommend a comprehensive compensation scheme to meet the stated
4 policy of "equal pay to those of equal qualifications for equal
5 work throughout the Trust Territory Government."^{23/} The
6 culmination of this review was the adoption by the Congress of
7 Micronesia in 1971 of a compensation plan which provided for
8 equal pay for equal work for all employees of the Government.
9 This legislation was vetoed by the High Commissioner.^{24/}

10 In 1972, the Congress of Micronesia enacted P.L. 4C-49
11 which established a comprehensive pay plan.^{25/} The plan
12 officially adopted segregated pay scales which in essence
13 perpetuated the pay practices which had developed through the
14 years of inattentive management.

15 The Fifth Congress of Micronesia viewed the bifurcated
16 compensation policy with dismay noting that "[t]he new plan does
17 not provide equal pay for equal work with equal qualifications",
18 a policy which must remain the "highest goal."^{26/} However, the
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21 ^{23/} Secretary of the Interior Walter Hickel, quoted in EMS
22 Report supra note 21, at 1.

23 ^{24/} See S.S.C.REP No.5-88, 5th Cong. of Micronesia, 1st Sess.
24 485 (1973)(S.D.6); see infra pp.79-82.

25 ^{25/} The concession by the Congress to enact separate compen-
26 sation plans based on citizenship was not entirely voluntary.
See infra p.83.

^{26/} S.S.C.Rep. No. 5-88, supra note 24, at 491.

1 Congress found itself "faced with the reality" that the Trust
2 Territory Government continued to employ expatriates who demanded
3 mainland labor market salaries.^{27/} The Fifth Congress
4 "regretfully" continued the wage plan but demanded that "the
5 Administration... develop timetables and implement programs
6 directed toward the replacement of all expatriate personnel with
7 Micronesian citizens."^{28/}

8 P.L. No. 6-65, the Salary Act of 1975, S.D.1,
9 perpetuated the wage imbalances. Based on the recommendations of
10 a retained consultant, Golightly and Co., the act established a
11 base salary at which Trust Territory citizens would be
12 compensated and incorporated a "market place differential" stated
13 in percentage figures, which would be added on to the pay figures
14 of United States citizens. These differentials ranged from 55.4%
15 to 198.0%. P.L. No. 6-65, Section 6.

16 The schedules embodied in P.L. No. 6-65 were extended
17 several times during the next few years until the Interior
18 Secretary issued Secretarial Order No. 3027^{29/} which dissolved the
19 Congress of Micronesia and transferred legislative authority to
20 the interim governments of the emerging nations. Faced with the
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22
23 ^{27/} Ibid.

24 ^{28/} Ibid.

25 ^{29/} 43 Fed.Reg. 49858 (1978).
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1 imminent expiration of the most recent extension of P.L. No.
2 6-65, the High Commissioner took action via Executive Order to
3 again extend the bifurcated pay scale which governed the
4 compensation of employees of the Trust Territory Government.^{30/}
5 In 1978, the High Commissioner again extended the life of the pay
6 scales.^{31/}

7 In 1979, the High Commissioner by Executive Order No.
8 119 implemented a new pay plan. S.D.23. While Executive Order
9 No. 119, in effect, continues the tripartite wage scales, it
10 differs from previous plans in several significant respects. The
11 new salary schedule eliminates the rubric of "market-place
12 differentials" and instead adopts three separate wage schedules.
13 Trust Territory citizens and citizens of "Southeast Asian"
14 countries who were employed on Saipan are compensated at Schedule
15 I. Schedule III Replaces the previous variable market place
16 differential formulas under which citizens of the United States,
17 Canada, the United Kingdom, Australia and "Northwest European"
18 countries are paid. Compensation under wage Schedule III is
19 approximately twice that paid under Schedule I. S.F.35.
20 Employees who are citizens of other countries are compensated at
21 Schedule II, the levels of which are set between Schedules I and
22 III. S.F.24. Another significant change appears also at Section
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24 ^{30/} Exec.Order No. 117 (S.D.21).

25 ^{31/} Exec.Order No. 118 (S.D.22).
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1 6 regarding the compensation of United States citizen employees
2 hired on a "local hire" contract. Formerly, local hire employees
3 were paid at a base salary plus a discretionary differential.
4 Executive Order No. 119 compensates at the full Schedule III
5 level. The other material provisions of Executive Order No. 119
6 perpetuated the previous policies. The salary plan established
7 by Executive Order 119 continues in force and effect with minor
8 modifications. S.F.26.

9
10 II. EMPLOYEES' CLAIMS

11 The plaintiff class pursues a remedy for the allegedly
12 discriminatory wage scales on several grounds.^{32/} Against the
13 Trust Territory, plaintiffs allege violations of 42 U.S.C.
14 §1981,^{33/} and of equal protection guaranties embodied in the Fifth
15 and Fourteenth Amendments to the United States Constitution^{34/}

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17 ^{32/} In addition to those claims still at issue here, plain-
18 tiffs had alleged violation of 42 U.S.C. §§2000(d) et. seq.
19 (Title VI) and 42 U.S.C. §§2000(e) et. seq. (Title VII); how-
ever, these claims were dismissed in Temengil I, 33 FEP Cases
at 1028-1029.

20 ^{33/} 42 U.S.C. §1981 provides:
21 All persons within the jurisdiction of the United States
22 shall have the same right in every State and Territory to make
23 and enforce contracts, to sue, be parties, give evidence, and
24 to the full and equal benefit of all laws and proceedings for
the security of persons and property as is enjoyed by white
citizens, and shall be subject to like punishment, pains,
penalties, taxes, licenses, and exactions of every kind, and
to no other.

25 ^{34/} Since the equal protection analysis under the 5th and
26 14th Amendments is the same, this Court has previously found
it unnecessary to decide which clause specifically acts as the
limitation. Temengil I, FEP at 1060.

1 enforceable through 42 U.S.C. §1983.^{35/} Plaintiffs additionally
2 ground their equal protection claim on Section 7 of the Trust
3 Territory Bill of Rights codified at 1 T.T.C. §7.^{36/} Also,
4 plaintiffs allege that the actions of the Trust Territory which
5 are at issue here violate Article 6(3) of the Trusteeship
6 Agreement. The plaintiffs also complain against the United
7 States, alleging that it violated its fiduciary obligations under
8 the Trusteeship Agreement. In the instant motion, plaintiffs
9 seek summary judgment as to liability on all claims against the
10 Trust Territory and the United States.

11 In separate cross-motions the Trust Territory and the
12 United States seek summary judgment on all claims, asserting that
13 plaintiffs have demonstrated no invidious discrimination
14 actionable under 42 U.S.C. §1981 and §1983. Also, both
15 governments move for judgment on the Trusteeship Agreement
16 claims.

17 Briefly, then, the claims pursued by the plaintiff
18 class can be divided into two broad categories:

19
20 35/ 42 U.S.C. §1983 provides:

21 Every person who, under color of any statute, ordinance,
22 regulation, custom, or usage, of any State or Territory or the
23 District of Columbia, subjects, or causes to be subjected, any
24 citizen of the United States or other person within the juris-
25 diction thereof to the deprivation of any rights, privileges,
26 or immunities secured by the Constitution and laws, shall be
liable to the party injured in an action at law, suit in
equity, or other proper proceeding for redress.

36/ For text of 1 T.T.C. §7 see infra p.92.

1 those founded on principles of equal protection, and those
2 relying on the provisions of the Trusteeship Agreement. The
3 claims and defenses will be addressed accordingly.

4
5 III. EQUAL PROTECTION CLAIMS^{37/}

6 [1,2] The equal protection clause of the Fourteenth Amendment
7 prohibits class-based discrimination which is not sufficiently
8 related to a permissible government objective. Official action
9 can transcend the bounds of equal protection in two ways. It can
10 be "facially discriminatory" in that it "explicitly classifies or
11 distinguishes among persons by reference to criteria - such as
12 race, sex, religion or ancestry - which have been determined
13 improper bases for differentiation." De La Cruz v. Tormey, 582
14 F.2d 4549 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979).
15 Or, an action which is facially neutral may nonetheless produce
16 results which demonstrate a disproportionate impact on a class of
17 persons identifiable by similar traits or characteristics. De La
18 Cruz, 582 F.2d at 50. Not all classifications, overt or covert,
19 violate principles of equal protection; rather, it is only those

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21
22 ^{37/} The plaintiffs rely on the equal protection component of
23 §1981 and the constitutional doctrine underlying §1983. The
24 Supreme Court has determined that the equal protection
25 analysis under either statute is functionally the same.
26 General Building Contractors Ass'n. v. Pennsylvania, 458 U.S.
375, 389-390, 102 S.Ct. 3141, 3149, 73 L.Ed. 2d 835 (1982).
Thus, the Court treats the two claims as one under equal
protection.

1 which cannot be explained in terms of "non-invidious purposes."
2 Id. Both types of equal protection analysis will be addressed
3 here.

4 A. Overt Classification

5 1. Standard of Review

6 [3] A classification which is based on race, national
7 origin or other such class is itself "immediately suspect" and
8 subject "to the most rigid scrutiny." Korematsu v. United
9 States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 8? L.Ed. 194
10 (1944). Under this "most rigid scrutiny", the subject
11 classification will survive only upon the government's
12 demonstration that the categories drawn are "necessary" to meet
13 an "overriding" state interest. Loving v. Virginia, 388 U.S. 1,
14 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967).

15 The challenged pay scales are drafted in terms of
16 "citizenship." Those "employees who are citizens of the Trust
17 Territory" are paid under one wage scale while those "employees
18 who are citizens of the United States" are paid under another
19 preferred scale.^{38/} To trigger exacting judicial review,
20 plaintiffs must demonstrate that this operative language overtly
21 discriminates against a "suspect" class. Plaintiffs contend that
22
23

24
25 ^{38/} P.L. 6-65, supra p.11, at §§5-6. Executive Order No.
26 119, supra p.12, also at issue here, incorporates the
identical language.

1 the compensation plan in fact so discriminates, arguing that pay
2 practices amount to "flagrant discrimination based ultimately on
3 race and national origin."^{39/} Defendants on the other hand argue
4 that the wage scales are founded only upon citizenship and thus
5 are permissible and do not trigger strict judicial scrutiny.^{40/}

6 Initially, it is noted that the Trust Territory does
7 not argue that there should be no shifting of the burden.
8 Rather, it maintains that the classification distinguishes in
9 terms of "citizenship" or "alienage" and so triggers a review
10 less searching than that necessitated by a racial
11 classification.^{41/} The Court concludes that those categories
12 implemented by the Trust Territory which treat Trust Territory
13 citizens and United States citizens differently for purposes of
14 wage compensation are inherently suspect and deserve an exacting
15 review.

16 [4] An appropriate starting point for an analysis of the
17 challenged classification is a review of the United States
18 Supreme Court's opinions regarding distinctions based on alien-
19 age. As a general matter, in reviewing classifications based on
20 alienage, the Supreme Court has examined the governmental body

22 ^{39/} Plaintiffs' Memorandum 13.

23 ^{40/} Brief in Support of TTPI Defendants' Motion for Summary
24 Judgment 17.

25 ^{41/} Ibid., at 17-19.
26

1 taking the questioned action and the authority from which the
2 government asserts its power to act.^{42/} Where a state has
3 employed a classification based on alienage, the Court has
4 considered the action "inherently suspect and subject to close
5 judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372, 91
6 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). Supporting this
7 conclusion, the Supreme Court has cited the "discrete and
8 insular" nature of the class of aliens and their guaranty of the
9 equal protection of the laws, along with citizens, under the
10 Fourteenth Amendment. See Graham, 91 S.Ct. at 1852. Thus, the
11 Court has concluded that strict scrutiny is the rule and other
12 standards of review the exception. Ambach v. Norwick, 441 U.S.
13 68, 75, 99 S.Ct. 1589, 1593, 60 L.Ed.2d 49 (1979).

14 [5.6] One exception mentioned in Ambach is termed the "rule
15 of governmental functions". 99 S.Ct. at 1593. This rule refers
16 to state action barring non-citizens from participating in those
17 essential government functions which "lie at the heart of our
18 political institutions." Foley v. Connelie, 435 U.S. 291, 296,
19 98 S.Ct. 1067, 1071, 55 L.Ed.2d 287 (1978). The Court emphasized
20 that while aliens are active participants in community life, the
21 right to govern is a right uniquely reserved to citizens. Foley

22
23
24 ^{42/} See generally Note, A Dual Standard for State Discrimi-
25 nation Against Aliens, 92 Harv.L.Rev. 1516 (1979); Note, Dual
26 Standard; L. Tribe, American Constitutional Law, 281-283
(1977).

1 v. Connelie, 98 S.Ct. at 1070. States may accordingly retain
2 distinctions between citizens and aliens where it is "fundamental
3 to the definition and government of a State." Ambach v. Norwick,
4 99 S.Ct. at 1593. Thus, the Court has upheld state laws or
5 regulations which prohibit the employment of non-citizens on the
6 police force, Ambach v. Norwick, which prevent aliens from
7 becoming teachers, Foley v. Connelie, and which establish
8 citizenship as a prerequisite to employment as a state probation
9 officer. Cabell v. Chavez-Salido, 454 U.S. 432, 102 S.Ct. 735,
10 70 L.Ed.2d 677 (1982). Where a core governmental function is
11 involved, the Court will examine the classification only to
12 ensure that it is rationally related to the state's legitimate
13 objective. Note, Dual Standard, supra note 42, at 1518.

14 [7] In addition to identifying this line of cases to
15 support its conclusion that the proper review depends "on the
16 amount of discretion that the government requires to accomplish
17 its objectives, and the importance of those objectives,"^{43/} the
18 Trust Territory relies on cases involving federal regulation of
19 aliens.

20 The Trust Territory correctly notes that Federal
21 discrimination against aliens has been treated in a manner very
22 different from similar state classifications. See Note, Dual
23 Standard, supra note 42, at 1516 n.3. Thus, in Fiallo v. Bell.

25 ^{43/} Brief in Support of TTPI Defendants' Motion for Summary
26 Judgment 23.

1 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977), which
2 concerned a special immigration preference status for children or
3 parents of lawful United States residents, the Court upheld the
4 challenged classification following a "narrow judicial review"
5 under which the challenged classification was given "special
6 judicial deference." 97 S.Ct. at 1478. Similarly, when faced
7 with a challenge to a congressional delegation to the Attorney
8 General of discretionary authority to waive visa inadmissibility,
9 the Court upheld the exercise of discretion, satisfied that the
10 reasons advanced in its support were "facially legitimate and
11 bona fide." Kleindienst v. Mandel, 408 U.S. 753, 769, 92 S.Ct.
12 2576, 2585, 33 L.Ed.2d 683 (1972). The Court on another occasion
13 has stated the narrow standard to which federal alien
14 classifications will be subject, upholding a discrimination among
15 aliens on the ground that it was not "wholly irrational."
16 Mathews v. Diaz, 426 U.S. 67, 83, 96 S.Ct. 1883, 1893, 48 L.Ed.2d
17 478 (1976).

18 The narrow standard of review of federal alien
19 classifications does not indicate a relaxing of the Court's
20 position stated in Graham, nor does it represent a conflicting
21 line of decisions. Rather, the Supreme Court rests its lenient
22 treatment of federal regulation of aliens on unique national
23 powers granted by the Constitution. On a previous occasion, the
24 Court found it "pertinent to observe" that "any policy toward
25 aliens is vitally and intricately interwoven with contemporaneous
26 policies in regard to the conduct of foreign relations, the war

1 power, and the maintenance of a republican form of government."
2 Harisiades v. Shaughnessy, 342 U.S. 580, 588, 589, 72 S.Ct. 512,
3 519, 96 L.Ed. 586 (1952). See also Toll v. Moreno, 458 U.S. 1,
4 10, 102 S.Ct. 2977, 2982, 73 L.Ed.2d 563 (1982)(federal authority
5 to regulate the status of aliens derives from its broad authority
6 over foreign affairs). Professor Laurence Tribe has concluded
7 that while the Court has allowed Congress to condition the
8 "entry, stay and naturalization of aliens upon compliance with
9 requirements courts would hold violative of constitutional limits
10 if applied to... citizens", it "would seem that... resident
11 aliens ought to enjoy the same constitutional rights secure from
12 congressional abridgment as are possessed by... citizens."
13 Tribe, supra note 42, at 281, 283.

14 From these three lines of cases can be extracted only
15 general criteria for determining the appropriate standard of
16 review. The Supreme Court in the past has examined the source
17 and the nature of the governmental authority exercised and the
18 relation of the action taken to that authority to determine the
19 judicial deference mandated. Thus, where a state has employed
20 alienage as a classification criterion, the Court has closely
21 examined the selected classification to see if it is necessary to
22 promote a compelling state interest. This strict review is
23 required because of the general irrelevance of alienage to state
24 actions and the great potential for discrimination due to the
25 political impotence of aliens as a group. However, where the
26 action challenged relates to a fundamental operation or function

1 of state government from which non-citizens are properly
2 excluded, the Court has looked for only a rational basis due to
3 the State's inherent authority in such areas. Likewise, where
4 the federal government acts on the basis of alienage regarding
5 the "entry, stay or naturalization" of non-citizens, the Court
6 has shown extreme deference due to the unique national nature of
7 immigration authority and the nearly "political nature" of these
8 decisions. Conversely, federal actions which do not touch on
9 aliens qua aliens do not merit the same deference but should
10 instead be critically examined for sufficient justification.

11 The Supreme Court cases produce no litmus test for
12 state or federal decisions and a fortiori produce no mechanical
13 standard by which to review the facts here presented. The Trust
14 Territory and the trust relationship it represents^{44/} are unique
15 among American political structures and the issues presented here
16 are of first impression. Thus, the Court will review the source
17 of the authority exercised and the nature of the challenged
18 action to determine what deference should be given to decisions
19 of the Trust Territory regarding alienage and pay
20 classifications.

21
22
23 ^{44/}[8] The Trust Territory government has been found to stand in
24 a fiduciary relationship to the inhabitants of the Micronesian
25 islands and to carry the duties and obligations of a trustee
26 to a beneficiary. See Palacios v. Trust Territory of the
Pacific Islands, DCA No. 81-5017, slip op. at 14 (D.N.M.I.
(App.Div.) 1983).

1 Equally important as identifying the authority
2 exercised, there must be an understanding as to the authority not
3 challenged here. The Trust Territory consistently attempts to
4 confuse the actors by making reference to the actions taken by
5 the Congress of Micronesia in promulgating the pay scales in
6 question. As plaintiffs repeatedly note, the defendant here is
7 the Trust Territory government, not the Congress of Micronesia.
8 Plaintiffs complain of acts, or failures to act, on or after
9 January 9, 1978. On that date, authority over the Trust
10 Territory employees on Saipan originally vested in the Congress
11 of Micronesia pursuant to Secretarial Order No. 2989 (Part VIII)
12 was revoked^{45/} leaving authority thereover reposed with the Trust
13 Territory Government.^{46/} Thus, while the decisions made and
14 actions taken by the Congress of Micronesia are relevant to the
15 justifications asserted by the Trust Territory in defense of the
16 wage scales,^{47/} the focus regarding the standard of review is on
17 the Trust Territory and its asserted source of authority.

18
19
20 ^{45/} Pursuant to Part XIV of Secretarial Order No. 2989, supra
21 note 12, the effectiveness of the Order, including the vesting
22 in the Congress of Micronesia of legislative authority over
23 the Capitol District, expired pursuant to the terms of the
24 Presidential Proclamation issued under Section 1003(b) of the
Covenant. As previously noted, President Carter issued
Presidential Proclamation No. 4534 on October 24, 1977, making
the Covenant sections identified in 1003(b) effective on
January 9, 1978. See supra note 12.

25 ^{46/} Secretarial Order No. 3039, supra note 16, at §3(a)(8).

26 ^{47/} See infra pp.38-62.

1 The authority exercised by the High Commissioner during
2 the period in question traces back to Secretarial Order No. 2915.
3 34 Fed.Reg. 157 (1968). Order No. 2918 vested in the High
4 Commissioner the executive authority of the Government of the
5 Trust Territory and the responsibility for carrying out the
6 international obligations undertaken by the United States. There
7 can be no serious contention that this language gives the High
8 Commissioner staffing authority. Pursuant to Order No. 2989,
9 which administratively segregated the Northern Mariana Islands, a
10 Trust Territory Capitol District was created, the legislative
11 authority for which was vested in the Congress of Micronesia.
12 Sec.Order No. 2989, Pt.VII, §2. When Secretarial Order No. 2989
13 was extinguished by Presidential Proclamation 4534, executive
14 authority over the Trust Territory employees reverted to the High
15 Commissioner under Secretarial Order 2918. This was superseded
16 by Secretarial Order 3027 which retained the High Commissioner's
17 staffing authority of the Trust Territory Headquarters.
18 Secretarial Order No. 3029 also vested in the High Commissioner
19 staffing authority to carry out the duties and responsibilities
20 of the Trust Territory Government.

21 The High Commissioner's jurisdiction in the Northern
22 Marianas after January 9, 1978, however, was greatly limited^{48/}.

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24
25 ^{48/} See supra pp.7-8.
26

1 As already noted, the Covenant granted the government of the
2 Northern Mariana Islands a great deal of autonomy over domestic
3 matters including authority over immigration. As for the other
4 political entities, Secretarial Order No. 3039 intended to
5 provide them "the maximum permissible amount of self-government
6 ... pursuant to their respective constitutions." Sec.Order 3039,
7 supra note 18, at §1. The High Commissioner was to arrange "for
8 the transfer, as expeditiously as possible, of executive
9 functions" not required by the Order. Sec.Order 3039, Section
10 3(a)(4).

11 [9] The High Commissioner's actions must be viewed in light
12 of the retained authority to determine the appropriate deference
13 to be given to the actions in question. Two important factors
14 predominate. The Trust Territory Government no longer had
15 authority over immigration into the Northern Mariana Islands,
16 since the Covenant extended such authority to the
17 Commonwealth.^{49/} Nor did it have authority over defense, which
18 was retained by the United States as administering authority
19 under Article 5 of the Trusteeship Agreement.^{50/} Likewise,

21 ^{49/} Section 503(a) of the Covenant explicitly made the immi-
22 gration and naturalization laws of the United States inappli-
23 cable to the Commonwealth. Thus, under Section 505, the
24 Commonwealth inherited the Trust Territory immigration laws
25 which it was free to alter. For examples of the exercise of
26 this authority by the Commonwealth, see Sirilan v. Castro, DCA
No. 83-9009 (D.N.M.I. (App.Div.) 1984) (regarding the Common-
wealth's permanent residency program).

^{50/} The President transferred "responsibility for the admin-
istration of civil government" to the Trust Territory Govern-

1 authority over foreign affairs was expressly reserved to the
2 Department of State. Exec. Order No. 11021, supra note 6, at §1.
3 The Covenant specifically granted these powers to the United
4 States upon termination of the Trusteeship Agreement. Covenant,
5 Section 104. Thus, one of the major justifications for the
6 Supreme Court's deference to federal action is absent here. The
7 High Commissioner in perpetuating or establishing wage scales was
8 not acting pursuant to an authority so plenary and unique as to
9 be virtually political and free from judicial oversight. Rather,
10 the High Commissioner was acting under a purely domestic
11 administrative authority generally not shielded from judicial
12 scrutiny.^{51/}

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14
15 (Con't. of footnote 50):

16 ment. See Exec. Order No. 11021, supra note 6 (emphasis
17 added). The President retained security authority. Exec.
18 Order No. 11021, at §1.

19 51/ [10] The Supreme Court has on occasion justified its reluctance
20 to decide immigration issues on the basis of the political
21 question doctrine, Hampton v. Maw Song Wong, 426 U.S. 88, 101
22 n.21, 96 S.Ct. 1895, 1904 n.21, 48 L.Ed.2d 495 (1976). At
23 issue in these cases is not an absence of subject matter
24 jurisdiction but justiciability, which refers to a discretionary
25 deference to avoid deciding certain controversies. Justice
26 Brennan, writing for the Supreme Court in Baker v. Carr, 369
U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), set forth some
guidelines for courts to follow when asked to determine the
justiciability of questions before the court:

Prominent on the surface of any case held to
involve a political question is found a text-
ually demonstrable constitutional commitment
of the issue to a coordinate political
department; or a lack of judicially discover-

1 [11] Additionally, the actions in question did not in fact
2 relate to a sensitive or political question uniquely within the
3 province and special expertise of the political departments.
4 Baker v. Carr, supra note 51, 82 S.Ct. at 710. The development
5 of employee compensation plans is a routine and general exercise
6 of administrative authority performed by federal, state and local
7 governments as well as by private employers. Nor do these
8 compensation plans present a "lack of judicially discoverable and
9 manageable standards." Id. Equal protection challenges to
10 employee compensation plans are routinely litigated in the
11 federal courts,^{52/} and, in fact, Congress has specifically granted

12 _____
13 (Con't. of footnote 51):

14 able and manageable standards for resolving it;
15 or the impossibility of deciding without an
16 initial policy determination of a kind clearly
17 for nonjudicial discretion; or the impossibili-
18 ty of a court's undertaking independent
19 resolution without expressing lack of the
20 respect due coordinate branches of government;
21 or an unusual need for unquestioning adherence
22 to a political decision already made; or the
23 potentiality of embarrassment from multifarious
24 pronouncements by various departments on one
25 question.

26 82 S.Ct. at 710. For the reasons discussed in the text, the
Court does not find the challenged authority of the High
Commissioner to represent a political question inappropriate
for judicial review.

52/ There were 5,017 employment discrimination cases filed
nationwide in the various district courts for the twelve-month
period ending June 30, 1980. C. Richey, Manual on Employment
Discrimination and Civil Rights Actions in the Federal Courts,
A-1 (Federal Judicial Center, 1983). This number rose by 23.1
percent in 1982. Id.

1 the federal courts jurisdiction to review complaints of
2 employment discrimination.^{53/}

3 Accordingly, this Court does not find present those
4 factors which have persuaded the Supreme Court to give special
5 deference to certain species of decisions of state and federal
6 government regarding aliens.^{54/} Rather, the use of citizenship
7 to set drastically divergent wage scales is inherently suspect
8 and deserves special scrutiny.

9 The Trust Territory's other arguments to the contrary
10 simply are not persuasive. In urging the adoption of a rational
11 basis test, the Trust Territory compares the instant situation
12 with federal Indian cases wherein classifications singling out
13 Indians were examined only for a rational relation to a
14 legitimate interest. Trust Territory's Opening Memorandum, pp.
15 18, 27-28, citing Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474,
16 41 L.Ed.2d 290 (1974) and Livingston v. Ewing, 455 F.Supp. 825
17 (D.N.M. 1978), aff'd, 601 F.2d 1110 (10th Cir. 1979), cert.
18 denied, 447 U.S. 905 (1979). The Court does not find these cases
19 or the Indian analogy supportive of the Trust Territory's
20 argument.

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22
23 ^{53/} 42 U.S.C. 2000e-5(f)(3).

24 ^{54/} The Trust Territory concedes that the government objectives
25 of the wage scales are "primarily social and economic rather
26 than political, so that the 'political function' test... is
not directly relevant." Brief in Support of TTPI Defendants'
Motion for Summary Judgment 27.

1 In both cases, preferences afforded members of Indian
2 tribes were under constitutional attack. The Supreme Court in
3 Mancari was not moved by the challenge and found that Congress,
4 in enacting the preference, was only fulfilling its historical
5 and legal trust obligation to the Indians. There was no evidence
6 of invidious racial discrimination against the class of
7 non-Indians. In the absence of such evidence, the government
8 needs only to demonstrate that the preference is rationally
9 related to the promotion of the stated goal. 94 S.Ct. at
10 2483-2485. Likewise in Livingston, the district court of New
11 Mexico upheld a museum preference for traditional native American
12 vendors on the basis that the action was not based on race but on
13 the unique responsibilities of the federal government and the
14 state toward Indians. 455 F.Supp. at 831. Again, there was no
15 evidence of invidious discrimination.

16 This Court has previously recognized the aptness of the
17 analogy between the United States-Indian and United States-
18 Micronesian trust relationships. See Palacios v. Commonwealth of
19 the Northern Mariana Islands, Civ.App.No. 81-9017 (D.N.M.I. (App.
20 Div.) 1983) slip op. at 10 ("the very purposes which engendered
21 the judicially created Indian fiduciary doctrine apply a fortiori
22 to the Micronesian-U.S. relationship"). However, there is no
23 analogy between the facts of Mancari and Livingston and the facts
24 here presented. The action taken by the Trust Territory
25 compensating the Trust Territory citizens at a rate approximately
26 half that paid United States citizens does not immediately dispel

1 an inference of discrimination; rather, it creates one. This is
2 not a case of preferential treatment of a trust beneficiary but
3 of facial discrimination, albeit in the alleged interest of the
4 beneficiary. The justifications in support of the classification,
5 therefore, are more appropriately considered in light of the
6 standard of review and not in support of one.^{55/}

7 The Trust Territory also argues that the "paramount
8 international obligations" arising out of the Trusteeship
9 Agreement^{56/} when entered into the equation call for a deferential
10 standard of review. And, the "broad scope of this duty" and the
11 "inherent difficulty of promoting economic self-sufficiency" call
12 for this Court's restraint in reviewing governmental actions. As
13 set forth earlier, the predominantly administrative nature of the
14 authority delegated the Trust Territory and the actual
15 circumstances of the exercise of that authority are not of the
16 type normally shunned by the courts. The Trust Territory's
17 arguments instead are properly advanced as justifications based
18

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20 55/ The Trust Territory itself identifies other programs which
21 distinguish between Trust Territory citizens and United States
22 citizens. However, unlike the wage plan, these other programs
23 offer preferences to Trust Territory citizens and would
24 accordingly be more appropriately reviewed under a relaxed
25 standard offered in Mancari. See Brief in Support of TTPI
26 Defendants' Motion For Summary Judgment 28-29 (citing
economic, housing and education programs open to citizens of
the Trust Territory exclusively.)

56/ Ibid.

1 on the importance of the state's interests and not at the
2 standard of review stage. Moreover, the importance of the
3 obligations imposed on the Trust Territory Government and the
4 fiduciary nature of those obligations supports the adoption by
5 this Court of a more searching review.^{57/}

6 Additionally, the Trust Territory cites the devolution
7 of the Government and the need to give deference to decisions
8 hastening the termination of the Trusteeship. These goals do not
9 support an argument that the wage scales are drawn. The
10 assertion that the Government will terminate soon, thereby
11 eliminating the need for the differentials, may demonstrate that
12 the pay discrimination is of short life span, eliminating the
13 need for indefinite injunctive relief. But, in no manner can
14 this event alone justify past discrimination or dissipate the
15 need for remedial monetary relief.

16 Again, the Trust Territory argues that the
17 discrimination was "self-imposed by a majority group... against
18 itself."^{58/} Even if the focus at this stage was on the Congress
19 of Micronesia legislation and not on the actions of the High
20 Commissioner, the self-imposed discrimination would not by that

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23 ^{57/} See infra pp.93-97.

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25 ^{58/} Brief in Support of TTPI Defendants' Motion for Summary
26 Judgment 29.

1 fact alone justify judicial deference. The Supreme Court
2 addressed a similar argument in Regents of the University of
3 California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750
4 (1978). In Bakke, a rejected white applicant to medical school
5 challenged the school admissions policy, which reserved a
6 specific number of slots for minority applicants. Rejecting the
7 University's argument that since the classification was imposed
8 by a majority class to its disadvantage and to the benefit of a
9 minority class and therefore called for deference, the Court
10 said:

11 Moreover, there are serious problems of
12 justice connected with the idea of preference
13 itself. First, it may not always be clear
14 that a so-called preference is in fact
15 benign. Courts may be asked to validate
16 burdens imposed upon individual members of a
17 particular group in order to advance the
18 group's general interest. [Citation omitted.]
19 Nothing in the Constitution supports the
20 notion that individuals may be asked to
21 suffer otherwise impermissible burdens in
22 order to enhance the societal standing of
23 their ethnic groups. Second, preferential
24 programs may only reinforce common stereo-
25 types holding that certain groups are unable
26 to achieve success without special protection
based on a factor having no relationship to
individual worth. [Citations omitted.]

98 S.Ct. at 2752.

Although Justice Powell announced the judgment of the
Court, he did not obtain a plurality on his position regarding
the standard of review. However, he was joined by four other
Justices (Brennan, Marshall, White, and Blackmun) in his
rejection of the deferential, rational basis standard. The

1 "Brennan four" rejected Powell's suggestion of applying the
2 strict scrutiny standard, but only because "whites as a class [do
3 not] have any of the 'traditional indicia of suspectness'." 98
4 S.Ct. at 2782 Brennan, J., White, J., Marshall, J., and Blackmun,
5 J., concurring in the judgment in part and dissenting in part)
6 (quoting San Antonio Independent School District v. Rodriguez,
7 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973)).
8 Thus, a majority of the Bakke court would reject the Trust
9 Territory's position, even accepting the Trust Territory's
10 argument that the compensation plan was enacted by the very class
11 of persons it burdens. See also Weinberger v. Wiesenfeld, 4290
12 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975) ("the
13 mere recitation of a benign, compensatory purpose is not an
14 automatic shield which protects against any inquiry into the
15 actual purposes underlying a statutory scheme").

16 17 2. National Origin

18 [12] The challenged classification is deserving of thorough
19 and searching review for another reason --- it significantly
20 relies on national origin for a substantial part of its
21 foundation. Generally, classifications based on alienage have
22 been treated differently from those discriminations based on race
23 or national origin because "the class of aliens is itself a
24 heterogeneous multitude of persons with a wide-ranging variety of
25 ties to [the] country." Mathews v. Diaz, supra, 96 S.Ct. at
26 1890-1891. Rather, the "suspect" character of the alien class

1 turns on its discrete and insular nature, its burden of stigma
2 and its history of discrimination. See, Note, Dual Standard,
3 supra note 41, at 1525-1527. Thus, as seen above, unlike racial
4 discrimination, the court will not strictly review every alienage
5 classification, but, rather, only those not based upon a state's
6 inherent constitutional power to regulate political functions or
7 upon the federal government's unique authority over the
8 regulation of aliens qua aliens. However, the Court has noted
9 that it will not so readily defer to governmental justifications
10 where alienage is used as a pretext for race or national origin
11 discrimination. See, e.g., Takahashi v. Fish & Game Comm'n., 344
12 U.S. 410, 418, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948)
13 (suggesting that California's alienage classification may indeed
14 be an "outgrowth of racial antagonism directed solely against the
15 Japanese"). In Oyama v. California, 332 U.S. 633, 636, 68 S.Ct.
16 269, 270, 92 L.Ed.249 (1948), the Court stated:

17 In approaching cases... in which federal
18 constitutional rights are asserted, it is
19 incumbent on us to inquire not merely whether
20 those rights have been denied in express
21 terms, but also whether they have been denied
22 in substance and effect. [Emphasis added.]

23 Justice Murphy, in his concurrence, added that the decision in
24 Oyama "is dictated by the uncompromising opposition of the
25 Constitution to racism, whatever cloak or disguise it may
26 assume." 68 S.Ct. at 277.^{59/}

^{59/} See also, Note, Dual Standard, supra note 42, at 1528

1 [13] The alienage classifications incorporated into the wage
2 scales vary from the "citizen/non-citizen" distinctions generally
3 reviewed by the Supreme Court in two ways which, taken together,
4 convince this Court that special attention is required. First,
5 the classification not only distinguishes between citizens of the
6 United States and non-United States citizens, it goes further and
7 classifies among aliens according to country of citizenship.
8 This manner is not only unique but is extremely open to national
9 origin discrimination. The "suspect" nature of these
10 discriminations is aggravated by the grouping of countries into
11 categories of generally homogeneous racial populations.

12 Second, the classification defined as "Trust Territory
13 citizen" is a group which can almost uniformly be classified as
14 Micronesian in ethnic origin. Good reason exists for this
15 statistical purity. "Trust Territory citizenship" is an
16 administrative classification designed by the Trust Territory
17 government to identify those persons who claim origin or ancestry
18 in the islands of Micronesia. "Natural citizens" of the Trust
19 Territory are only those born in the Trust Territory who do not
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23 (Con't. of footnote 59):

24 ("To be sure, the alien population of a particular State may
25 well be composed almost entirely of a single racial or
26 national minority, and distinctions based on alienage may be
used to mask discrimination aimed at such a group.")

1 otherwise acquire another nationality at birth,^{60/} and those born
2 outside the Trust Territory of parents who are Trust Territory
3 citizens.^{61/} Qualifications for naturalization are very
4 restrictive requiring, inter alia, that one parent or grandparent
5 be a citizen of the Trust Territory.^{62/} The restrictiveness of
6 the immigration scheme is demonstrated by the statistics in this
7 action: 100% of the class of Trust Territory citizen employees
8

9 ^{60/} 53 T.T.C. §1 provides:

10 §1. Natural citizens. (1) All persons born in the Trust
11 Territory shall be deemed to be citizens of the Trust Terri-
12 tory, except persons born in the Trust Territory, who at birth
13 or otherwise have acquired another nationality.

14 ^{61/} 53 T.T.C. §1(2) provides:

15 (2) A child born outside the Trust Territory of parents
16 who are citizens of the Trust Territory shall be considered a
17 citizen of the Trust Territory while under the age of twenty-
18 one years, and thereafter if he becomes a permanent resident
19 of the Trust Territory while under the age of twenty-one
20 years.

21 ^{62/} 53 T.T.C. §2 provides:

22 §2. Naturalization; authority of High Commissioner to
23 grant. The High Commissioner may grant Trust Territory
24 citizenship to persons who:

- 25 (1) Are eighteen years of age or over;
- 26 (2) Are of good moral character, as certified by the
district administrator and two leading citizens of the
community in which they intend to reside;
- (3) Have not acquired, or who renounce, previous citizen-
ship and renounce allegiance to any and all foreign powers and
rulers;
- (4) Have been permanent residents of and legally
domiciled continuously in the Trust Territory for at least
five years immediately prior to application for citizenship,
and
- (a) Have been born of parents, one of whom was a citizen
of, and maintained his principal residence in the Trust
Territory at the time of the birth; or
- (b) Have been born of parents, one of whom has been
granted Trust Territory citizenship pursuant to this section.

1 are Micronesians.^{63/} It is hard to imagine another way to define
2 an ethnic class or other class of common national origin which
3 would produce equal or less deviation from the desired goal than
4 does the class defined by the defendants here.

5 The ethnically pure nature of the class of Trust
6 Territory citizens alone would justify a decision to strictly
7 review the classifications involved here due to its "suspect"
8 nature and potential for hidden or disguised abuses. Considered
9 in conjunction with what has previously been said regarding
10 alienage and the classes here involved, principles of justice and
11 fair play not only warrant a searching review of the
12 classifications chosen, they demand it.

13
14 2. Trust Territory's Justifications

15 [14] The Supreme Court has held that "[i]n order to justify
16 the use of a suspect classification, a [government] must show
17 that its purpose or interest is both constitutionally permissible
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21 ^{63/} Answers to Plaintiffs' Interrogatories (filed August 15,
22 1983). The answer incorporates a computer print-out which
23 lists all Trust Territory citizen employees from January 9,
24 1978 to August 5, 1983. All 775 employees are listed as
25 having Micronesia as their origin. (Plaintiffs' Exh. 5 to
26 Motion to Certify Class). Micronesians are defined as
"persons whose ancestors were the indigenous inhabitants of
the former districts of the Trust Territory known as the
Marshalls, Truk, Ponape, Kosrae, the Marianas, Yap and Palau."
(S.F.31) No statistics were presented regarding the percent-
age of Trust Territory citizens who are Micronesians.

1 and substantial, and that its use of the classification is
2 'necessary... to the accomplishment' of its purpose or the
3 safeguarding of its interest." In Re Griffiths, 413 U.S. 717,
4 721-722, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910 (1973)(footnotes
5 omitted).

6 The Trust Territory sets forth two prevailing
7 governmental interests in justification of the use of the
8 challenged wage scales. First, the Trust Territory cites its
9 trusteeship obligation to "promote the economic advancement and
10 self-sufficiency of the inhabitants." Due to the state of the
11 economy of the islands in the post-war period the Trust Territory
12 concluded that it would need to recruit skilled labor from other
13 regions to meet its obligations. Making this recruitment of
14 experienced manpower a goal in itself, the government sought the
15 means to best accomplish this. They concluded that the
16 expatriate expertise would have to be paid at a wage equivalent
17 to the prevailing wage of the labor market from which the
18 manpower was drawn. Believing a unitary pay scale set at a
19 United States wage level to be financially disastrous and
20 economically unsound, the government established the tripartite
21 wage scale to meet its stated goals. Brief in Support of TTPI
22 Defendants' Motion for Summary Judgment 14-15.

23 Initially, it would be difficult to argue with the
24 Trust Territory's assertion that its goals of promoting "economic
25 advancement" and "self-sufficiency" as mandated by the
26 Trusteeship Agreement are sufficiently compelling to justify some

1 practices which might not otherwise survive constitutional
2 challenge; however, this proves nothing. Instead, the method by
3 which the Trust Territory recruited and compensated expatriate
4 expertise must be examined both as a goal and as a means of
5 promoting the social and economic ends advanced by the Trust
6 Territory. Secondly, it must be determined whether the
7 compensation plan designed to foster these purposes was
8 "necessary" to actually do so.

9 The "economic advancement" of the Micronesian people
10 was a difficult task not just in its accomplishment as much as in
11 the definition of the goal. Following the war, Micronesia was
12 devastated. In the views of one commentator, "[w]hen the
13 fighting was over, the Micronesian economy had been set back a
14 quarter of a century."^{64/} As a general matter, the economy of
15 Micronesia throughout recorded history was one of subsistence.
16 While the various colonial powers established some trade in the
17 islands, no economic boom was brought about, not at least until
18 the Japanese took control of the islands under a mandate from the
19 League of Nations.^{65/} The Japanese brought large scale agricul-

21 ^{64/} Gale, supra note 2, at 42; Spoehr, supra note 20, at
22 91-95.

23 ^{65/} The mandate system was the immediate predecessor to the
24 trusteeship system of the United Nations. See generally, J.
25 Murray, The United Nations Trusteeship System 7-22 (1957).
26 The Japanese received the mandate following relinquishment of
their control by the Germans after World War I. See
Micronesia: Winds of Change, 436-438 (F. Hezel, S.J. Berg &
M.L. Berg ed.).

1 tural development to the Marianas concentrating on sugar cane,
2 coffee, cassava and pineapple.^{66/} While the indigenous
3 population of the Marianas did not participate much in the actual
4 production, their social and economic structure changed
5 significantly. The prime homestead land was used for cane
6 production, thus reducing land available for subsistence
7 cultivation. The Japanese administration leased a large amount
8 of private land^{67/} from the Chamorro and Carolinian population,
9 and in addition, the Japanese brought in workers to do the manual
10 labor. Thus, the local inhabitants to a large extent lived off
11 the rents obtained from the family land. Also, the inhabitants
12 obtained more income from employment as teachers, policemen,
13 stevedores, nurses, and the like.^{68/} A money economy began to
14 evolve.

15 The war destroyed the Marianas, especially Saipan.
16 Over 30,000 lives were lost in the campaign.^{69/} The towns which
17 the Japanese had erected were destroyed, as were most of the
18 other structures.

20 ^{66/} Spoehr, supra note 20, at 84.

21 ^{67/} The amount of private land leased to the Japanese Admini-
22 stration has been estimated at greater than 75%. Ibid. at 86.

23 ^{68/} Ibid. at 87.

24 ^{69/} The attack on Saipan in June, 1944, involved 127,000
25 American troops and 535 ships. Over 29,000 Japanese had been
26 killed during the battle and 3,144 Americans. Accurate
figures on loss to the local inhabitants is not available.
Gale, supra note 2, at 41.

1 In the fifteen years following the installation of a
2 civilian government, the Trust Territory administration
3 essentially pursued a "hands off" policy regarding Micronesia.^{70/}
4 In 1961, a United Nations team visited Micronesia and returned
5 with a scathing report.^{71/} The team expressed upset at the
6 general neglect shown by the United States and by the political,
7 social, and economic underdevelopment of the islands.^{72/}

8 The Kennedy administration sought to alter United
9 States policy regarding Micronesia, and in fact did so in
10 dramatic fashion. In 1962, the capitol was moved, for the first
11 time to Micronesia. The Kennedy administration set out to raise
12 living standards by sending American teachers to teach English,
13 adopting American health standards, and sending in the Peace
14

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16 ^{70/} This period has been called one of "benign neglect."
17 Note, Self-Determination and Security in the Pacific, 9 N.Y.U.
18 J. Int'l. L. Politics 277, 283 (1976) (Note, Self-Determi-
19 nation). The same cannot be said of the military's involve-
20 ment. The thermonuclear tests conducted in the Marshall
21 Islands destroying the ancestral homelands of the inhabitants
22 of Bikini and Enewetak atolls are now well-known. See, e.g.,
23 People of Enewetak v. Laird, 353 F.Supp. 811, 813 (D.Haw.
24 1973); see also Gale, supra note 2, at 283-284. In the
25 Marianas, authority over Saipan and Tinian was transferred
26 back to the Navy. Supra pp.4-5. During this time Saipan was
closed to visitors to allow the Central Intelligence Agency to
covertly house and train nationalist Chinese guerillas. Gale,
supra, at 84; Note, Self-Determination, supra, at 285. Left
behind after the abandonment of the C.I.A. camp was a \$28
million headquarters complex into which the Trust Territory
administration eventually moved. Gale, supra, at 101-102.

^{71/} D.McHenry, Micronesia: Trust Betrayed 13 (1975) (McHenry).

^{72/} Ibid.

1 Corps.^{73/} Actual spending in Micronesia increased from \$6.1
2 million in fiscal 1962 to \$15 million in the following year.
3 Johnson continued the trend with "gradual routinization of the
4 extension of federal education, health and labor programs to
5 Micronesia."^{74/} Not only did this send a great deal of money
6 into Micronesia, important for purposes here, these programs
7 resulted in a "dramatic increase" in the number of personnel in
8 Micronesia.^{75/} It was this massive infusion of American and
9 other foreign personnel that eventually led to the chaotic pay
10 practices identified above.

11 The policy decisions made regarding the path of
12 economic development in Micronesia are the type of political
13 question best left to the expertise of the coordinate branches of
14 government.^{76/} It is beyond the scope of this Court's task, for
15 the purposes of these motions, to analyze and critique the policy
16 decisions made in the 1960s.^{77/} However, even taking as valid

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19 ^{73/} Gale, supra note 2, at 102-103.

20 ^{74/} Ibid., pp. 109-110.

21 ^{75/} Ibid.

22 ^{76/} See discussion of Baker v. Carr and justiciability supra
23 P. ____.

24 ^{77/} However, the Trust Territory should not be allowed to
25 rely on its own misdeeds to justify subsequent unlawful
26 action. Scholarly commentary notes that the policy change of
the 1960's while in part altruistic, falling in line with the
Democratic attitudes of the time, was more a reflection of a

1 the economic goals established by the Trust Territory and United
2 States governments, it is well within this Court's ability to
3 review the mechanics of implementation of those goals to
4 determine whether they fall outside the limitations imposed by
5 the Constitution.

6 [15] The issues then may be framed as follows: was the
7 employment of "foreign" personnel compelling as a goal and was it
8 a necessary means to the goal of "economic advancement"?
9 Secondly, were the wage scales necessary to each goal? A review
10 of these issues leaves this Court no alternative but to conclude
11 that the means and ends were neither sufficiently necessary nor
12 substantial enough to justify the resulting discrimination.

13 [16] In reviewing a classification which touches on an
14 individual's race or ethnic background, the person challenging

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17 (Con't. of footnote 77):

18 renewed interest in Micronesia as a vital element of our
19 national security interests. See generally, Note, Self-Deter-
20 mination, supra note 70, at 284; Note, The Marianas, the
21 United States and the United Nations: Uncertain Status of the
22 New Commonwealth, 6 Calif.W.Int'l.L.J. 382, 390, 405, 409,
23 393; J. Metelski, Micronesia and Free Association: Can
24 Federalism Save Them? 5 Calif.W.Int'l L.J. 162, 165-166;
25 McHenry, supra note 71, at 30; Gale, supra note 1, at 166.
26 Perhaps most telling is the "Solomon Report", a report done at
the request of the Kennedy administration. The report details
the United States' perceived need to annex the islands to
protect its security interests. The Report is discussed in
greater detail below. See infra pp.73-77. Thus, the Trust
Territory seeks to justify the pay scales as necessary to
attract skilled labor which in turn is needed to promote
economic development. Yet, the development pursued was not
always founded on Trusteeship obligations as much as selfish
national security interests.

1 the classification "is entitled to a judicial determination that
2 the burden he[she] is asked to bear on that basis is precisely
3 tailored to serve a compelling governmental interest." Bakke,
4 supra, 98 S.Ct. 2733. A court's task will encompass an analysis
5 of the chosen scheme to ensure that it provides a sufficiently
6 close fit between the means and ends. Tribe, supra note 42, at
7 1000-1002. Also, another tool to determine whether the
8 classification is "precisely tailored" is to look for "less
9 restrictive means" available to the government. Tribe, supra, at
10 999 n.17 and accompanying text.

11 [17] One immediately apparent flaw in the wage scale is the
12 failure of the chosen classification scheme to sufficiently
13 promote the stated goals. Throughout its brief and at the
14 hearing on the motions, the Trust Territory has attempted to
15 justify the tripartite wage scales with the argument that skilled
16 and experienced labor was needed to meet the Trust Territory's
17 economic development goals. Their argument, already stated
18 earlier, is that such labor with the necessary qualifications
19 could only be found in outside labor markets; thus, a wage
20 competitive with the source labor pool was necessary. Even
21 assuming for the sake of argument that only by paying source pool
22 wages would recruitment be possible,^{78/} the wage scales were both

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24 ^{78/} This premise is by no means self-evident. The economic
25 boom of the 1960's was largely due to the assistance of Peace
26 Corps volunteers who were not paid a prevailing market wage.
The phase-down of the Peace Corps program in Micronesia is

1 over-inclusive and under-inclusive in that they paid a premium
2 salary without guaranteeing the desired experience and they
3 discouraged local skill from continued employment. For example,
4 to qualify as a "Systems Accountant-Consultant" with the
5 Headquarters Department of Finance, an applicant would need a
6 degree in business administration or a related field from an
7 accredited college in addition to five years of increasingly
8 responsible experience. Plaintiffs' Exhibit 7 in support of
9 Motion for Class Certification. Once a qualified applicant was
10 hired for this position, he or she would be paid in 1978 at a
11 bi-weekly rate of \$371.68 if a Trust Territory citizen and
12 \$673.11 if a United States citizen hired on a prime contract.
13 Similarly, a "Mental Health Specialist" with the Headquarters
14 Health Services would need to have graduated from an accredited
15 college or university with a major in social health or behavioral
16 sciences and have five years experience in a related field; in
17 1978 such an employee would receive bi-weekly salary of \$264.96
18 if a Trust Territory citizen and \$528.07 if a citizen of the
19 United States hired on a prime contract. Id.

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21 (Con't. of footnote 78):

22 arguably more properly attributable to its successes rather
23 than its failures. See McHenry, supra note 71, at 28.
24 McHenry notes that the curtailment of the program was inspired
25 in part by Interior's dislike of Peace Corps volunteers
26 voicing criticism of American officials and of the Department
of the Interior and in part by the Nixon administration's
intolerance of Peace Corps lawyers educating Micronesians
about their rights.

1 These examples demonstrate the failure of the wage
2 scales in some, if not many, instances to promote the stated
3 goals of recruiting qualified and needed labor not available in
4 the Trust Territory. The scales, as drafted, did not operate to
5 ensure that recruited labor in fact had superior skills and
6 experience than was available locally. The evidence indicates
7 that from 1978 to 1983, there were 300 instances in which
8 expatriates held job positions which were also held by Trust
9 Territory citizens.^{79/} Thus, the Trust Territory in many
10 instances was not recruiting superior skill and experience but
11 instead was employing expatriates with identical qualifications
12 to those of Trust Territory citizen employees. If the
13 administration were only interested in attracting labor with
14 qualifications not found in the Territory, a single unitary scale
15 setting entry level and advanced wage grade according to skill
16 and experience would have served better the stated purpose.

17 In several instances the scales had the reverse
18 effect. There is evidence in the record to demonstrate that
19 qualified Trust Territory citizens left the employ of the Trust
20 Territory Government due to the undesirability of working along
21 side a non-Trust Territory citizen in the same position classifi-

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24 ^{79/} Hearing on Motion to Certify Class (Nov. 17, 1983)(Class
25 Certification Hearing), Reporter's Transcript (RT) at 90; see
26 also testimony of J. Manglona, Class Certification Hearing, RT
50-51; Exh. 6, received at Class Certification Hearing.

1 cation who made nearly twice the salary.^{80/}

2 Perhaps more telling of the failure of the wage scale
3 to provide a sufficiently "close fit" and of the vacuity of the
4 Trust Territory's protestations of good faith in the promulgation
5 of the wage scales are the preferential provisions for "local
6 hire" United States citizens. The "local hire" wage scale was
7 designed to compensate non-Trust Territory citizens who were
8 recruited from within the Trust Territory. See P.L. No. 6-65,
9 §3(8)(b). The Congress of Micronesia had consistently expressed
10 frustration with the Government's system of paying local hires in
11 parity with prime contract employees. In reporting out the
12 Salary Bill Act of 1973, the Senate Committee on Judiciary and
13 Governmental Operations commented favorably on the section of the
14 bill which reduced the salary of local hires to take-home parity
15 with Trust Territory citizens.^{81/} While realizing that immediate
16 pay reduction would be "difficult in practice" the bill proposed
17 progressive reductions as contracts expired; all new contracts
18 would be subject to the new local hire provisions. The drafters

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21 ^{80/} See, e.g., Plaintiffs' Answer to Defendants' First Set of
22 Interrogatories, no. 4(e); Responses of Defendant Trust
23 Territory of the Pacific Islands to Plaintiffs' Second Set of
24 Interrogatories, no. 8(e)(i).

24 ^{81/} Under the proposal, local hire United States citizens
25 were given a "Tax Relief Allowance" to offset the federal
26 income tax paid by all United States citizens and not assessed
against Trust Territory citizens. S.S.C.Rep. No.5-88, supra
note 24, at 489.

1 of the bill envisioned a three-year period to achieve pay parity
2 between local hires and United States citizens. S.S.C.Rep. No.
3 5-88, supra note 24, at 490-491. This suggestion was not
4 adopted, leaving local hires with an 80% U.S. differential.

5 Again, during the development of the 1975 Salary Act
6 (enacted as P.L. No. 6-65) a local hire "phase down" was strongly
7 recommended.^{82/} The Senate Committee on Judiciary and Govern-
8 mental Operations proposed that local hires receive the base
9 salary paid Trust Territory citizens, finding that local hires
10 "compete directly in the labor market with Trust Territory
11 citizens" and concluding that "[t]here is simply no justification
12 for payment of wages any greater than those paid to Trust
13 Territory citizens." S.S.C.Rep. No. 6-133, 6th Cong.of
14 Micronesia, 1st Reg.Sess. 501(1975)(S.D.4). Only under
15 unidentified pressure and following a High Commissioner veto of
16 the previous proposal did the Committee retreat and authorize an
17 80% market-place differential add-on for local hires. Even so,
18 the Committee was adamant that the local hire differential be
19 eliminated in two years. S.S.C.Rep. No. 6-155, 6th Cong.of
20 Micronesia, 1st Special Sess. 83-84 (1975)(S.D.2). This is
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22
23 ^{82/} Trust Territory retained consultants Golightly & Co. noted
24 that the phase down of local hire wage rates was adopted by
25 the Joint Salary Task Force as appropriate "after strong
26 statements from attorneys from both houses." Golightly & Co.,
Summary Report: Salary Act Review and Recommendations 8 (1975)
(1975 Golightly Report).

1 reflected in P.L. No. 6-65 at Section 6(2).^{83/}

2 During the next two years, the Trust Territory
3 Administration and the Congress of Micronesia negotiated
4 regarding a viable and mutually acceptable compensation plan.
5 See, e.g., S.S.C.Rep. No. 7-330, 7th Cong.of Micronesia, 2nd
6 Special Sess. 1(1978)(S.D.13)(referring to objections to
7 "administration-sponsored legislation which...would...provide for
8 new Base Salary Schedules."). During the negotiations, P.L.No.
9 6-65 was continued in effect.^{84/}

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13 83/ Section 6(2) of Pub.L.No. 6-65 provides:

14 (2) Employees who are citizens of the United States and
15 who are recruited and hired under a local-hire contract for
16 service within the geographical boundaries and administrative
17 control limits of the Trust Territory shall be provided the
18 following compensation:

19 (a) A Base Salary, as provided in Section 4 of this
20 act; and

21 (b) 80% of the U.S. Market Pay Differential as
22 provided under Section 6(1)(b) of this act.

23 (c) Paragraph (b) of this subsection shall expire two
24 years following the effective date of implementation of this
25 act. Commencing on the date of such expiration, the Adjusted
26 Base Salary for these local-hire contracts shall be reduced,
without benefit of any phase-down schedule, directly to the
Base Salary Rate only, as provided for in Section 4 of this
act.

84/ P.L. No. 6-98, effective April 11, 1976, extended the
expiration date of the Salary Schedules to October 10, 1977.
S.F.15. The deadline was postponed to October 7, 1978 by the
enactment of Pub.L.No. 7-10. S.F.16; S.D.20(b). The
enactment of Pub.L.No. 7-136 extended the life of the wage
scales to February 28, 1979. S.F.19; S.D.20(a).

1 Again, a major point of disagreement was the compensa-
2 tion of local hire United States citizens. In 1978, the Trust
3 Territory administration sponsored legislation which would have
4 replaced the salary schedules of P.L. No. 6-65 with a new
5 compensation plan.^{85/} Under H.B. 7-403, United States citizens,
6 whether employed on prime contracts or as local hires would have
7 been paid under the same schedule; Trust Territory citizens would
8 have been paid under a separate schedule. The Congress of
9 Micronesia would not adopt this proposal, instead devising a
10 compromise which would have established local hire compensation
11 at the Trust Territory citizen level. However, the Committee
12 amendment provided that a "reasonable differential may be added
13 in cases where warranted" as determined by the Director of
14 Personnel with the approval of the Personnel Board and the High
15 Commissioner. H.S.C.Rep. No. 7-296, 7th Cong. of Micronesia, 2nd
16 Reg.Sess. 4(1978)(S.D.32). The Senate tabled H.B. 7-403
17 following a committee report suggesting rejection of the bill as
18 too costly.^{86/} Ultimately the Trust Territory administration was
19 able to implement its policy. Executive Order No. 119 provided
20 for compensation of United States citizen employees at Schedule
21 III "whether recruited on a prime contract or a local hire
22 contract." Exec.Order No.119 at 4.

23
24 ^{85/} The legislation was introduced as H.B.7-403, 7th Cong.of
Micronesia, 2nd Reg.Sess. (1978)(S.D.30).

25 ^{86/} See S.S.C.Rep. No. 7-329, 7th Cong. of Micronesia, 2nd
26 Reg.Sess. (1978)(S.D.31).

1 The adoption of a pay formula at which local hire
2 employees are compensated at a rate equal to that of prime
3 contract employees poignantly demonstrates the inadequacies of
4 the wage scales. The Trust Territory has consistently defended
5 the scales as necessary "to attract candidates from labor areas
6 where the prevailing rates of pay were higher than those in the
7 Trust Territory." Trust Territory's Opening Memorandum at p.9
8 (quoting 1975 Golightly Report supra note 82, at 9). Quite
9 obviously, as the Committee on Judiciary and Governmental Opera-
10 tions noted, there is no need to attract potential employees who
11 already reside in the Trust Territory. The beneficial provisions
12 for locally hired United States citizens amply demonstrate that
13 the wage scales are not tailored with the preciseness required
14 where suspect classifications are used.^{87/}

15 The lack of the "close fit" demanded of classifications
16 such as those used here is further evidenced by the lack of
17 precision in the differentials as drafted. When originally
18 adopted in a comprehensive pay plan the differentials were based
19 on the prevailing market rates of the source labor markets.

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24 ^{87/} Not only does the local hire provision show the overinclud-
25 siveness of the classification, the process involved in its
26 adoption and the attitudes of the Administration evidenced
therein demonstrate illicit motive on the part of the Trust
Territory. See infra pp.66-88.

1 Section 7 of P.L. No. 6-65^{88/} provided that employees who were
2 neither Trust Territory citizens nor United States citizens would
3 receive, in addition to the base salary, a Market Place
4 Differential as determined by the Director of Personnel based on
5 the difference "between the prevailing rates in the Trust
6 Territory and those in the country of citizenship." A plan so
7 designed allowed for "flexibility in determining the standard
8 percentages of base salary for the... premium" so the
9 differentials could "vary as prevailing rates change" and to more
10 accurately achieve the goal of attracting skilled labor out of
11 their labor market. S.S.C.Rep. No.5-88, supra note 24, at 489-490
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14 88/ Section 7 of P.L. 6-65 provides:

15 Compensation of Third-Country Nationals. Except as
16 provided in Section 8:

17 (1) Employees who are citizens neither of the Trust
18 Territory nor of the United States and who are recruited and
19 hired under a prime contract, or under a local-hire contract
20 for service in locations outside the geographic boundaries or
21 administrative control limits of the Trust Territory, shall be
22 provided the following compensation:

23 (a) A Base Salary, as provided in Section 4 of this
24 act; and

25 (b) In cases where prevailing rates of pay in the
26 country of citizenship are significantly higher than in
Micronesia, a Market Place Differential; PROVIDED, that such a
Market Place Differential shall be determined by the Director
of Personnel, with the approval of the Trust Territory
Personnel Board and the High Commissioner, on the basis of the
difference, insofar as it can be best estimated, between the
prevailing rates in the Trust Territory and those in the
country of citizenship. In no case shall such a Market Place
Differential exceed 90 percent of the United States Market
Place Differential at the same pay level and step, or exceed
the percentage of the United States Market Place Differential
set forth in the following table, whichever is less:

1 (referring to a similar provision in P.L. No. 4C-49).

2 Executive Order No. 119 abandons the floating
3 differential for non-Trust Territory citizens and establishes
4 three inflexible schedules. United States citizens are
5 compensated under Schedule III as are citizens of "Canada, the
6 United Kingdom, Australia [and] Northwest European countries."^{89/}
7 Exec. Order No. 119, §6. Under Schedule I are paid Trust
8 Territory citizens and "citizens of Southwest Pacific or
9 Southeast Asian countries (including, without limitation, the
10 Republic of the Philippines, Korea, and China)."^{90/} Id., §6(2).
11 Citizens of all other countries are salaried under Schedule II.

12
13 (Con't. of footnote 88):

14
15 TABLE OF FOREIGN NATIONAL
RECRUITMENT PERCENTAGES BY COUNTRY OF CITIZENSHIP

16 Percent of U.S. Market Place

<u>Differentials</u>	<u>Country of Citizenship</u>
90%	Canada
75%	Northwestern Europe
65%	Australia
50%	Latin America
50%	New Zealand
25%	Malaysia
0%	Southwest Pacific Areas (including, without limitation, the Republics of the Philippines, Korea, and China).

23 ^{89/} "Northwestern European countries" is not further defined.

24
25 ^{90/} Other than the reference to the Philippines, Korea and
26 China, "Southwest Pacific or Southeast Asian countries" is not
defined.

1 Id., §6(3). The rigidity of this plan itself evidences its
2 marginal use at promoting the desired goals. There is no room
3 for developing a differential to adjust salaries of potential
4 employees recruited from unlisted "third" countries. Nor is
5 there provision to adjust the differentials as labor conditions
6 and prevailing wages fluctuate relative to conditions existing in
7 the Trust Territory. The plan has an extremely loose "fit" at
8 best creating gross, unjustified pay discrepancies.

9 In addition to the inflexibility of the Executive Order
10 No. 119, the Trust Territory has produced no evidence to justify
11 the labor market clusters themselves. Omitted are the
12 differentiations among the Canadian, European and Australian
13 labor markets which were included in P.L. No. 6-65 after initial
14 economic studies.^{91/} Instead, these countries are all included
15 with the United States, presumably according to labor market
16 conditions. Yet, the Trust Territory has produced no evidence to
17 justify this grouping. The High Commissioner under whose
18 signature the Order was promulgated was unable to support the
19 clusters with any data.^{92/} Nor is there any other evidence which
20 demonstrates factual support for the groupings.

21
22 ^{91/} The differential percentages were originally proposed by
23 Golightly & Co. based upon prevailing wage rates of the listed
countries. 1975 Golightly Report, supra note 82, at 13.

24 ^{92/} See Deposition of Adrian P. Winkel (4/16/81) (Deposition).
25 Secretary Winkler stated that he wasn't "personally...
26 familiar with the source of the data and didn't recall that
any data had in fact been presented to him." Deposition 16-17.
Nor was Winkel able to identify persons whom he knew to have
obtained or analyzed such information. Deposition 23-24.

1 The pay scales as adopted by the Trust Territory
2 administration after January 9, 1978 are only roughly drafted to
3 meet the stated goal of recruiting needed skilled personnel to
4 staff the government which chose to remain physically in the
5 Commonwealth. The scales lost what little flexibility existed in
6 the previous plans and in their rigidity created even greater
7 gaps between the income earned by Trust Territory citizens living
8 and working in the Commonwealth and that earned by others. The
9 Trust Territory is unable to justify these changes with any
10 factual support.

11 Also demonstrating the absence of the necessary
12 correlation between the scales and the goal of recruiting needed
13 labor is the basic design of the pay differentials themselves.
14 The goal of recruiting skilled labor from outside the Territory
15 is not furthered by paying a "market differential" based on
16 prevailing wages other than those of the country from where the
17 employee is recruited. Citizenship is for the most part
18 irrelevant except as a general indicator of the probable country
19 of recruitment. However, the point of recruitment is readily
20 identifiable, thus eliminating the need to determine
21 probabilities based on citizenship. Thus, the use of citizenship
22 fails in dramatic fashion to meet the desired goals. The
23 classification can be expected to attract United States citizens
24 from any labor market, but will not attract others who are
25 employed in a market with higher prevailing wages than those of
26 his or her home country. The offensiveness of the classification

1 is further exemplified by the definitional change in the term
2 "United States citizen." In P.L. No. 6-65, a "United States
3 citizen" was defined to include "a citizen, permanent resident,
4 or national of the United States." P.L. No. 6-65, Section 3(13).
5 Executive Order No. 119 redefines "United States citizens" to
6 include only those "citizens eligible for a United States
7 passport." The Director of Personnel describes this change as
8 follows:

9 "[T]he plan revises the definition of 'United
10 States Citizen' to mean only bona fide United
11 States citizens. United States permanent
12 resident aliens, who were previously
considered United States citizens, will no
longer be considered as such by the new
plan."

13 Memorandum from Director of Personnel to Administrator of
14 Administrative Services (6/20/79)(S.14D). Whether an employee
15 recruited from the United States is a citizen or a "permanent
16 resident alien" should be of no consequence if the actual goal is
17 the stated goal of providing recruitment incentives. The Trust
18 Territory's justification shows considerable weakness.

19 The Trust Territory's justifications are also
20 inadequate in their failure to prove the unavailability of less
21 restrictive alternatives. Of some weight is Trust Territory's
22 failure to demonstrate to the satisfaction of this Court that an
23 intermediate wage at which all workers would be paid was not
24 feasible. Under the plan drafted by the Trust Territory
25 Administration and its consultants, and enacted as P.L. No. 6-65,
26 United States citizen employees were paid a differential which

1 matched or exceeded those add-ons established by the 1973 Salary
2 Act.^{93/} The market place differentials were calculated to bring
3 the salaries in parity with the United States salaries. In
4 addition, United States citizens received free housing and
5 utilities, which resulted in income greater than their mainland
6 counterparts. The Trust Territory has not shown that a reduction
7 in expatriate salary would result in the inability to attract
8 qualified labor. The great success of the Peace Corps program
9 would indicate otherwise.^{94/} Also, the Trust Territory insists
10 that setting a wage scale at American standards would be
11 financially ruinous. They do not analyze, much less prove, that
12 a single salary scale set between the United States rate and the
13 base rate would be equally undesirable.

14 Perhaps more telling is the failure to adequately
15 explain why proposed "phase-outs" of United States contract
16 workers were never carried out. There was no shortage of counsel
17 on this matter. The Government itself in 1973 stated its aim to
18 phase out virtually all expatriate employment to alleviate the
19

20
21 ^{93/} In calculating the market place differential, the Golightly
22 consultants attempted to match for each pay level the
23 differential established by the 1973 Salary Act. Where the
24 differential was less, the employee was "adjusted" to the next
25 higher Base Salary Step to compensate. 1975 Golightly Report,
26 supra note 82, at 12.

24 ^{94/} The Peace Corps was able to attract hundreds of volunteers
25 to Micronesia in a short amount of time. At one point it is
26 estimated there was one volunteer for every one hundred
Micronesians. McHenry, supra note 71, at 27-28.

1 tensions caused by the discriminatory pay scales. Report of the
2 United Nations Visiting Mission to the Trust Territory of the
3 Pacific Islands 39 (1973).^{95/} Also in 1973, members of the
4 Congress of Micronesia stated to the Administration their
5 position that one method to equalize pay was to phase out
6 expatriate workers and the accompanying pay differential.
7 S.S.C.Rep. No. 5-88, supra note 24, at 491. To aid in the
8 accomplishment of this objective, the Committee urged the
9 administration to develop timetables and implement programs to
10 train Micronesians to adequately move into the employee ranks.
11 Id. Yet by 1976, the drafters of the Five-Year Indicative
12 Development Plan^{96/} found that "[m]anpower is... one of
13 Micronesia's greatest under-utilized resources" and found further
14 that the "lack of an educational [program] appears to be one of
15 the major causes." Five-Year Development Plan at 37. The Report
16 concluded that "in the future, positive job development programs
17 and extensive training are needed." Id. at 9. Again, a
18 Committee of the Congress of Micronesia communicated its desire
19 that there be effectuated as quickly as possible a transition to
20 an all-Micronesian workforce. Thus, it provided that the market

21
22
23 ^{95/} The visiting mission included in its Report its satisfaction
24 with the "considerable progress" which had been made in
25 replacing expatriate employees with Micronesians.
26 Unfortunately, this trend did not continue throughout the
decade but was in fact reversed. See infra, pp.60-61.

^{96/} Supra note 20.

1 place differentials of P.L. No. 6-65 expire in one year. H.S.C.
 2 Rep.No. 6-120, 6th Cong. of Micronesia, 1st Reg.Sess. 618 (1975)
 3 (S.D.5). Again in 1977, the Administration's own consultant
 4 advised the Government to shift away from reliance on expatriate
 5 labor. 1975 Golightly Report, supra note 82, at 16.

6 Despite the constant attention given the subject, the
 7 administration did not trim down its ratio of expatriate
 8 employees to any considerable extent. From 1970 to 1977 the
 9 percentage of Trust Territory citizens employed on a Territory-
 10 wide basis rose from 89.3%^{97/} to 93.2%^{98/}, while the percentage of
 11 United States contract personnel dropped slightly from 5.4% in
 12 1970 to 5.2% in 1977. Of concern here are the actions in the
 13 Northern Marianas after January, 1978. Rather than a phase-out
 14 which would eliminate any reason, justifiable or not, for

16
 17 ^{97/} Based on figures from EMS Report, supra note 21:

18	Trust Territory citizens	5,000	
19	U.S. citizen-contract (U.S. Civil Service)	300 (300)	(not included in percentage calcu- lation)
20	Total	5,600	

21
 22 ^{98/} Based on figures from Golightly & Co., Summary Report:
 23 Plan for Salary Act and Recommendations (1977)(S.D.10)(1977
 Golightly Report):

24	Trust Territory citizens	6,679
25	U.S. citizen-contract	282
	Others	88
26	Total	7,049

1 separate pay scales, there was a relative increase in United
 2 States citizen employees. The percentage figures are as follows:

3	<u>Year</u>	<u>T.T. Citizen %</u>	<u>U.S. Citizen %</u>
4	1978	76.5	19.5
	1979	75.5	20.0
5	1980	69.4	22.3
	1981	66.2	23.3
6	1982 (Jan.)	60.8	28.0
	1982 (Nov.)	58.8	29.4
7	1984	61.3	28.8 ^{99/}

8 Thus, while there was a reduction in total personnel employed at
 9 the Headquarters, the Trust Territory did not "phase out"
 10 expatriate employees at a greater rate.^{100/} Available alterna-
 11 tives suggested by the Trust Territory government itself were not
 12 successfully enacted nor is there sufficient evidence to believe
 13 that a good-faith attempt at its implementation was made.

14 The Trust Territory's attempts to justify the use of

15
 16 ^{99/} Based on the following figures from Stipulation of fact
 17 No. 11:

18	<u>Date</u>	<u>Total HQ Emp.</u>	<u>T.T. Citizens</u>	<u>U.S. Citizens</u>	<u>Others</u>
19	1/1/78	740	566	144	30
	1/1/79	652	492	131	29
20	1/1/80	484	336	111	37
	1/1/81	390	258	91	41
21	1/1/82	314	191	88	35
	11/31/82	228	134	67	27
22	11/6/84	160	98	46	16

23 ^{100/} The Trust Territory attempts to use these figures to
 24 demonstrate their good-faith phase-out efforts by highlighting
 25 only the U.S. citizen statistics which show a 98 person
 26 decrease. Brief in Support of TTPI Defendants' Motion for
 Summary Judgment 11. The percentage calculations demonstrate
 the fallacy of this assertion.

1 the suspect pay scales have not convinced this Court that the
2 challenged compensation plans were necessary to achieve what
3 could be characterized as of sufficiently compelling interest.
4 The Court is unconvinced that the wage disparity was necessary to
5 attract qualified skilled labor to the Trust Territory. Even if
6 the Trust Territory were persuasive on this element, the scales
7 as drawn are not sufficiently tailored to serve the stated
8 purpose while minimizing the adverse impacts. The scales do not
9 adequately work to compensate employees at the wages of their
10 country of recruitment, but instead compensate at the market rate
11 of the country of citizenship. The relevance of this plan has
12 not been proven and indeed the Trust Territory has not attempted
13 to so prove, relying instead on the point-of-recruitment theory.
14 This discrepancy is perhaps most dramatically demonstrated by the
15 liberal local-hire pay scales. Also, the Court is of the opinion
16 that less drastic means were not actively pursued. Although
17 aware of a "phase-down" option, and even though such an option
18 was expressly endorsed, the relative size of the United States
19 citizen work force remained relatively constant from 1970 to 1977
20 and on the headquarter level actually increased from 1978 to
21 1984. Nor is the Court satisfied that a new equitable salary
22 schedule adopted in 1978 would have had the deleterious financial
23 and social effects which the Trust Territory feared. The Trust
24 Territory has not met its burden of demonstrating to this Court
25 that the plaintiffs' rights to equal protection of the laws have
26 not been denied.

1 B. Disproportionate Impact

2 The conclusion reached regarding the unconstitutionality
3 of the wage scales as promulgated and perpetuated by the Trust
4 Territory administration is dispositive of the equal protection
5 claim and entitles plaintiffs to remedial relief. Unfortunately,
6 the equal protection doctrine is still in an early stage of
7 development relative to other constitutional principles.^{101/}
8 Thus, the many principles which together comprise the doctrine of
9 equal protection are far from settled. A unique factual setting
10 such as that presented by these motions is subject to widely
11 divergent legal interpretations as the parties' memoranda
12 indicate. Here, the parties differ as to the proper
13 characterization of the classification at issue and as to the
14 proper standard of review. The Trust Territory argues that the
15 wage scales are permissibly based on citizenship, making judicial
16 deference appropriate absent a showing of discriminatory intent.
17 [18,19] The concept of discriminatory intent is a relatively
18 recent development in equal protection analysis, first finding
19 its place in Supreme Court jurisprudence in Washington vs. Davis,

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21
22
23 ^{101/} See, e.g., G. Gunther, The Supreme Court, 1971 Term-Forward,
24 86 Harv.L.Rev. 1, 8 (1972) ("In the beginning of the 1960's,
25 judicial intervention under the banner of equal protection was
26 virtually unknown outside racial discrimination cases."); M.
Phillips, Neutrality and Purposiveness in the Application of
Strict Scrutiny to Racial Classifications, 55 Temple L.Q. 317,
324 (1982).

1 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Under more
2 traditional doctrine, "[t]he central prohibition of the equal
3 protection clause is directed against the government's deliberate
4 use of race as a criterion of selection." M. Perry, The
5 Disproportionate Impact Theory of Racial Discrimination, 125
6 U.Penn.L.Rev. 540, 548 (1977)(Perry). A law which seeks a goal
7 that is not race-related will nonetheless be subject to strict
8 scrutiny if it is based on racial or like characteristics.
9 Perry, at 549. Two reasons support this approach.

10 In the first instance, the Supreme Court has demanded
11 substantial justifications for the use of such criteria because
12 these laws "are precisely the kind of laws that are most likely
13 to have resulted from animus, or prejudice, or the arbitrary
14 discounting of individuals or groups." J. Clark, Legislative
15 Motivation and Fundamental Rights in Constitutional Law, 15 S.D.
16 L.Rev. 953, 969-970 (1978)(Clark). However, presumptions of
17 intentional discrimination are not the only reasons suspect
18 classifications trigger strict scrutiny. The very use of race or
19 like criteria is disfavored "because of its tendency to foster
20 race consciousness, to ingrain stereotypical thinking, and to
21 cause competition and even hostility among racial groups." S.
22 Bice, Motivational Analysis as a Complete Explanation of the
23 Justification Process, 15 S.D.L.Rev. 1131, 1134 (1978). Thus,
24 the Supreme Court has subjected to close judicial review all
25 classifications which facially delineate on the basis of race,
26 national origin, or other like criteria whether or not there has

1 been proof of a discriminatory intent or purpose.^{102/}

2 The Supreme Court in Washington v. Davis addressed a
3 challenge to an employment test which was facially neutral but
4 which in effect disqualified four times more black than white
5 applicants. Rejecting the plaintiffs' calls for strict scrutiny,
6 the Court concluded that disproportionate impact, "[s]tanding
7 alone... does not trigger the rule... that racial classifications
8 are to be subjected to the strictest scrutiny and are justifiable
9 only by the weightiest of considerations." 96 S.Ct. at 2049. In
10 addition there must be an intent or purpose to discriminate. It
11 is under this newer element of equal protection jurisprudence
12 that the Trust Territory urges that plaintiffs' claims be
13 considered.

14 Although the Court remains convinced that the actions
15 herein complained of transcend the bounds of equal protection on
16 the basis of their unjustified use of suspect criteria, the Court
17 also finds evidence of intentional discrimination. Accordingly,
18 as an alternative basis for its judgment, the Court relies on the
19 plaintiffs' demonstration of impermissible intent as set forth in
20 the following disproportionate impact analysis.^{103/}

21
22
23 ^{102/} Consider the Bakke and other opinions wherein the Supreme
24 Court rejected rational basis review of allegedly benign
25 classifications. See supra pp.31-32.

26 ^{103/} A similar resort to alternative legal theories was used
by Chief Judge Peckham of the Northern District of California
in Larry P. v. Riles, 495 F.Supp. 926, 974 (N.D.Cal. 1979).

1 1. Employees' Burden

2 [20-22] As stated above, it is now settled that a facially
3 neutral statute or regulation which disproportionately disadvan-
4 tages a suspect or less than suspect class of persons or which
5 infringes upon a fundamental right or important interest will
6 not, standing alone, be found violative of the equal protection
7 clause. Washington v. Davis, *supra*; Village of Arlington Heights
8 v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct.
9 555, 50 L.Ed.2d 450 (1977). The Equal Protection Clause
10 prohibits only invidious discrimination. Washington v. Davis, 96
11 S.Ct. at 2047. Thus, to succeed on his or her claim, a plaintiff
12 must prove that the disproportionate effect is the result of
13 "racially discriminatory purpose" or intent. Washington v.
14 Davis, 96 S.Ct. at 2047-2048. The burden rests with the
15 challenger to show that the government action was taken to some
16 extent "because of" the adverse impact and not just "in spite" of
17 it. Personnel Administrator of Massachusetts v. Feeney, 442 U.S.
18 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). However,
19 the plaintiff need not demonstrate that an unlawful intent was
20 the sole purpose of the action; rather, it must be shown to have

21 _____
22
23 (Con't. of footnote 103):

24 Judge Peckham, although having decided the case on statutory
25 principles, nevertheless opted to address the constitutional
26 claims due to the uncertainty of Title VI judicial review in
the wake of Bakke.

1 been a substantial or motivating factor. Village of Arlington
2 Heights, 97 S.Ct. at 563 and n.21; Hunter v. Underwood, ___ U.S.
3 ___, 105 S.Ct. 1916, 1919, L.Ed.2d 222 (1985). Put another way,
4 there must be a showing that a discriminatory purpose has in some
5 way "shaped" the action. Feeney, 99 S.Ct. at 2294.

6 [23] As an initial matter, it cannot be disputed that the
7 use of the challenged wage scales disproportionately affects
8 Micronesians.^{104/} As noted above, the employee class defined as
9 "Trust Territory citizens" is composed entirely of Micronesians.
10 Nor does this Court hesitate in finding that the class of
11 Micronesians is a class defined by ancestry or ethnic origin^{105/}
12 and as such is a "suspect" class deserving of heightened judicial
13 scrutiny. See Hirobayashi v. United States, 370 U.S. 81, 100, 63
14 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1946)(distinctions between
15 persons solely because of their ancestry "are by their very
16 nature odious to a free people whose institutions are founded
17 upon the doctrine of equality.")

18 [24] The burden which the Supreme Court has placed upon
19 challengers of adverse impacts is not one lightly taken; proof of
20
21

22 ^{104/} The Trust Territory concedes that Micronesians are
23 adversely affected by the pay scales. Trust Territory Opening
24 Brief at 20.

25 ^{105/} See, supra note 63 for stipulated definition of
26 "Micronesian."

1 discriminatory purpose "is often a problematic undertaking."
2 Hunter v. Underwood, 105 S.Ct. at 1920. Rarely is there direct
3 evidence of impermissible motive. Where the action is taken by
4 only one official, it will be couched generally in lawful, non-
5 discriminatory terms. Where the action of a legislature or other
6 group of government representatives is challenged, motive is
7 difficult to determine because legislatures or other groups of
8 policy-makers do not act with a single purpose or intent.
9 Arlington Heights, 97 S.Ct. at 563. Rather, purpose and intent
10 must be determined from the "cumulative impact of the evidence."
11 Diaz v. San Jose Unified School District, 733 F.2d 660, 674 (9th
12 Cir. 1984)(en banc), cert. denied, __ U.S. __, 105 S.Ct. 2140
13 (1985).

14 [25,26] Disproportionate impact, however, is by no means
15 irrelevant and "may provide an important starting point."
16 Arlington Heights, 97 S.Ct. at 564. The adverse impact, as noted
17 above, is clear. How does this aid in the proof of intent?

18 The Supreme Court has declined to adopt the tort law
19 analysis that one intends the natural and foreseeable
20 consequences of his or her acts. "[D]isparate impact and
21 foreseeable consequences, without more, do not establish a
22 constitutional violation." Columbus Board of Education v.
23 Penick, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666
24 (1979). Nevertheless, "actions having foreseeable and
25 anticipated disparate impact are relevant evidence to prove the
26 ultimate fact, forbidden purpose." Id. In situations where the

1 disproportionate impact is as inevitable as the burdens placed on
2 Micronesians under the wage scales, the Supreme Court has
3 recognized that "a strong inference that the adverse effects were
4 desired can reasonably be drawn." Personnel Administrator v.
5 Feeney, supra, 99 S.Ct. at 2296 n.25. While the inference alone
6 is not a "synonym for proof", it is useful as a "working tool."
7 Id. In addition to the foreseeability of the adverse impacts of
8 the wage scale, there is ample evidence to demonstrate the Trust
9 Territory's awareness of the consequences.

10 The Trust Territory does not dispute that the compensa-
11 tion plans had a severely disproportionate impact on Micronesian
12 employees. The ethnic homogeneity of the class of Trust
13 Territory citizens amply supports the foreseeability of the
14 adverse impact on Micronesians. The administration admits that
15 the pay plans were promulgated "knowingly and intentionally, and
16 not by accident or mistake." S.F.33. Furthermore, its own
17 records, produced in response to discovery requests, reveal that
18 the employee class compensated under Schedule I consists almost
19 exclusively of Micronesians. Nor can the administration feign
20 unawareness of the social consequences of the compensation plan.
21 In 1969, the Trust Territory Department of Education, reporting
22 on the existing compensation practices and proposing a "single
23 salary schedule for Education employees" drew attention to the
24 discriminatory pay practices and warned that "dissatisfaction and
25 feeling of inequitable treatment does not foster a satisfied
26 [employee]." DOE Report supra note 20, at "Conclusions." Perhaps

1 most importantly, the Trust Territory government was made aware
2 of the painful consequences of the discriminatory action by the
3 employees themselves. See Responses of Defendant Trust Territory
4 of the Pacific Islands to Plaintiffs' Second Set of
5 Interrogatories 9-13. One employee, Justin Manglona, made
6 several complaints to the High Commissioner and United States
7 officials arguing that the continued application of the
8 discriminatory wage scales results in a loss of trust and respect
9 in the government.^{106/} After receiving no response, Mr. Manglona
10 again wrote the High Commissioner complaining of the
11 discrimination and unfair treatment which had resulted in
12 feelings of inferiority.^{107/} The practices, he charged, were
13 "demeaning and morally wrong," and caused humiliation resulting
14 in loss of "morale, efficiency, honesty and trust."^{108/}

15 [27,28] The historical background of the challenged action may
16 also be useful in determining discriminatory intent "particularly
17 if it reveals a series of official actions taken for invidious
18 purposes." Arlington Heights, 97 S.Ct. at 564. The actions of
19 the United States regarding policy in Micronesia is probative for
20

21 ^{106/} Letter of June 26, 1979 from J. Manglona to High
22 Commissioner (appended to affidavit of J. Manglona in support
of Opposition to Motion to Dismiss).

23
24 ^{107/} Letter of November 23, 1979 from J. Manglona to High
Commissioner. See note 106 supra.

25
26 ^{108/} See note 106 supra.

1 several reasons. As will be discussed below, the evidence shows
2 a pattern of invidious official action which placed Micronesians
3 in a secondary, inferior class; the evidence reveals an intent to
4 treat Micronesians with disfavour to advance the United States to
5 a superior position. This pattern of historical discrimination
6 is relevant not only in its own right, but to uncover the
7 attitudes of the Trust Territory administration. As noted above,
8 the Trust Territory was merely a conduit through which to imple-
9 ment United States policy in Micronesia. The High Commissioner
10 was appointed by the Interior Secretary, and later by the
11 President, and was answerable to them. Accordingly, it is not
12 unreasonable to examine the United States' attitudes and policy
13 decisions in order to understand the underpinnings of Trust
14 Territory governmental action.

15 The United States has, in general, been relatively
16 candid in its admissions that its policy regarding Micronesia is
17 founded primarily on its perceived national security needs. The
18 United States' drafted Trusteeship Agreement^{109/} established the
19 world's only strategic trusteeship by giving the United States
20 full authority to "establish naval, military and air bases"^{110/}
21 and to close from time to time areas of the Territory for
22 security reasons.^{111/} The debates of the Security Council demon-

23 ^{109/} See Temengil I, 33 FEP Cases at 1032.

24 ^{110/} Trusteeship Agreement Article 5.

25 ^{111/} Trusteeship Agreement Article 13.

1 strate the purposes of the United States in acquiring the
2 Territory. Upon presentation of the draft Agreement, Mr. Austin,
3 the United States Representative to the United Nations, noted
4 that the islands constitute "an integrated strategic physical
5 complex vital to the security of the United States."^{112/} and that
6 "in such an area the security objective must be an overriding
7 consideration."^{113/} This attitude was expounded at the
8 Congressional hearings on the Agreement. Chief of Staff Dwight
9 D. Eisenhower assured the members of the Senate Committee on
10 Foreign Relations that, in view of the area's necessity to the
11 security of the United States, the agreement was drafted to "give
12 us all the national security rights and... permissive functions
13 that we need."^{114/} Likewise, the Secretary of State reassured
14 the Senate Committee that under the Agreement, the United States
15 maintains "the same freedom of action as [it] would have... under
16 [the] present exclusive control."^{115/} In response to further
17 questioning, Secretary of State Marshall dispelled any confusion
18

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20 ^{112/} U.N. SCOR 407 (1947), reprinted in Note, Self-Determina-
tion, supra note 69, at 390.

21 ^{113/} U.N. SCOR at 409, Note, Self-Determination supra note 70
22 at 390.

23 ^{114/} Hearings on S.J. Res. 143 Before the Senate Comm. on
Foreign Relations, 80th Cong., 1st Sess. at 18, reprinted in
24 Note, Self-Determination, supra note 70, at 390 n.44
("Hearing").

25 ^{115/} Id., Hearings at 5, Note, Self-Determination, supra note
26 70, at 390 n.45.

1 regarding priorities between rights of the inhabitants and
2 national security interests by assuring the Committee that there
3 was nothing in the agreement regarding the rights of the peoples
4 of the Trust Territory which would in any way hamper the United
5 States' defense control.^{116/} The Congress and the Security
6 Council approved the Agreement, giving the United States plenary
7 military authority over the area.

8 Perhaps most revealing regarding the attitude of the
9 United States are the actions taken by the Kennedy and Johnson
10 administrations in the 1960's. The policies of these administra-
11 tions are reflected in the report of Anthony Solomon's Visiting
12 Mission to the Trust Territory which was conducted in response to
13 National Agency Security Memorandum No. 145.^{117/} The report

15 ^{116/} Id., Hearings, supra note 114, at 6, Self-Determination.
16 supra note 70, at 390 n.47.

17 ^{117/} [29,30]
18 The Court takes judicial notice of the "Solomon Report".
19 Generally, "a district court may utilize the doctrines under-
20 lying judicial notice in hearing a motion for summary judgment
21 substantially as they would be utilized at trial." St. Louis
22 Baptist Temple v. F.D.I.C., 605 F.2d 1169, 1171-1172 (10th
23 Cir. 1979); see 10A C. Wright, A. Miller & M. Kane. Federal
24 Practice and Procedure §2723 (1983); 6 J. Moore, W. Taggart &
25 J. Wicker, Moore's Federal Procedure ¶56.11 [1-7]; 9 Wigmore
26 on Evidence §2571 (Chadbourn Rev. 1981). Judicial notice may
be taken of documents and other forms of evidence even though
not introduced by the parties. St. Louis Baptist Temple, 605
F.2d at 1172; Sierra Club v. Morton, 400 F.Supp. 610, 633
(N.D.Cal. 1975), rev'd on other grounds, 610 F.2d 581 (9th
Cir. 1979), rev'd, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d
101 (1981). Specifically, courts have taken notice of
administrative reports, memoranda and other public documents.
See Interstate Natural Gas Co. v. Southern California Gas Co.
209 F.2d 380, 385 (9th Cir. 1953) (Federal Power Commission

1 recognized that Micronesia was "essential to the U.S. for
2 security reasons" and sought to find a resolution to the
3 conflicting interests presented by the perceived security needs
4 on one hand and international pressure to settle the status of
5 Micronesia in the best interests of the inhabitants on the
6 other.^{118/} The report concluded that as the United States could
7 not "give the area up,"^{119/} it would have to make Micronesia
8 United States territory. In order to achieve this goal while
9 maintaining the semblance of self-determination necessary to
10 satisfy international critics, the Mission concluded that there
11 should be a plebiscite which the United States should insure will
12 result in a vote for a permanent relationship.^{120/} "Winning the
13 plebiscite and making Micronesia United States territory" could
14 be accomplished by the initiation of an intensive capital invest-

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16
17 (Con't. of footnote 117):

18 report); Tempel vs. United States, 248 U.S. 121, 130, 39 S.Ct.
19 56, 59, 63 L.Ed. 162 (1918) (Supreme Court takes judicial
20 notice of reports of Secretary of War to 'amplify' findings of
21 fact); see also, United States v. Camp, 723 F.2d 741, 744 note
22 (9th Cir. 1984) (collecting cases where court took judicial
23 notice of documents which were public records). The Solomon
24 Report is an official report commissioned by the White House
25 and is reprinted in McHenry, supra note 71, at Appendix I;
26 McHenry's work is available at public libraries. See Sierra
Club v. Morton, supra (district court took judicial notice of
Senate document which it obtained at the public library).

24 ^{118/} McHenry, supra note 116, at 231.

25 ^{119/} Ibid.

26 ^{120/} Ibid. at 233.

1 ment program which would flood the islands with United States
2 money and give the Micronesians "a sense of progress to replace
3 the deadly feeling of economic dormancy."^{121/} The Mission
4 suggested that the plebiscite be held in 1968 since it believed
5 that the

6 "maximum impact of the recommended capital
7 investment program will not be felt until late
8 1967 on the one hand, nor will it be felt as
9 strongly after 1968, since the Mission does not
10 expect the development process in the private
11 sector of the Micronesian economy to be strong
12 enough to offset the anticipated cutback in the
13 capital investment program after fiscal year
14 1968."^{122/}

15 The goal of selling annexation to the Micronesians would be aided
16 by other actions which would "facilitate the general development
17 of Micronesia[n] interest in, and loyalties to, the U.S." such as
18 sponsorship of leader visits to the United States, introduction
19 of "U.S.-oriented curriculum changes" and "patriotic rituals"
20 into the schools, and acceleration of college scholarship
21 programs.^{123/}

22 The security-oriented goals never lost the sight of the
23 Mission, however. The intensive capital investment program was
24 considered "strategic rental,"^{124/} which could be reduced follow-

25 ^{121/} Ibid. at 223, 235.

26 ^{122/} Id. at 236-237.

^{123/} Id. at 238.

^{124/} Id. at 233.

1 ing a "favorable" plebiscite.^{125/} The United States could keep
2 close watch on the political activities of the inhabitants while
3 developing interest in permanent affiliation through the use of
4 "information officers" who would supply information to
5 Micronesians as well as perform "the regular political reporting
6 function."^{126/} Also, while recognizing that the inhabitants
7 would desire some form of self-government, the Mission cautioned
8 against losing security control. A "reasonable appearance of
9 self-government" could be given by allowing an elected
10 legislature and a legislatively appointed chief executive, while
11 at the same time retaining "adequate control" through an
12 appointed High Commissioner.^{127/} The authority of the High
13 Commissioner would include at a minimum the authority to withhold
14 all funds and to declare martial law^{128/} and the "maximum
15 additional power of vetoing all laws, confirming the Chief
16 Executive's appointments of key department directors and
17 dismissing the Chief Executive and dissolving the legislature at
18 any time."¹²⁹

20
21 ^{125/} Ibid at 235.

22 ^{126/} Id. at 237.

23 ^{127/} Id. at 238.

24 ^{128/} Id. at 238. The powers of martial law would include the
25 authority to "assume all legislative and executive powers when
the security of the US so requires."

26 ^{129/} Id. at 239.

1 Interestingly, the Mission detected the simmering
2 resentment of the people toward the "high salaries for U.S.
3 personnel in Micronesia."^{130/} In response, the Mission suggested
4 that promises be made to the wage earners that upon agreeing on a
5 new status "Micronesian and U.S. personnel basic pay scales would
6 be equalized."^{131/}

7 The candid analysis of United States' policy embodied
8 in the Solomon Report become, in the words of one commentator.
9 the "blueprint" for Micronesia followed by the Kennedy and
10 Johnson administrations. Note, Self-Determination, supra note 70
11 at 284 n.45.^{132/}

12 The historical background assists in attempting to
13 decipher the intent and purpose of the Trust Territory
14 government's personnel actions in the 1970's. The historical
15 policy actions taken and the general attitude of the government
16 toward the complaining class must be reviewed in light of the
17 legislative history and the events surrounding the challenged
18 action. Arlington Heights, 97 S.Ct. at 564-565.

19
20 ^{130/} Id. at 235.

21
22 ^{131/} Id. at 238. The commission concluded that the costs
23 of such a plan would not be excessive.

24 ^{132/} The statistics of the period bear out this conclusion.
25 In 1961 the budget of the Trust Territory was increased from
26 \$7.5 million to \$17.5 million and continued to escalate
through the 1960's reaching \$60 million in 1971. Metelski.
supra note 76, at 166 n.20.

1 The impetus to develop equitable wage scales came from
2 officials of the United States who urged that policy changes be
3 made to eliminate divergent pay scales and to equalize wages. On
4 his visit to Micronesia in 1969, Interior Secretary Hickel, in an
5 address to the people, made known the Nixon administration's
6 pledge to Micronesia:

7 "you will be brought into the planning and
8 decision processes as full and equal partici-
9 pants with American personnel. To accelerate
10 this process, I have directed the High
11 Commissioner to start within 90 days an
12 active and imaginative program of training of
13 Micronesians for positions of greater
14 responsibility in the Administration. Every
15 effort will be made to eliminate any differ-
16 ence which may exist in pay schedules. We
17 look forward to the day when we can proudly
18 say that we provide for persons with equal
19 qualifications, equal pay for equal work
20 throughout the Trust Territory Govern-
21 ment."^{133/}

22 Adopting the Secretary's stated objectives on behalf of the Trust
23 Territory Government was then High Commissioner Edward Johnson
24 who told the Micronesian people:

25 "The keynote of our program will be the ever-
26 increasing involvement of the Micronesian
people in their own government. Greater
emphasis than ever before will be placed on a
Micronesian Training Program reaching every
level of every branch of the Trust Territory

27 ^{133/} Secretary Hickel's statement is taken from Issue Support
28 Paper No. 72-65-1 of the Department of the Interior, which is
29 available in the Trust Territory Archives. The Court takes
30 judicial notice of the document. See note 117, *supra*. The
31 statement is also reprinted in part in two of the Stipulated
32 Documents. See DOE Report, *supra* note 20; EMI Report, *supra*
33 note 21, at 1.

1 Government. We must fully realize that as
2 Micronesians prepare themselves eventually to
3 occupy every position in their government,
4 there must be an equalization of the American
and Micronesian pay scales in the Trust
Territory.^{134/} (Emphasis added).

5 The encouraging statements of the two officials were received
6 with appreciation and were followed by immediate responses by
7 people in the Trust Territory.

8 The Trust Territory Department of Education was one of
9 the first to act, interpreting Secretary's Hickel's statement as
10 a "mandate... to proceed toward the accomplishment of [equality
11 of pay]." DOE Report, supra note 20 at "Origin of Study." A
12 special committee composed to study Department of Education's
13 compensation policy proposed a plan to provide take-home pay
14 equity among United States and Micronesian employees. In the
15 following year, H.B. 57 was introduced in the Congress of
16 Micronesia proposing a single salary plan.^{135/} The bill was
17 tabled at the request of the administration which asked that any
18 action on personnel administration await the report of its
19 consultant, Employee Management Service, Inc. (EMSI) which the
20 administration planned to follow.^{136/}

21
22 ^{134/} High Commissioner Johnson's address is reprinted in
23 DOE Report, supra note 20 at "Conclusions."

24 ^{135/} S.S.C.Rep. No. 4-26, 4th Cong. of Micronesia, 4th Special
25 Sess. 154-166 (1971). The Court takes judicial notice of the
26 report. See note 117 supra.

^{136/} Ibid. at 155.

1 Before the Fourth Congress convened, EMSI released its
2 report. The report was undertaken only upon the consultants'
3 belief in the sincerity of the High Commissioner's pledge to
4 equalize wage scales in the Trust Territory. EMS Report, supra
5 note 21, at 1. Finding, as did the Department of Education, the
6 tripartite compensation practices then in effect to be
7 discriminatory, the report proposed a single pay schedule with
8 income tax and relocation add-ons for employees from the United
9 States. EMSI Report, supra, at 29.^{137/}

10 Contrary to his indications to the Congress of Microne-
11 sia, the High Commissioner did not adopt the recommendations of
12 the EMSI Report. Instead, he enacted new pay scales which set
13 the pay of contract personnel to approximately the wage earned by
14 Civil Service employees. It was estimated that this resulted in
15 a greater pay discrepancy, and set United States personnel
16 salaries at a rate 50% to 300% higher than that proposed by EMSI.
17 S.S.C.Rep. No. 4-26, supra note 135, at 155. Additionally, the
18 High Commissioner adopted a local-hire pay plan allowing local
19

20
21 ^{137/} The perceived need for a tax-differential was based on
22 the federal tax obligations imposed on United States citizens
23 which obligations were not applicable to the incomes of
24 Micronesian employees. The add-on was proposed to off-set the
25 tax burden and achieve pay parity. The size of the
26 differential was arrived at from estimated tax calculations.
The relocation differential was adopted from the existing
system which allowed a differential for any employee who was
assigned to a duty post other than his home district or
country. The relocation differential was available to United
States citizens and Micronesians alike.

1 hire United States citizens 80% of the standard United States
2 differential. Public Administration Service, Report on a Review
3 of Salary Administration in the Executive Branch of the Trust
4 Territory Government 2-3 (1972)(PAS Report).

5 Not surprisingly, the members of the Congress of
6 Micronesia were outraged.^{138/} Not only did the High Commissioner
7 fail to develop a single salary plan along the lines of Secretary
8 Hickel's pledge, as requested by the Congress and as promised by
9 the High Commissioner,^{139/} High Commissioner Johnson did not even
10 adopt the advice of his own consultants. Worse, he further
11 increased the existing discrepancies in the pay gap between the
12 United States and Trust Territory citizens, all without the
13 knowledge, much less the consent of the Congress.^{140/} The
14 Congress took two actions to demonstrate its disapproval of the
15 Commissioner's actions. The Senate passed Senate Joint
16 Resolution No. 26 on March 17, 1971, requesting the Secretary of
17 the Interior to consider replacing the High Commissioner with

18
19
20 ^{138/} See generally S.S.C.Rep. No. 4-26, supra note 135.

21 ^{139/} Ibid. at 155. The Committee alleges that the High
22 Commissioner allowed the Congress to believe that if H.B. 57
23 were tabled, an equitable pay plan would be developed.
24 Further, there is evidence that the High Commissioner
25 testified before the United States Congress to the effect that
26 a single salary plan would soon be implemented along the lines
of Secretary Hickel's pledge. [92nd Cong., 1st Sess. House
Comm. 783-786-789].

^{140/} Ibid.

1 an Executive Council.^{141/} More importantly, H.B. 57 was
2 reintroduced and was enacted by both chambers.^{142/}

3 H.B. 57, as reintroduced, inter alia, mandated the High
4 Commissioner to develop a single scale pay plan by April 1972; in
5 the interim, the EMSI proposals would take effect. On July 10,
6 1971, the High Commissioner vetoed H.B. 57.^{143/} The High
7 Commissioner cited as necessitating the veto a section which
8 attempted to eliminate Civil Service employees, which he
9 contended the Congress of Micronesia was without authority to
10 do.^{144/} However, the majority of the veto message focused on the
11 undesirability of a unitary compensation plan. In addition, the
12 High Commissioner reaffirmed the pay schedules adopted as of
13 April 1, 1971.^{145/}

14
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16 ^{141/} See S.S.C.Rep.No. 4-10, 4th Cong.of Micronesia, 4th Special
Session (1971).

17 ^{142/} The Senate passed the bill on May 21, 1971. Senate Journal,
18 4th Cong.of Micronesia, 4th Special Sess. 97(1971) (Senate
19 Journal). The bill was apparently adopted by the House as
20 H.B. 57 and was sent to the Conference Committee. C.C.Rep.
21 No. 2, 4th Cong.of Micronesia, 4th Special Sess. 168 (1971).
The Conference Committee amendments apparently were approved
and included in H.B. 57, since the High Commissioner saw it
necessary to exercise his veto authority.

22 ^{143/} High Commissioner Communication No. 18 (7/10/71), reprinted
23 in Senate Journal, supra note 142, at 170-171.

24 ^{144/} Interestingly, the High Commissioner chose not to exercise
a line item veto.

25 ^{145/} The Congress responded with a Joint Resolution requesting
26 the Secretary of the Interior to give the Congress override
authority. S.J.R. 94, 4th Cong.2d Reg.Sess. 222 (1972).

1 The Fourth Congress returned to its Second Regular
2 Session and enacted P.L. No. 4C-49. The law was important for
3 two reasons. It allowed the High Commissioner to implement "one
4 or more salary schedules"; and, second, it required that all
5 salary schedules be approved by the newly-created Trust
6 Territory Personnel Board. All salary schedules were to be
7 enacted into law by the Congress. The Trust Territory cites this
8 and other Congressional action as demonstrative of Congressional
9 approval of disparate pay scales, thereby negating any inference
10 of discriminatory intent. The Committee Reports demonstrate the
11 fallacy of this conclusion. The members of Congress made it
12 clear that P.L. No. 4C-49 was no more than a reluctant compromise
13 in light of the recognition that "a Single Salary Plan is
14 unacceptable to the Administration." S.S.C.Rep. No. 4-123, 4th
15 Cong.of Micronesia, 2nd Reg.Sess. 414-418 (1972). The Committee
16 reaffirmed that its views "with respect to a single pay plan...
17 have not changed." Id. at 414. The Committee continues:

18 We still view the adoption of a single pay
19 plan for all employees of the Trust Territory
20 Government as essential. This is one area,
21 however, on which the Administration has
22 refused to compromise. Therefore, the bill
23 gives the authority for the enactment of 'one
24 or more salary schedules.'

25 Id.

26 At the end of 1972, the administration's pay scales
were criticized by yet another consultant. Public Administration
Services, commissioned to study the existing pay scales and
propose modifications, found the administration's pay scales for

1 expatriate employees objectionable. Initially, PAS found it
2 "almost impossible to defend a policy under which two employees,
3 possessing equal qualifications and assigned to similar or
4 identical jobs, are given pay levels on the sole basis of their
5 nationality." PAS Report, supra p.81, at 8. The report noted
6 that the concept of "equal pay for equal work" is "almost
7 universally accepted in modern personnel administration." Id.
8 Aside from the inherent inequity, the report found the pay
9 practices regarding United States employees otherwise
10 unjustifiably preferential. Establishing the wage scale based on
11 Civil Service pay in order to attract qualified United States
12 personnel was not necessary since civil service rates were
13 generally higher than prevailing United States wage rates.
14 Furthermore, the Trust Territory historically did not draw its
15 employees from the federal schedule labor pool. PAS Report, at
16 20-21. Thus, their current pay practices were excessive.

17 Also objectionable was the administration's local-hire
18 pay plan which compensated local-hire and third country nationals
19 at 80% of the United States schedule. This differential was
20 "unjustifiably high" and was not supported by the government's
21 assertions that differentials were needed to attract labor.
22 Local-hire labor was already here. Moreover, because the pay
23 scales did no more than set pay on the basis of color or national
24 origin, they were termed "repugnant both from the moral and the
25 legal points of view." PAS Report, at 21- 22. Also, regarding
26 the 80% differential for third country nationals, the report

1 found that this was not based on pay surveys but was rather done
2 for administrative convenience. Id. at 23. In conclusion, PAS
3 proposed a market place differential plan with actual
4 differentials determined by the prevailing wages of the country
5 of recruitment. Local hires would be compensated at the
6 Micronesian rate with special differentials added only in
7 exceptional circumstances.

8 The Congress of Micronesia implemented many of the PAS
9 recommendations in P.L. No. 5-59. The new schedule steered away
10 from the federal wage rates and instead paid United States
11 contract employees the base salary and a tax allowance, plus a
12 recruitment allowance based on the prevailing wages of the
13 country of recruitment. Importantly, the recruitment differential
14 applied only to those expatriates recruited from abroad. Section
15 7(1); Section 8. The 80% local-hire differential was replaced by
16 a nominal tax-relief allowance. The new salary plan was to
17 expire within one year in order to give Congress an opportunity
18 to review it after implementation.^{146/}

19 The enactment of P.L. No. 6-65 demonstrates the
20 administration's success at selling its position regarding local
21 hires. Under P.L. No. 6-65, local hires are returned to the 80%
22 differential; the Congress of Micronesia compromise appears as a
23 two-year limit on the differential.

25 ^{146/} S.S.C.Rep. No. 5-88, supra note 24, at 453. 5th Cong.
26 1st Sess. (1973) at 453.

1 Despite concerns raised throughout the 1970's about pay
2 equity, the administration proposed legislation to the Seventh
3 Congress which perpetuated the divergent pay scales. H.B. 7-403,
4 supra note 85. Eliminating the system of differentials, H.B.
5 7-403 sought to establish two separate pay scales, one for United
6 States citizens and one for Trust Territory citizens. The
7 feature most indicative of the administration's intent was the
8 inclusion of a local-hire wage scale equivalent to that of
9 expatriates recruited abroad. H.B. 7-403, §6. Gone are the
10 'point of recruitment' justifications. H.B. 7-403 did not gain
11 the approval of the Congress of Micronesia. Instead, P.L. No.
12 6-65 was continued in effect by legislation and, upon the
13 dissolution of the Congress, by Executive Order. See supra
14 pp.11-13.

15 The capstone of the administration's efforts to
16 segregate absolutely the Micronesians and United States citizens
17 is Executive Order No. 119. Already discussed above, the terms
18 of the Order need not be extensively reviewed here. Executive
19 Order No. 119 established a tripartite wage scale. Despite the
20 constant battles over local hires, once the High Commissioner
21 again had unfettered authority, local hire United States citizens
22 were paid at the same rate as expatriates recruited from
23 abroad.^{147/} Also gone was the flexibility in differentials for
24

25 ^{147/} The Bureau of Personnel portrayed the administration's
26 justification of the uniform pay scales for United States

1 third country nationals. Discussed above was the inability of
2 this new plan to meet the administrations's stated needs. This
3 equalization of pay along with the rigidity of the other aspects
4 of the system aptly demonstrates the administration's insistence
5 of paying United States employees a higher rate than
6 Micronesians.

7 [31,32] There is more than sufficient evidence to demonstrate
8 that the Trust Territory administration, by failing to take
9 remedial action on and after January 9, 1978 regarding the
10 discriminatory pay practices and by promulgating Executive Order
11 No. 119, was acting with the purpose and intent of offering
12 preferential compensation plans to United States citizens over
13 equally qualified Micronesians. The intent to discriminate does
14 not necessarily mean an intent to harm Micronesians. See Larry
15 P. v. Riles, 495 F.Supp. 926, 979 (N.D.Cal. 1979)(Even a "well
16 meaning intention to adopt and retain procedures" which have a
17 segregative effect found violative of equal protection). The
18

19 (Con't. of footnote 147):

20 prime and local hires, as a desire to eliminate discrimination
21 among the two groups. "The allegation that the current TT
22 Headquarters pay plan discriminates on the basis of race is
23 not valid," the report states. Rather, the Bureau of
24 Personnel asserts that the pay practices were guided by the
25 principle of "equal pay for equal work." Accordingly, the
26 report continues, "the current... pay plan treats all
employees in the same category of citizenship, whether
recruited locally or from abroad, equally in terms of basic
pay." Bureau of Personnel, Memorandum: Review of Trust
Territory Headquarters Pay Administration Practices 3 (1980).
S.D.16.

1 prohibition against discriminatory action is a command for
2 "purity of motive." Not only are motives of hostility and
3 vengeance forbidden but, alternatively, so are goals of
4 partiality and favoritism. Clark, supra p.64, at 964 (quoting
5 Tussman & TenBroek, The Equal Protection of the Laws, 37
6 Calif.L.Rev. 341, 358 (1949)). The history of the pay scales
7 reveals a series of frustrated attempts to achieve pay equity:
8 the failure by the administration to carry out its own pledges,
9 the refusal to adopt alternative pay plans with less
10 discriminatory impact, and the implementation of a grossly
11 disproportionate wage schedule which afforded preferential
12 treatment to United States citizens qua United States citizens.
13 Together these actions satisfy this Court that a prima facie case
14 of intentional discrimination is presented.

15
16
17 2. Trust Territory's Justifications

18 [33] The burden now shifts to the Trust Territory to "rebut
19 the presumption of unconstitutional action by showing that
20 permissible racially neutral selection criteria and procedures
21 have produced the monochromatic result." Alexander v. Louisiana,
22 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972)).
23 Put another way, "the presumption of intentional discrimination
24 becomes proof unless the defendants affirmatively establish that
25 their action or inaction was a consistent and resolute applica-
26 tion of racially neutral policies." Oliver v. Michigan State

1 Board of Education, 508 F.2d 178, 182 (6th Cir. 1974), cert.
2 denied, 421 U.S. 963 (1975). The matter is one of causation.
3 The Trust Territory must now prove that "the same decision would
4 have resulted even had the impermissible purpose not been
5 considered." Arlington, supra, 97 S.Ct. at 566 n.21.

6 [34] In reviewing the Trust Territory's justifications, this
7 Court will not accept allegations of a mere rational basis. Upon
8 a prima facie showing of discrimination, "judicial deference is
9 no longer justified." Arlington, 97 S.Ct. at 563. The
10 government's justifications will be subject to the strictest
11 scrutiny and are justifiable only by the weightiest of
12 considerations. Davis, 96 S.Ct. at 2049. The rule that a law or
13 other government action which classifies on national origin
14 requires an extraordinary justification "applies as well to a
15 classification that is ostensibly neutral but is an obvious
16 pretext for... discrimination." Feeney, supra, 99 S.Ct. at 2292.
17 The Second Circuit has well-stated the burden shift in the
18 context of school segregation:

19 The burden of proof then shifts to the
20 defendant officials to show that the pattern
21 of actions taken by those officials can be
22 explained in a manner consistent with the
23 absence of segregative intent. Put differ-
24 ently, once the burden of proof has shifted,
25 school officials must be able to demonstrate
26 that no reasonable alternative policy would
have achieved the same permissible education-
al goals with less segregative effect. When
such a showing cannot be made, it is entirely
reasonable to infer that the officials acted
with unlawful segregative intent. [footnote
omitted]

1 Arthur v. Nyquist, 573 F.2d at 142-143 (2nd Cir. 1978), cert.
2 denied, 439 U.S. 860 (1978).

3 [35] The Trust Territory's justifications for the continued
4 use of the disputed wage scales have been extensively reviewed in
5 the previous section; that analysis applies equally as well here.
6 The administration argues that the disproportionate and adverse
7 impact on Micronesians is an unfortunate, undesirable, but
8 unavoidable consequence of a policy necessary to promote the
9 economic advancement of the Trust Territory inhabitants. As
10 discussed above, however, the need for the continued employment
11 of foreign, especially United States, personnel has not been
12 sufficiently supported. The Trust Territory itself conceded
13 years ago that a phase-down of non-Micronesian personnel was
14 necessary for an eventual equalization of pay scales. Yet, from
15 1978 to the present, there has actually been a relative increase
16 in United States employees at the Headquarters. See supra p.61.
17 The Court is not convinced that there were no qualified
18 Micronesian employees to staff the Headquarters, nor is it
19 satisfied that implementation of the "innovative" training
20 programs ordered by Secretary Hickel would not have provided the
21 necessary manpower.

22 Moreover, even were a small staff of non-Micronesian
23 personnel necessary, the Trust Territory has not persuaded the
24 Court that the divergent pay scales were necessary to the
25 recruitment of these employees. Not only is there no evidence
26 that the administration would be unable to attract qualified

1 personnel at wages lower than were paid, there is evidence to the
2 opposite effect. For instance, in the 1960's and early 1970's,
3 the Trust Territory was in fact attracting experienced labor at
4 rates less than the prevailing United States government wage at
5 the time. See supra p.80 (wages of contract employees were
6 raised to meet the U.S. Civil Service standard not because of
7 difficulty in recruitment but to eliminate discrimination among
8 United States employees). The success of the Peace Corps program
9 lends support as well. See supra note 94. Nor is the Court
10 convinced that as of 1978 the administration could not have
11 equalized the pay scales without causing the "ruinous" economic
12 results feared. Moreover, even in light of these "economic
13 disaster" tales, the administration raised the compensation of
14 local-hire United States citizens to a level commensurate with
15 that earned by prime contract employees.

16 Not surprisingly, the Court concludes that the Trust
17 Territory Government has failed to justify on permissible grounds
18 its actions perpetuating and promulgating the tripartite wage
19 scale. In light of the available alternatives which the
20 government stubbornly refused to explore yet which had less
21 discriminatory impact, the Trust Territory has failed to
22 convincingly demonstrate that its activities were taken indepen-
23 dent of discriminatory intent. The inference that such discrimi-
24 natory intent led to the challenged actions regarding compensa-
25 tion plans is compelling. The Trust Territory government's
26 actions on and after January 9, 1978 were taken in violation of

1 the principles embodied in the Equal Protection Clause of the
2 Fourteenth Amendment entitling the plaintiffs to a remedy
3 pursuant to 42 U.S.C. §1983.
4

5 IV. Trust Territory Bill of Rights

6 1 T.T.C. §7 provides:

7 Discrimination on account of race, sex,
8 language or religion. No law shall be
9 enacted in the Trust Territory which
10 discriminates against any person on account
11 of race, sex, language or religion; nor shall
12 the equal protection of the laws be denied.

13 [36] At a minimum, the equal protection clause of the Trust
14 Territory Code prohibits conduct which violates principles of
15 equal protection embodied in the United States Constitution.
16 See, e.g., Di Stefano v. Di Stefano, 6 T.T.R. 312 (High Court
17 1973)(the interpretation and meaning of the clauses of the United
18 States Constitution);^{148/} see, also, Temengil I, supra, 33 FEP at
19 1066. Thus, the conclusion reached above regarding the
20 unconstitutionality of the challenged actions is dispositive of
21 the claims raised under 1 T.T.C. §7. Accordingly, the Court
22 concludes that the equal protection clause of the Trust Territory

23 ^{148/} The Trust Territory Clause may well proscribe conduct
24 permitted under the United States Constitution. Note for
25 instance the express language regarding discrimination which
26 is absent from the Fourteenth Amendment. Note also the
Supreme Court's more lenient review of sex-based classifica-
tions. See Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50
L.Ed.2d 397 (1976).

1 Bill of Rights has also been violated.

2
3 V. Trusteeship Agreement Claims

4 [37-39] "The Trusteeship Agreement creates direct and
5 affirmative rights which are judicially enforceable in federal
6 courts." Temengil I, 33 FEP Cases 1035; People of Saipan v.
7 Department of the Interior, 502 F.2d 90, 97 (9th Cir. 1974),
8 cert. denied, 420 U.S. 1003. The Agreement created a fiduciary
9 relationship between the United States and the people of the
10 Trust Territory in which "the interests of the inhabitants of the
11 territory become paramount." Liebowitz, supra note 9, at 79
12 n.236. Temengil v. Trust Territory, Civ.No. 81-0006 (Decision
13 filed Feb. 4, 1985)(Temengil II); Temengil I, 33 FEP Cases at
14 1032. The terms and principles of the Agreement govern the
15 conduct of the United States and the Trust Territory governments
16 alike; each are subject to liability for the breach of duties and
17 obligations created thereunder. Temengil I, 33 FEP Cases at
18 1044-1047.^{149/}

19 [40] The duties imposed under the agreement are
20 unprecedented in their "detail, precision and scope." Temengil
21 I, 33 FEP Cases at 1035. Specifically, the covenants against
22 discrimination encompassed by the Agreement are legion. See

23 _____
24 ^{149/} While the Trust Territory remains liable for monetary and
25 injunctive relief, the monetary claims against the United
26 States have been previously dismissed. Temengil I, 33 FEP
Cases at 1047-1048.

1 generally Temengil II, slip op. at 26-29. The Agreement itself
2 imposes upon the United States the obligation to "protect the
3 rights and fundamental freedoms of all elements of the population
4 without discrimination." Article 6(3). Also, the Charter of the
5 United Nations, obedience to which is mandated by the Trusteeship
6 Agreement,^{150/} commands the member nations to "take action for the
7 achievement of universal respect for, and observance of, human
8 rights and fundamental freedoms for all without distinction as to
9 race." Charter of the United Nations, Articles 55 and 56,
10 reprinted in, Goodrich, Hambro and Simons, Charter of the United
11 Nations: Commentary and Documents 371-382 (1969).

12 The contours and delineations of these covenants
13 against discrimination are found in and derived from "relevant
14 principles of international law... which have achieved a
15 substantial degree of codification and consensus." People of
16 Saipan, 502 F.2d at 99. This Court has previously held that "a
17 well-recognized and leading document" which further defines such
18 international principles is the Universal Declaration of Human
19 Rights, Gen.Assembly Res. 217 A(III)(Dec. 10, 1948).^{151/} Article
20 23(2) of the Declaration provides:

21 _____
22 ^{150/} Trusteeship Agreement Article 4.

23 ^{151/} The Declaration was adopted by the United States in 1948,
24 within a year of the ratification of the Trusteeship
25 Agreement. See Temengil II, slip op. at 28. "The United
26 States has frequently reiterated its acceptance of the
Universal Declaration, and whatever legal character it has
would bind the United States." Restatement of the Law 2d,

1 Everyone, without discrimination has the
2 right to equal pay for equal work.

3 The rights of freedom from discrimination are further elaborated
4 at Article 2:

5 Everyone is entitled to all the rights
6 and freedoms set forth in this Declaration,
7 without distinction of any kind, such as
8 race, colour, sex, language, religion,
9 political or other opinion, national or
10 social origin, property, birth or other
11 status.

12 Equal protection principles are embodied at Article 7 which
13 provides:

14 All are equal before the law and are
15 entitled without any discrimination to equal
16 protection of the law. All are entitled to
17 equal protection against any discrimination
18 in violation of this Declaration and against
19 any incitement to such discrimination.
20

21 (Con't. of footnote 151):

22 Foreign Relations Law of the United States (6th tent. draft,
23 Apr. 12, 1985), introductory note to Part VII, p.453. The
24 Reporters' Note 4 to §701 of the Restatement (Human Rights
25 Obligations under United Nations Charter) states that "the
26 Charter, the Universal Declaration, other international
resolutions and declarations... have combined to create a
customary international law of human rights requiring every
state to respect the rights set forth in the Declaration."
Id. at 461. The Reporters' Note 5 to §701 (International
Human Rights Standards as Source of U.S. Law) comments
that "[c]ourts in the United States have increasingly looked to
international human rights standards as law in the United
States or as a guide to U.S. law." *Id.* p.464. See also *Id.*
at 465 (collecting United States cases which have referred to
the Declaration to interpret provisions of the Constitution
and laws of the United States). The preamble of the
Declaration makes the principles therein announced expressly
applicable to the trust territories. See Temengil II, slip
op. at 28.

1 [40] The actions of the Trust Territory administration set
2 forth in detail above amply demonstrate not only a violation of
3 equal protection principles embodied in the United States
4 Constitution, but of parallel principles found in international
5 law. The right to "equal pay for equal work" is explicit. The
6 Trust Territory, exercising the delegated powers of the
7 administering authority, has express and solemn obligations to
8 not only refrain from engaging in pay discrimination, but to take
9 affirmative steps to ensure that all employees are treated
10 equally. The facts previously set forth conclusively establish
11 that the Trust Territory administration did not take such
12 affirmative steps, but instead intentionally engaged in pay
13 discrimination by compensating employees unequally for equal
14 work.

15 [41,42] The United States fares no better. The international
16 obligations expressed in the Charter, the Agreement and the
17 Declaration are imposed on the United States itself as a member
18 of the international community and as signatory to the documents.
19 It cannot, and does not, escape liability simply because it
20 delegated its duties to an entity which acted in violation of
21 principles of international law. The United States is a trustee
22 imbued with affirmative fiduciary obligations which cannot be
23 delegated. Where delegation of acts has been made, the trustee
24 remains liable for any resulting breach of those obligations.^{152/}

25 ^{152/} Generally, a trustee is under an obligation to the
26

1 A comment of the Senate Committee on Foreign Relations, quoted
2 , previously by the Court, bears repeating: "[Micronesia] is a U.S.
3 trust territory and if the United States has fulfilled its trust
4 to the inhabitants badly then those responsible for this
5 condition ought to also be responsible for its remedy." S.Rep.
6 No. 223, 90th Cong. 1st Sess. 8(1967)(amending the Peace Corps
7 Act)(quoted in Temengil I, 33 FEP Cases at 1047). The Court
8 finds the United States responsible for the pay inequities
9 imposed by the Trust Territory Administration and is subject to
10 remedial relief to the extent of this Court's jurisdiction.

11
12 VI. CONCLUSION AND RELIEF

13 The Court concludes that on January 9, 1978 the Trust
14 Territory government was possessed with duties and obligations to
15 guaranty to its employees, at least to those whom it employed or
16 continued to employ within the Commonwealth of the Northern
17 Mariana Islands - the Plaintiffs in this case, the equal
18 protection of the law regardless of national origin. The failure

19
20
21 (Con't. of footnote 152):

22 beneficiary not to delegate to others the administration of
23 the trust, although it may properly delegate the authority to
24 do particular acts. Restatement of Trusts, 2d, §171 and
25 comment d. The delegation of governing authority to the Trust
26 Territory is not challenged. However, where a trustee has
properly delegated duties to agents, it "is under a duty to
the beneficiary to exercise a general supervision over their
conduct." Id. at comment k.

1 as of that date to take action to remedy existing inequities in
2 the compensation of its employees in the Northern Mariana
3 Islands, and the promulgation under Executive Order and
4 perpetuation thereunder of grossly discriminatory wage scales in
5 the following years deprived the plaintiffs of equal protection
6 of the laws guaranteed by the Fourteenth Amendment, 42 U.S.C.
7 §1983 and the Trust Territory Bill of Rights. In addition, the
8 Trust Territory breached its solemn obligations undertaken in the
9 Trusteeship Agreement. The unconstitutionality of this conduct
10 subjects the Trust Territory government to a permanent injunction
11 enjoining the continuation of the inequitable pay practices.
12 Furthermore, the wrongful actions have caused the plaintiffs to
13 suffer monetary injuries entitling them to appropriate relief.

14 The United States, as well, has breached its duties to
15 the inhabitants of the Trust Territory. Injunctive relief will
16 issue against it.

17 The parties will set a status conference on these
18 issues of injunctive and monetary relief to be held no later than
19 July 18, 1986.

20
21
22
23
24
25
26

June 6, 1986
Date

Alfred Laureta
JUDGE ALFRED LAURETA