HJR

36

0-LS0939\P
Glover
3/3/98

AS amended pg 4
adopted 3/3/98

CS FOR HOUSE JOINT RESOLUTION NO. 36(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GREEN, Martin, Mulder

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing obsolete language setting out the apportionment schedule used to elect the members of the first state legislature; and providing for an effective date.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** Article VI, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. **House** **[ELECTION] Districts.** Members of the house of representatives shall be elected by the qualified voters of the respective **house** [ELECTION] districts. **The boundaries of the house districts shall be set under this article after each decennial census of the United States** [UNTIL REAPPORTIONMENT, ELECTION DISTRICTS AND THE NUMBER OF REPRESENTATIVES TO BE ELECTED FROM EACH DISTRICT SHALL BE AS SET FORTH IN SECTION 1 OF ARTICLE XIV].

* **Sec. 2.** Article VI, sec. 2, Constitution of the State of Alaska, is amended to read:

Section 2. Senate Districts. Members of the senate shall be elected by the qualified voters of the respective senate districts. **The boundaries of the senate**

districts shall be set under this article after each decennial census of the United States [SENATE DISTRICTS SHALL BE AS SET FORTH IN SECTION 2 OF ARTICLE XIV, SUBJECT TO CHANGES AUTHORIZED IN THIS ARTICLE].

* **Sec. 3.** Article VI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Redistricting [REAPPORTIONMENT] of House and Senate. The governor shall **redistrict** [REAPPORTION] the house of representatives **and the senate** immediately following the official reporting of each decennial census of the United States. **Redistricting** [REAPPORTIONMENT] shall be based upon **the** [CIVILIAN] population within each **house and senate** [ELECTION] district as reported by the census.

* **Sec. 4.** Article VI, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Method of Redistricting. The governor shall establish forty single-member house districts, and the governor shall establish twenty single-member senate districts, each composed of two house districts [REAPPORTIONMENT SHALL BE BY THE METHOD OF EQUAL PROPORTIONS, EXCEPT THAT EACH ELECTION DISTRICT HAVING THE MAJOR FRACTION OF THE QUOTIENT OBTAINED BY DIVIDING TOTAL CIVILIAN POPULATION BY FORTY SHALL HAVE ONE REPRESENTATIVE].

* **Sec. 5.** Article VI, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. District Boundaries [REDISTRICTING]. The governor **shall establish** [MAY FURTHER REDISTRICT BY CHANGING] the size and area of **house** [ELECTION] districts, subject to the limitations of this article. Each **house** [NEW] district [SO CREATED] shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population **as near as practicable** [AT LEAST EQUAL] to the quotient obtained by dividing the [TOTAL CIVILIAN] population **of the state** by forty. **Each senate district shall be composed as near as practicable of two contiguous house districts.** Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

* **Sec. 6.** Article VI, sec. 8, Constitution of the State of Alaska, is amended to read:

Section 8. **Redistricting** [REAPPORTIONMENT] **Board.** The governor shall appoint a [REAPPORTIONMENT] board to act in an advisory capacity to **the governor** [HIM]. It shall consist of five members, **all of whom shall be residents of the state and** none of whom may be public employees or officials **at the time of and during the tenure of appointment** [. AT LEAST ONE MEMBER EACH SHALL BE APPOINTED FROM THE SOUTHEASTERN, SOUTHCENTRAL, CENTRAL, AND NORTHWESTERN SENATE DISTRICTS. APPOINTMENTS SHALL BE MADE WITHOUT REGARD TO POLITICAL AFFILIATION]. Board members shall be compensated.

* **Sec. 7.** Article VI, sec. 10, Constitution of the State of Alaska, is amended to read:

Section 10. **Redistricting** **[REAPPORTIONMENT] Plan and Proclamation.** Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for [REAPPORTIONMENT AND] redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of [REAPPORTIONMENT AND] redistricting. An accompanying statement shall explain any change from the plan of the board. The **final plan shall set out boundaries of house and senate districts and** [REAPPORTIONMENT AND REDISTRICTING] shall be effective for the election of members of the legislature until **sixty days** after the **adoption and final adjudication of the succeeding redistricting plan and proclamation of redistricting** [OFFICIAL REPORTING OF THE NEXT DECENNIAL CENSUS].

* **Sec. 8.** Article VI, sec. 11, Constitution of the State of Alaska, is amended to read:

Section 11. Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** or to correct any error in redistricting [OR REAPPORTIONMENT]. Application to compel the governor to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting [OR REAPPORTIONMENT] must be filed within thirty days following the proclamation. Original jurisdiction in these matters

is [HEREBY] vested in the superior court. On appeal **from the superior court**, the cause shall be reviewed by the supreme court **on** [UPON] the law and the facts. **Notwithstanding Section 15 of Article IV, all dispositions by the superior court and the supreme court under this section shall be expedited and shall have priority over all other matters pending before the respective court. Upon a final judicial decision that a plan is invalid, the matter shall be returned to the board for correction and development of a new plan under this article and subsequent action by the governor under section 10 of this article.**

*** Sec. 9.** Article XI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Petition. After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the **house** [ELECTION] districts of the State, it may be filed with the lieutenant governor.

*** Sec. 10.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 29. Effective Date and Applicability of Amendments Providing for Redistricting of the Legislature. (a) The 1998 amendments relating to redistricting of the legislature (art. VI and art. XIV) and relating to redistricting of the legislature (art. VI, sec. 3), take effect January 1, 2001. [2000]

(b) Notwithstanding Section 10 of Article VI, the proclamation of redistricting in effect on December 31, 2000, is effective for election of members of the legislature until sixty days after adoption and final adjudication of the succeeding redistricting plan and proclamation of redistricting under Article VI.

*** Sec. 11.** Article VI, secs. 5 and 7, and Article XIV, Constitution of the State of Alaska, are repealed.

*** Sec. 12.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: January 23, 1998 FURTHER REFERRALS:

Date of Committee Action: 3/5/98

The FINANCE Committee considered: HJR 36

HOUSE JOINT RESOLUTION NO. 36 REAPPORTIONMENT BOARD & REDISTRICTING

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing as obsolete language in the article setting out the apportionment schedule used to elect the members of the first state legislature.

recommends it be replaced with the following committee substitute CS HJR 36 (FIN) [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [✓] fiscal note(s) of. of Ht Gov 1/23/98

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
	Therriault	X			
	Hanley	X			
	Mulder	X			
	Minton	X			
	Kohring	X			
	J. Davies		X		
	Grussendorf		X		
	J Moses			X	
	G. Davis	X			
	J Kelly	✓			
	Foster	X			

CO CHAIR'S SIGNATURE Therriault Hanley

FISCAL NOTE

No: 1
Bill Version: CSHJR 36 (JUD)
(H) Publish Date: 1/23/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____ Dept. Affected Office of the Governor
Title Const. Amend: Reapportionment Board and Redistricting BRU Elective Operations
Component Elections
Sponsor Representative Green
Requester House Judiciary Committee Component Serial No. #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Dana LaTour Phone 465-5347
Division Division of Elections Date 1/20/98
Approved by Lt. Governor Fran Ulmer Date 1/20/98
Agency Office of the Lieutenant Governor

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COMMITTEE COPY

discussed
NOT moved

0-LS0939\P.1
Cook
3/4/98

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHJR 36(FIN), Draft Version "P"

Page 4, line 18:

Delete "**and Applicability**"

Page 4, line 19:

Delete "(a)"

Page 4, lines 20 - 21:

Delete all material.

Insert "of the legislature (art. VI and art. XIV), and relating to filing of initiative petitions (art. XI, sec. 3), take effect January 1, 2000."

Page 4, lines 22 - 25:

Delete all material.

Page 4, line 27, following "repealed":

Insert "January 1, 2000"

adopted

3/5/98 #2

AMENDMENT

OFFERED IN THE HOUSE
TO: CSHJR 36(FIN)
0-LS0939\P

Page 3, Line 19

After "legislature until"

Delete "**sixty days"**

Page 3, Lines 19 – 20

After "after the"

Delete "**adoption and final adjudication of the succeeding redistricting plan and proclamation of redistricting** ["

Page 3, Line 21

After "CENSUS"

Delete "]"

R. J. DAVIS

withdrawn

Amendment #3

p. 2 l. 10 after census

insert "The population for each House and Senate district may be adjusted by deducting non-resident military personnel and dependents."

Author: tim.storey@ncsl.org (Tim Storey) at CC2MHS1
Date: 3/4/98 3:59 PM
Priority: Normal
TO: Mike Tibbles at LAA_HTHR
Subject: Redistricting Language

Mike,

"Contiguity

The contiguity requirement-that no part of one district be completely separated from any other part of the same district-has been universally accepted and poses no enforcement problem or serious challenge to districting flexibility pursuit of other fair representation values.

Compactness

The requirement of compactness specifies that the boundaries of each district shall be as short as practicable. Although there is no federal constitutional requirement of compactness, such a requirement may present a certain restraint on gerrymandering and may seem innocuous on its face. Rigid adherence to a compactness, however, phrased, should be avoided. A district pattern of symmetrical squares, although conceivable, well can operate to submerge a significant element of the electorate. As a practical matter, absolute compactness (districts forming perfect circles that are even shorter lines than squares) is an impossibility. Furthermore, a benign gerrymander, in the sense of some asymmetrical districts, may well be required to assure representation of submerged elements within a larger area. Shape requirements focus on form rather than the substance of effective political representation."

I hope this is of some assistance.

Best Regards,
Tim Storey
NCSL staff

NATIONAL CONFERENCE OF STATE LEGISLATURES

TIM STOREY

SENIOR POLICY SPECIALIST
LEGISLATIVE MANAGEMENT

1560 BROADWAY SUITE 700 DENVER COLORADO 80202
303.830-2200 FAX 303-863-8003 tim.storey@ncsl.org

0-LS0939\H
Glover
2/7/98

CS FOR HOUSE JOINT RESOLUTION NO. 36(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GREEN, Martin, Mulder

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing as obsolete language in the article setting out the apportionment schedule used to elect the members of the first state legislature.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** Article V, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. Qualified Voters. Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the **house** [ELECTION] district in which he seeks to vote, except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions.

* **Sec. 2.** Article V, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Voting Precincts; Registration. The legislature may provide a

system of permanent registration of voters, and may establish voting precincts within **house** [ELECTION] districts.

*** Sec. 3.** Article VI, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. House [ELECTION] Districts. Members of the house of representatives shall be elected by the qualified voters of the respective **house** [ELECTION] districts. **The boundaries of the house districts shall be set under this article after each decennial census of the United States** [UNTIL REAPPORTIONMENT, ELECTION DISTRICTS AND THE NUMBER OF REPRESENTATIVES TO BE ELECTED FROM EACH DISTRICT SHALL BE AS SET FORTH IN SECTION 1 OF ARTICLE XIV].

*** Sec. 4.** Article VI, sec. 2, Constitution of the State of Alaska, is amended to read:

Section 2. Senate Districts. Members of the senate shall be elected by the qualified voters of the respective senate districts. **The boundaries of the senate districts shall be set under this article after each decennial census of the United States** [SENATE DISTRICTS SHALL BE AS SET FORTH IN SECTION 2 OF ARTICLE XIV, SUBJECT TO CHANGES AUTHORIZED IN THIS ARTICLE].

*** Sec. 5.** Article VI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Redistricting [REAPPORTIONMENT] of House and Senate. The governor shall **redistrict** [REAPPORTION] the house of representatives **and the senate** immediately following the official reporting of each decennial census of the United States. **Redistricting** [REAPPORTIONMENT] shall be based upon [CIVILIAN] population within each **house and senate** [ELECTION] district as reported by the census.

*** Sec. 6.** Article VI, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Single-Member Districts [METHOD]. The governor shall establish forty single-member house districts, and shall establish twenty senate districts composed of two contiguous house districts, with each senate district to elect one senator. [REAPPORTIONMENT SHALL BE BY THE METHOD OF EQUAL PROPORTIONS, EXCEPT THAT EACH ELECTION DISTRICT HAVING THE MAJOR FRACTION OF THE QUOTIENT OBTAINED BY DIVIDING TOTAL CIVILIAN POPULATION BY FORTY SHALL HAVE ONE REPRESENTATIVE.]

* **Sec. 7.** Article VI, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. **District Boundaries** **[REDISTRICTING].** **As nearly as practicable, each house district** [THE GOVERNOR MAY FURTHER REDISTRICT BY CHANGING THE SIZE AND AREA OF ELECTION DISTRICTS, SUBJECT TO THE LIMITATIONS OF THIS ARTICLE. EACH NEW DISTRICT SO CREATED] shall be formed of contiguous and compact territory containing [AS NEARLY AS PRACTICABLE] a relatively integrated socio-economic area. [EACH SHALL CONTAIN A POPULATION AT LEAST EQUAL TO THE QUOTIENT OBTAINED BY DIVIDING THE TOTAL CIVILIAN POPULATION BY FORTY.] Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

* **Sec. 8.** Article VI, sec. 8, Constitution of the State of Alaska, is amended to read:

Section 8. **Redistricting** **[REAPPORTIONMENT] Board.** The governor shall appoint a [REAPPORTIONMENT] board to act in an advisory capacity to **the governor** [HIM]. It shall consist of five members, none of whom may be public employees or officials. At least one **board** member [EACH] shall be appointed from **each judicial district established by law under Section 1 of Article IV** [THE SOUTHEASTERN, SOUTHCENTRAL, CENTRAL, AND NORTHWESTERN SENATE DISTRICTS]. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

* **Sec. 9.** Article VI, sec. 10, Constitution of the State of Alaska, is amended to read:

Section 10. **Redistricting** **[REAPPORTIONMENT] Plan and Proclamation.** Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for [REAPPORTIONMENT AND] redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of [REAPPORTIONMENT AND] redistricting. An accompanying statement shall explain any change from the plan of the board. The [REAPPORTIONMENT AND] redistricting shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

* **Sec. 10.** Article VI, sec. 11, Constitution of the State of Alaska, is amended to read:

Section 11. Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** or to correct any error in redistricting [OR REAPPORTIONMENT]. Application to compel the governor to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting [OR REAPPORTIONMENT] must be filed withir thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

*** Sec. 11.** Article XI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Petition. After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the **house** [ELECTION] districts of the State, it may be filed with the lieutenant governor.

*** Sec. 12.** Article VI, secs. 5 and 7, and Article XIV, Constitution of the State of Alaska, are repealed.

*** Sec. 13.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

waiting for new draft

0-LS0939\F

CS FOR HOUSE JOINT RESOLUTION NO. 36(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GREEN, Martin, Mulder

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing as obsolete language in the article setting out the apportionment schedule used to elect the members of the first state legislature.

2/6/98 adopted #1

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** Article VI, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. ~~Election~~ House Districts. Members of the house of representatives shall be elected by the qualified voters of the respective election districts. **The boundaries of the ~~election~~ House districts shall be set under this article after each decennial census of the United States** [UNTIL REAPPORTIONMENT, ELECTION DISTRICTS AND THE NUMBER OF REPRESENTATIVES TO BE ELECTED FROM EACH DISTRICT SHALL BE AS SET FORTH IN SECTION 1 OF ARTICLE XIV].

Clear election districts and the House Districts

*** Sec. 2.** Article VI, sec. 2, Constitution of the State of Alaska, is amended to read:

#2 is also

Section 2. Senate Districts. Members of the senate shall be elected by the qualified voters of the respective senate districts. **The boundaries of the senate districts shall be set under this article after each decennial census of the United**

States [SENATE DISTRICTS SHALL BE AS SET FORTH IN SECTION 2 OF ARTICLE XIV, SUBJECT TO CHANGES AUTHORIZED IN THIS ARTICLE].

*** Sec. 3.** Article VI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Redistricting [REAPPORTIONMENT] of House and Senate. The governor shall **redistrict** [REAPPORTION] the house of representatives **and the senate** immediately following the official reporting of each decennial census of the United States. **Redistricting** [REAPPORTIONMENT] shall be based upon [CIVILIAN] population within each election **and senate** district as reported by the census.

*** Sec. 4.** Article VI, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Single-member districts [METHOD]. The governor shall establish forty single-member ~~election~~ districts, and shall establish twenty senate districts composed of two contiguous ~~election~~ districts, with each senate district to elect one senator. [REAPPORTIONMENT SHALL BE BY THE METHOD OF EQUAL PROPORTIONS, EXCEPT THAT EACH ELECTION DISTRICT HAVING THE MAJOR FRACTION OF THE QUOTIENT OBTAINED BY DIVIDING TOTAL CIVILIAN POPULATION BY FORTY SHALL HAVE ONE REPRESENTATIVE.]

*** Sec. 5.** Article VI, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. District Boundaries [REDISTRICTING]. Election districts [THE GOVERNOR MAY FURTHER REDISTRICT BY CHANGING THE SIZE AND AREA OF ELECTION DISTRICTS, SUBJECT TO THE LIMITATIONS OF THIS ARTICLE. EACH NEW DISTRICT SO CREATED] shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. [EACH SHALL CONTAIN A POPULATION AT LEAST EQUAL TO THE QUOTIENT OBTAINED BY DIVIDING THE TOTAL CIVILIAN POPULATION BY FORTY.] Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

*** Sec. 6.** Article VI, sec. 8, Constitution of the State of Alaska, is amended to read:

Section 8. Redistricting [REAPPORTIONMENT] Board. The governor shall appoint a [REAPPORTIONMENT] board to act in an advisory capacity to **the**

governor [HIM]. It shall consist of five members, none of whom may be public employees or officials. At least one board member [EACH] shall be appointed from each judicial district established by law under Section 1 of Article IV [THE SOUTHEASTERN, SOUTHCENTRAL, CENTRAL, AND NORTHWESTERN SENATE DISTRICTS]. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

* **Sec. 7.** Article VI, sec. 10, Constitution of the State of Alaska, is amended to read:

Section 10. Redistricting [REAPPORTIONMENT] Plan and Proclamation. Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for [REAPPORTIONMENT AND] redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of [REAPPORTIONMENT AND] redistricting. An accompanying statement shall explain any change from the plan of the board. The [REAPPORTIONMENT AND] redistricting shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

* **Sec. 8.** Article VI, sec. 11, Constitution of the State of Alaska is amended to read:

Section 11. Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform the [HIS REAPPORTIONMENT] duties assigned to the governor under this article or to correct any error in redistricting [OR REAPPORTIONMENT]. Application to compel the governor to perform the [HIS REAPPORTIONMENT] duties assigned to the governor under this article must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting [OR REAPPORTIONMENT] must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

* **Sec. 9.** Article VI, secs. 5 and 7, and Article XIV, Constitution of the State of Alaska, are repealed.

* **Sec. 10.** The amendments proposed by this resolution shall be placed before the voters

of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

#2029 2-6-98

#2 adopted

Conceptual amendment for new section 5

Wording would be changed to the following:

Section 6 **District Boundaries**. As nearly as practicable, House ~~a~~ each district shall be formed of contiguous and compact territory containing a relatively integrated socio-economic area. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

2-6-98

-withdrawn-

AMENDMENT #3

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 2, line 13:

Delete "**contiguous**" "adjacent" martin

Page 2, lines 19 and 20:

Delete "**and senate districts**"

2-6-98

-withdrawn- #4

AMENDMENT

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 3, line 2:

Delete "employees or"

2-6-98

AMENDMENT

#5

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 3, lines 1 and 2:

Delete "public employees or"

Insert "state employees or public officials"

2-6-98

- withdrawn -

AMENDMENT #6

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 2, beginning line 8:

Insert "civilian"

2-6-98

AMENDMENT

#7

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 2, line 1, following "States":

Insert: "and shall comprise two election districts"

Page 2, line 4:

Delete "House **and Senate**"

Insert "election districts"

Page 2, lines 5 and 6:

Delete "house of representatives and the senate"

Insert "election districts"

Page 2, line 8:

Delete "and senate"

was reaffirmed by *Burns v. Richardson*, which encapsulated *Fortson* with

> [w]here the requirements of *Reynolds v. Sims* are met, apportionment schemes including multimember districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[315]

A. MULTIMEMBER DISTRICTS DRAWN BY COURTS

In the 1970s, the Supreme Court first started to whittle away at the use of multimember districts by discouraging their use in court-drawn plans. In *Connor v. Johnson*, the Court said: "We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multimember districts as a general matter."[316] And in *Chapman v. Meier*, it said: "The standards for evaluating the use of multimember districts thus clearly differ depending on whether a federal court or a state legislature has initiated the use. . . . Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State."[317]

B. APPLICATION OF THE EQUAL PROTECTION CLAUSE

In 1973, the Court in *White v. Regester* upheld a lower court finding that certain multimember legislative districts were in violation of the Equal Protection Clause.

> Plainly, under our cases, multi-member districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. [cites omitted] But we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups. [cites omitted] To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. [cites omitted][318]

The Supreme Court so held as to the black community in one Texas county and the Mexican-American community in another.

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[315] 384 U.S. 73, 88 (1966).

[316] 402 U.S. 690, 692 (1971).

[317] 420 U.S. 1, 18-19 (1975).

[318] 412 U.S. 755, 765-766 (1973).

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AK Supreme Ct

1. **Contiguity.**

Contiguous territory is territory which is bordering or touching. As one commentator has noted, "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)." Grofman, **Criteria for Districting: A Social Science Perspective**, 33 UCLA L. Rev. 77, 84 (1985). Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain some amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration.

2. **Compactness.**

" 'Compact' in the sense used here means having a small perimeter in relation to the area encompassed." **Carpenter**, 667 P.2d at 1218 (Matthews, J., concurring). Compact districting should not yield "bizarre designs." **Davenport v. Apportionment Comm'n of New Jersey**, 124 N.J. Super. 30, 304 A.2d 736, 743 (N.J. Super. Ct. App. Div. 1973), **quoted in Carpenter**, 667 P.2d at 1218-19 (Matthews, J., concurring). We will look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact. **Carpenter**, 667 P.2d at 1218 (Matthews, J., concurring).

The compactness inquiry thus looks to the shape of a district. Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.

3. **Socio-economic Integration.**

In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.

> We should not lose sight of the fundamental principle involved in reapportionment -- truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.

Change in Multimember Legislative Districts from 1980s to 1990s

	State Senates						State Houses					
	Total Number of Districts		Number of Multimember Districts		Largest Number of Seats in a District		Total Number of Districts		Number of Multimember Districts		Largest Number of Seats in a District	
state	1980s	1990s	1980s	1990s	1980s	1990s	1980s	1990s	1980s	1990s	1980s	1990s
Alaska	14	20	6	0	2	1	27	40	13	0	2	1
Arizona							30	30	30	30	2	2
Arkansas							84	97	10	2	3	3
Georgia							156	180	15	0	5	1
Idaho	33	35	6	0	3	1	33	35	33	35	6	2
Indiana							77	100	16	0	3	1
Maryland							59	62	45	44	3	3
Nevada	14	16	7	5	2	2						
New Hampshire							175	132	103	74	10	36
New Jersey							40	40	40	40	2	2
North Carolina	35	42	13	8	3	2	72	98	30	17	4	3
North Dakota	53	49	2	0	2	1	53	49	53	49	2	2
South Dakota							35	35	35	35	2	2
Vermont	13	13	10	10	6	6		108		42		2
Washington							49	49	49	49	2	2
West Virginia	17	17	17	17	2	2	40	56	26	23	12	7
Wyoming	18	30	5	0	4	1	23	60	15	0	9	1

Source: National Conference of State Legislatures

Hickel et al v. Southeast Conference et al (12/29/92) sp-3911

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THE SUPREME COURT OF THE STATE OF ALASKA

WALTER J. HICKEL, Governor of Alaska, STATE OF ALASKA, TUCKERMAN BABCOCK, ALLEN VEZEY, MARY LYNNE WOOD, JOHN C. INGRAM, ROBERT PICKRELL, ORIE WILLIAMS, FISH AND GAME FUND,

Petitioners,

v.

SOUTHEAST CONFERENCE, a non-profit Alaska corporation, PEGGY ANN McCONNOCHIE, FRED E. REEDER; MATANUSKA-SUSITNA BOROUGH, STEVE CYPRA, TED SMITH, AL JORGENSEN, HAROLD NEWCOMB, JOHN STEIN, DUNCAN FRAZIER, GARY THURLOW, ELSIE O'BRYAN, RONDA L. KELLEY; OLIVER LEAVITT, JACOB ADAMS, GEORGE AHMAOGAK, WILLIAM LEAVITT, BENJAMIN NAGEAK, RONALD BROWER, MAX AHGEAK, CHARLES D.N. BROWER, CHARLES "CHUCK" GREENE, ROSWELL SCHAEFFER, MARIE GREENE, REGINALD CLEVELAND, CHARLES CURTIS,

Supreme Court
Nos. S-5093/5154

WILLIE GOODWIN, JR.; MITCHELL A. DEMIENTIEFF, JERRY ISAAC, LEO MORGAN, NICK JACKSON, CLYDE PETER; ALASKA DEMOCRATIC PARTY, LIDIA L. SELKREGG,

Respondents.

SOUTHEAST CONFERENCE, a non-profit Alaska corporation,

Petitioners,

v.

WALTER J. HICKEL, Governor of Alaska, STATE OF ALASKA,

Respondents.

Supreme Court File

No. S-5156

Superior Court No. 1JU 91-01608 Civil

O P I N I O N

[No. 3911 -]

[December 29, 1992]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau,

Larry R. Weeks, Judge.

Appearances: Virginia Ragle and Stephen C. Slotnick, Assistant Attorneys General, Juneau, Mary A. Lundquist, Assistant Attorney General, Anchorage, Charles Cole, Attorney General, Juneau, for Petitioners Walter J. Hickel, Governor of Alaska and State of Alaska. Thomas M. Daniel, Perkins Coie, Anchorage, for Petitioner Fish and Game Fund. Myra M. Munson, Sonosky, Chambers, Sachse, Miller & Munson, Juneau, Donald J. Simon, Sonosky, Chambers, Sachse & Enderson, Washington, D.C., for Respondents Southeast Conference, et al. and Mat-Su Borough, et al. David C. Crosby, Juneau, James Wickwire, Seattle, Wickwire, Greene, Crosby & Seward, for Respondents Leavitt, et al. Don Clocksin, Wagstaff, Pope & Clocksin, Anchorage, for Respondents Alaska Democratic Party, et al. Michael J. Walleri, Tanana Chiefs Conference, Inc., Fairbanks, for Respondents Demientieff, et al. Robert P. Blasco and Mary A. Nordale, Robertson, Monagle & Eastaugh, Juneau, for Amicus Curiae Fairbanks North Star Borough. Joel H. Bolger, Jamin, Ebell, Bolger & Gentry, Kodiak, for Amicus Curiae Kodiak Island Borough; Kenneth P. Jacobus, Anchorage, for Amicus Curiae Constance Zawacki and The Republican Party of Alaska. Michael W. Price, Groh, Eggers & Price, Anchorage, for Amicus Curiae Municipality of Anchorage. Bruce Boltar, Dillingham, Alaska, for Amicus Curiae Bristol Bay Native Association.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

COMPTON, Justice.

MOORE, Chief Justice, concurring, in part, and dissenting, in part.

BURKE, Justice, concurring, in part, and dissenting, in part.

At issue in this petition for review is the validity of the 1991 Proclamation of Reapportionment and Redistricting Plan (plan) issued by Governor Walter J. Hickel.

I. FACTUAL AND PROCEDURAL BACKGROUND

Under the Alaska Constitution, the governor has the power and duty to reapportion the state legislature every ten years. Alaska Const. art. VI, 3; Wade v. Nolan, 414 P.2d 689, 700 (Alaska 1966). In December 1990, Governor Hickel appointed a five member advisory reapportionment board (Board), as is required by article VI, section 8 of the Alaska Constitution. The Board was required to prepare and submit to the Governor a plan for reapportionment and redistricting following the reporting of the decennial census.1

In January 1991, the Board held an organizational meeting, elected Allen Vezey as chair and appointed Tuckerman Babcock as director. In March it adopted the following policies to guide the development of redistricting plans:

* The population base is the 1990 population reported by the United States Census Bureau for the State of Alaska.

* The redistricting plan will be composed of single-member districts.

* One person, one vote: equal protection for all individuals will be realized by equal population among districts, with the least populated and most populated districts separated by a variance of no more than two percent.

* Federal Voting Rights Act: protect and enhance minority political voting strength by a non-retrogression policy and by considering individual linguistic and ethnic blocks.

* Alaska Constitution: compact, contiguous and relatively integrated socio-economic areas for House districts.

* Consider preservation of political subdivision boundaries.

* Consider public testimony, which will be incorporated into the record if received within 75 days after receipt of the United States Census PL94-171 data.

* Accept alternative plans submitted up to 60 days after receipt of the United States Census PL94-171 data for input into the state's computer system, if received in a form allowing direct input into the computer or on United States Geological Survey maps or United States Coast and Geodetic Survey maps.2

With the assistance of computer technology, which made possible more detailed analysis of potential redistricting than was previously available, the Board and its staff began forming a reapportionment plan based on the adopted policies. The Board received the decennial census report from the United States Bureau of the Census in March 1991. The Board held a number of public hearings and reviewed alternative redistricting plans submitted by various interest groups. In June 1991, the Board delivered its report and proposed plan to the Governor.

On September 5, 1991, Governor Hickel issued his Proclamation of Reapportionment and Redistricting and Accompanying Statement. The final plan3 included several relatively minor changes to the Board's proposed district boundaries. The proclamation directed the Attorney General to submit the plan to the United States Department of Justice for preclearance in accordance with section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (1988).4

Seven lawsuits were filed in superior court challenging the Governor's plan.5 Two cases were dismissed with prejudice pursuant to stipulations. Five cases were consolidated for trial before Superior Court Judge Larry R. Weeks.6

After a sixteen day bench trial, Judge Weeks concluded that the Governor's plan was invalid because it violated the Alaska Constitution. Specifically, Judge Weeks concluded that the plan was not in compliance with article VI, section 6 of the Alaska Constitution because two of the districts were not "compact" and eight of the districts did not comprise "as nearly as practicable a relatively socio-economically integrated area." He determined that the Board "needlessly nullified Alaska constitutional requirements" in its attempt to reach its various policy goals, including the creation of districts with no more than two percent population deviation from the ideal district size. He also concluded that the Board failed to give due consideration to the possibility of excluding non-resident military personnel from the population base, and that this failure was arbitrary and unreasonable. Judge Weeks held that the Board violated the Open Meetings Act, AS 44.62.310, but ruled that voiding the plan on the basis of this violation was not in the public interest. He also concluded that the Board violated the Public Records Act, AS 09.25.110-140, and the Procurement Code, AS 36.30.

Pursuant to Alaska Appellate Rule 402(a), Governor Hickel and the State of Alaska (State) petitioned this court for review, contending that Judge Weeks had erred: 1) in finding that the plan violated the equal protection clause of the Alaska Constitution; 2) in his interpretation of article VI, section 6 of the Alaska Constitution and in his

determination that the plan violated this section; 3) in concluding that the Open Meetings Act, AS 44.62.310, and the Public Records Act, AS 09.25, applied to and were violated by the Governor's Advisory Reapportionment Board; and 4) in substituting his judgment for that of the Board with regard to matters within the Board's discretion.

We granted the State's petition to review the decision, and expedited the proceedings. On May 28, 1992, we concluded that the Governor's plan violated the Alaska Constitution. See Appendix B. We affirmed the superior court's findings of fact and conclusions of law that House Districts 1, 2, 3, 6, 26, 28, 34 and 35 violate requirements of article VI, section 6 of the Alaska Constitution. We also affirmed its holdings that the Open Meetings Act and the Public Records Act apply to the Board. However, we reversed its holding that the Board's decision not to exclude non-resident military from the population base was arbitrary and unreasonable.

In a separate Order of Remand, later corrected, we directed the superior court to remand the case to the Board for formulation of a final plan. However, because of time constraints, we also directed the court to formulate an interim plan so that 1992 state elections might proceed in conformity with the requirements of the United States Constitution, the Alaska Constitution and the federal Voting Rights Act. Further, we authorized the court to employ experts or masters to assist in the formulation of an interim plan. See Appendix C.

Thereafter the superior court appointed three masters. After receiving instructions from the court7 and reviewing alternative plans proposed by the parties, the masters

presented a recommended interim plan to the court on June 14. In Orders dated June 18 and 19,8 the superior court accepted the Masters' recommendation, with several modifications including a redrawing of the Fairbanks House Districts. The parties cross-petitioned this court for review of the court's orders. On June 25, after considering oral and written arguments, we granted the petition and affirmed the court's interim plan with modifications required by our determination that the court had erred in redrawing the Fairbanks House Districts.9

II. LEGISLATIVE REAPPORTIONMENT

> Now the goal of all apportionment plans is simple: the goal is adequate and true representation by the people in their elected legislature, true, just, and fair representation. And in deciding and in weighing this plan, never lose sight of that goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government.

3 Proceedings of the Constitutional Convention (PACC) 1835 (January 11, 1956).

Legislative reapportionment is subject to a variety of legal requirements. The Federal Constitution, the Federal Voting Rights Act, and the Alaska Constitution all contain commands which guide the formation of a reapportionment plan. It is the interaction of these diverse and often diverging guidelines which makes reapportionment a difficult process. Because these guidelines sometimes lead in different directions, it is important to understand how they fit together.

A. ARTICLE VI, SECTION 6 OF THE ALASKA CONSTITUTION.

The mandate for redistricting the election districts of the Alaska House of Representatives is found in article VI, section 6 of the Alaska Constitution:

> The governor may further redistrict by changing the size and area of election districts, subject to the limitations of this article. Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each area shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

Contiguity, compactness and relative socio-economic integration are constitutional requirements. See Kenai Peninsula Borough v. State, 743 P.2d 1352, 1360-61 (Alaska 1987) ("The state must consistently enforce the constitutional article VI, section 6 requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting."). A district lacking any one of these characteristics may not be constitutional under the Alaska Constitution.10

The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering. 3 PACC 1846 (January 11, 1956) ("[The requirements] prohibit[] gerrymandering which would have to take place were 40 districts arbitrarily set up by the governor. . . . [T]he Committee feels that gerrymandering is definitely prevented by these restrictive limits."). Gerrymandering is the dividing of an area into political units "in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others."11 Carpenter v. Hammond, 667 P.2d 1204, 1220 (Alaska 1983) (Matthews, J., concurring).

The constitutional requirements help to ensure that the election district boundaries fall along natural or logical lines rather than political or other lines.

1. Contiguity.

Contiguous territory is territory which is bordering or touching. As one commentator has noted, "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)." Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 84 (1985). Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain some amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration.

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"`Compact' in the sense used here means having a small perimeter in relation to the area encompassed." Carpenter, 667 P.2d at 1218 (Matthews, J., concurring). Compact districting should not yield "bizarre designs." Davenport v. Apportionment Comm'n of New Jersey, 304 A.2d 736, 743 (N.J. Super. Ct. App. Div. 1973), quoted in Carpenter, 667 P.2d at 1218-19 (Matthews, J., concurring). We will look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact. Carpenter, 667 P.2d at 1218 (Matthews, J., concurring).

The compactness inquiry thus looks to the shape of a district. Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.

3. Socio-economic Integration.

In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.

> [W]e should not lose sight of the fundamental principle involved in reapportionment -- truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.

Groh, 526 P.2d at 890 (Erwin, J., dissenting).

We have looked before to the Minutes of the Constitutional Convention for guidance in defining "relatively integrated socio-economic area." Kenai Peninsula Borough, 743 P.2d at 1360 n.11; Carpenter, 667 P.2d at 1215; Groh, 526 P.2d at 878. The delegates explained the "socio-economic principle" as follows:

> [W]here people live together and work together and earn their living together,

> where people do that, they should be logically grouped that way.

3 PACC 1836 (January 11, 1956). Accordingly, the delegates define an integrated socio-economic unit as:

> an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits.

3 PACC 1873 (January 12, 1956).

In order to satisfy this constitutional requirement, the Governor must provide "sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction and interconnectedness rather than mere homogeneity." Kenai Peninsula Borough, 743 P.2d at 1363. In areas where a common region is divided into several districts, significant socio-economic integration between communities within a district outside the region and the region in general "demonstrates the requisite interconnectedness and interaction," even though there may be little actual interaction between the areas joined in a district. Id. (declining to draw a fine distinction between the interaction of North Kenai with Anchorage and North Kenai with South Anchorage). "The sufficiency of the contacts between the communities involved here can be determined by way of comparison with districts which we have previously upheld." Id. A district will be held invalid if "[t]he record is simply devoid of significant social and economic interaction" among the communities within an election district. Carpenter, 667 P.2d at 1215.

In our previous reapportionment decisions we have identified several specific characteristics of socio-economic integration. In Kenai Peninsula Borough, we found that service by the state ferry system, daily local air taxi

service, a common major economic activity, shared fishing areas, a common interest in the management of state lands, the predominately Native character of the populace, and historical links evidenced socio-economic integration of Hoonah and Metlakatla with several other southeastern island communities.12 743 P.2d at 1361.

In the same case, we found it persuasive that North Kenai and South Anchorage were geographically proximate, were linked by daily airline flights, shared recreational and commercial fishing areas, and were both strongly dependent on Anchorage for transportation, entertainment, news and professional services. Id. at 1362-63.

In Groh, we stated that "patterns of housing, income levels and minority residences" in an urban area "may form a basis for districting, [although] they lack the necessary significance to justify" large population variances. 526 P.2d at 879. We identified transportation ties, namely ferry and daily air service, geographical similarities and historical economic links as more significant factors. Id. (holding that a district in southeast Alaska comprising the mainland communities of Juneau, Haines and Skagway was sufficiently integrated, considering that the rest of Southeast was island oriented).

The Alaska Constitution requires districts comprising "relatively integrated" areas. Alaska Const. art. VI, 6. Petitioners argue that the term "relatively" diminishes the degree of socio-economic integration required within an election district. We are urged to compare all proposed districts with a hypothetical completely unintegrated area, as if a district including both Quinhagak and Los Angeles had been proposed. We decline to adopt petitioners'

interpretation of this provision.

"Relatively" means that we compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient. "Relatively" does not mean "minimally," and it does not weaken the constitutional requirement of integration.

B. EQUAL PROTECTION.

"In the context of voting rights in redistricting and reapportionment litigation, there are two principles of equal protection, namely that of `one person, one vote' -- the right to an equally weighted vote -- and of `fair and effective representation' -- the right to group effectiveness or an equally powerful vote." Kenai Peninsula Borough, 743 P.2d at 1366. The former is quantitative, or purely numerical, in nature; the latter is qualitative. Id. at 1366-67.

The equal protection clause of the Alaska Constitution13 has been interpreted along lines which resemble but do not precisely parallel the interpretation given the federal clause.14 While the first part, "one person, one vote," has mirrored the federal requirement, see, e.g., Groh, 526 P.2d at 875, the second part, "fair and effective representation," has been interpreted more strictly than the analogous federal provision.

1. One Person, One Vote.

"[A] State [must] make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964), quoted in Kenai Peninsula Borough, 743 P.2d at 1358. "Whatever the means of

accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." Reynolds, 377 U.S. at 579.

We discussed the Supreme Court's equal population requirement of "substantial equality" in Kenai Peninsula Borough:

> Under a "one person, one vote" theory, "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." . . . [A]s a general matter an apportionment plan containing a maximum population deviation under 10% falls within the category of minor deviations. The state must provide justification for any greater deviation.

743 P.2d at 1366 (quoting Gaffney v. Cummings, 412 U.S. 735, 745 (1973)) (citations omitted).15 Thus, we have recognized that the effectuation of the article VI, section 6 requirements will justify population deviations greater than 10 percent. Id. at 1360. Accordingly, as a matter of federal constitutional law the Governor may in good faith declare election districts with a maximum population deviation greater than 10 percent, if such deviations are a result of the creation of contiguous, compact and relatively socio-economically integrated areas.16

We have identified several other state policies which may also justify a population deviation greater than 10 percent. We noted that a state's desire to maintain political boundaries is sufficient justification provided this principle is consistently applied. Kenai Peninsula Borough, 743 P.2d at 1360. Similarly, we implied that adherence to

Native corporation boundaries might also provide justification, as long as the boundaries were adhered to consistently. Groh, 526 P.2d at 877-78 (holding that the utilization of a portion of the Calista corporate boundary as a district boundary was not an adequate justification where the Calista region was otherwise fractionated by the reapportionment plan).17

On the other hand, we have rejected several policies as inadequate justifications for population deviation. We held that the "mining potential in the [Nome] area and the need for a 'common port facility'" did not justify a 15 percent overrepresentation where "the makeup of the population both to the north and the east [did] not vary significantly from that of the adjoining villages within the Nome [election district] boundaries." Groh, 526 P.2d at 877.

2. Fair and Effective Representation.

In addition to the guarantee of substantial mathematical equality, the Equal Protection Clause of the United States Constitution provides for the more nebulous guarantee of fair representation. Under this qualitative principle, certain mathematically palatable apportionment schemes will be overturned because they systematically circumscribe the voting impact of specific population groups. This principle recognizes the danger that racial and political groups will be fenced out of the political process and their voting strength invidiously minimized." Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

A plurality of the United States Supreme Court has indicated that a mere lack of proportional representation will be insufficient to support a finding of unconstitutional vote dilution. Plaintiffs must prove both intentional

discrimination against a group and a discriminatory effect on that group.18 Davis v. Bandemer, 478 U.S. 109, 127 (1986). In addition, the plurality opinion requires a showing of a pattern of discrimination:

> In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Id. at 133, quoted in Kenai Peninsula Borough, 743 P.2d at 1369. Thus, under the qualitative principle of federal equal protection, fair representation is denied where there is "proof that the group has been consistently and substantially excluded from the political process [and] denied political effectiveness over a period of more than one election." Kenai Peninsula Borough, 743 P.2d at 1369.

The equal protection clause of the Alaska Constitution imposes a more strict standard than its federal counterpart. Kenai Peninsula Borough, 743 P.2d at 1371; Isakson v. Rickey, 550 P.2d 359, 362-63 (Alaska 1976) (requiring a more flexible and demanding standard and noting that the court "will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard"). In the context of reapportionment, we have held that upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation. Kenai Peninsula Borough, 743 P.2d at 1372. Because of the more strict standard, we do not require a showing of a pattern of discrimination, and do not consider any effect of disproportionality de minimis when determining the legitimacy of the Board's purpose. Id.

C. VOTING RIGHTS ACT.

The Federal Voting Rights Act, 42 U.S.C. 1973 (1988), also plays a significant role in the reapportionment of state election districts. The purpose of this Act is to protect the voting power of racial minorities: "Under section 5 of the Act, a reapportionment plan is invalid if it 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" Kenai Peninsula Borough, 743 P.2d at 1361 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)); 42. U.S.C. 1973c (1988). We have noted that compliance with section 5 is a legitimate goal of a Reapportionment Board: "A state may constitutionally reapportion districts to enhance the voting strength of minorities in order to facilitate compliance with the Voting Rights Act." Kenai Peninsula Borough, 743 P.2d at 1361.

Section 2 of the Act, as amended in 1986, creates a cause of action to remedy the use of certain electoral laws or practices which, when interacting with social and historical conditions, create an inequality in the opportunities enjoyed by voters to elect their preferred representatives. Thornburg v. Gingles, 478 U.S. 30, 47 (1986). Plaintiffs may have a redistricting plan or an election invalidated if they can prove that 1) under the totality of the circumstances, the redistricting results in unequal access to the electoral process; and 2) racially polarized bloc voting exists. "[T]he conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation." Id. at 46.

In each of our previous reapportionment decisions we have

noted the difficulty in drawing election districts in Alaska. We have emphasized the need to preserve flexibility in the redistricting process so that all constitutional requirements may be satisfied as nearly as practicable.

> At the outset we recognize the difficulty of creating districts of equal population while also conforming to the Alaska constitutional mandate that the districts "be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area." When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state. Surprisingly small changes in district boundaries create large percentage variances from the ideal population.
>
> . . . .
>
> When confronted with conditions so different from those of any other single state in the continental United States, it is readily apparent that it becomes well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states.

Egan v. Hammond, 502 P.2d 856, 865-66 (Alaska 1972) (footnotes omitted) (quoting Alaska Const. art VI, 6), quoted in Groh, 526 P.2d at 875 and Kenai Peninsula Borough, 743 P.2d at 1359.

Thus, although the Board and the Governor are free to pursue their own policies and goals in recommending and declaring redistricting and reapportionment, such policies may not be pursued at the expense of the federal and Alaska constitutional and statutory mandates.

III. REGIONAL APPLICATIONS

A. SOUTHEAST ALASKA.

Under the Governor's reapportionment plan, southeast Alaska (Southeast) was divided into five election districts, designated 1 through 5.19 Respondent Southeast Conference contends that Districts 1, 2 and 3 violate article VI, section 6 of the Alaska Constitution. The trial court agreed, finding specifically that "The districts of Southeast are not socio-economically integrated and they easily could have been." We affirm this conclusion.

District 1 includes most of the Ketchikan Gateway Borough, the City of Wrangell and the eastern half of Prince of Wales Island. District 2 includes most of Sitka and the cities of Haines and Petersburg. District 3 includes the downtown portions of Sitka and Ketchikan, the City of Saxman, the communities of Annette, Metlakatla, Hydaburg, Craig, Point Baker, Port Armstrong, Pelican and Yakutat. As such, it includes parts of Chichagof, Baranof, Admiralty, Kupreanof, Prince of Wales and Revillagigedo Islands. District 3 stretches almost the entire length of Southeast from Annette to Yakutat.

The districts created by the Governor's plan do not take into account several local municipal boundaries. The plan separates the downtowns of two major cities from the rest of the cities (Sitka and Ketchikan). It also splits two closely interrelated cities, Ketchikan and Saxman. Further, the plan ignores natural geographic boundaries by splitting all of the major islands of the Alexander Archipelago.

Article VI, section 6 does not require that districts be drawn along municipal boundaries. Rather, the provision states only that "[c]onsideration may be given to local government boundaries." Alaska Const. art. VI, 6. However, local boundaries are significant in determining

whether an area is relatively socio-economically integrated. By statute, a borough must have a population which "is interrelated and integrated as to its social, cultural, and economic activities." AS 29.05.031.20

Divisions of Ketchikan and Sitka are not permissible unless the resulting districts evidence a pattern of relative socio-economic integration. The resulting District 3 is not composed of relatively integrated socio-economic areas. District 3 mixes the small, rural, Native communities with the urban areas of Ketchikan and Sitka. These rural and urban communities have different social concerns and political needs. Logical and natural boundaries cannot be ignored without raising the specter of gerrymandering.

The Ketchikan Gateway Borough has a population of 13,828, only 71 people above the ideal district size. Saxman, part of the Borough, is more socio-economically integrated with the City of Ketchikan than it is with other Native communities of the Southeast islands.21 Prince of Wales Island is likewise more socio-economically integrated as a whole than it is relative to the rest of District 3 in which the western half of the island was placed.

The Board cited the Voting Rights Act as its justification in creating District 3. District 3 was meant to be a Native influence district. The proposed configuration of District 3 raised the Native percentage of the district two percentage points compared to the old "Islands District." However, such an awkward reapportionment of the Southeast Native population was not necessary for compliance with the Voting Rights Act.22 An "Island" District can be configured which satisfies the requirements of the Voting Rights Act and which is more compact and better integrated socially.23

Thus, Districts 1, 2 and 3 all violate article VI, section 6 of the Alaska Constitution. These districts do not contain, as nearly as practicable, relatively integrated socio-economic areas, identified with due regard for local governmental and geographic boundaries. Although these boundaries need not necessarily be followed in creating election districts, they must be considered by the Board in so far as they indicate the true socio-economic integration of several areas.

B. MATANUSKA-SUSITNA BOROUGH.

The Matanuska-Susitna (Mat-Su) Borough was divided among five house districts, designated 6, 26, 27, 28 and 34.24 Only District 27 is wholly composed of land within the Mat-Su Borough. District 6 groups Palmer with Prince William Sound. District 26 groups the residential neighborhoods between Palmer and Wasilla with Chugiak and the northern communities of the Municipality of Anchorage. District 28, stretching to the Canadian border, comprises interior Ahtna areas and parts of the Gulkana and Copper River valleys. It includes Glennallen, Tok and Delta Junction. It also includes a narrow corridor which reaches into the Mat-Su Borough, and encompasses the outskirts of Palmer and Wasilla.25 District 34 combines Willow, Talkeetna and a large portion of the rural northern part of the Mat-Su Borough with a majority of the Denali Borough and a part of the Fairbanks North Star Borough that includes the communities of North Pole, Salcha and Eielson Air Force Base.

As noted above, a borough is by definition socio-economically integrated. It is axiomatic that a district composed wholly of land belonging to a single borough is

adequately integrated. Thus, District 27 complies with that requirement.

We recognize that it may be necessary to divide a borough so that its excess population is allocated to a district situated elsewhere. However, where possible, all of a municipality's excess population should go to one other district in order to maximize effective representation of the excess group.26 This result is compelled not only by the article VI, section 6 requirements, but also by the state equal protection clause which guarantees the right to proportional geographic representation. See Kenai Peninsula Borough v. State, 743 P.2d 1352, 1369, 1372-73 (Alaska 1987) (stating that a primary indication of intentional discrimination against a geographic region was a lack of adherence to established political subdivision boundaries).

In this case, the Mat-Su Borough population is allocated between five districts. With the exception of District 27, the resulting districts have serious shortcomings in their resulting relative socio-economic integration.

District 6 merges Palmer with the Prince William Sound communities. Palmer is the governmental center of the Mat-Su Borough, an established agricultural area. In contrast, the Prince William Sound communities are oriented toward commercial fishing and maritime activities. Further, Palmer is part of an organized borough whereas Prince William Sound is not. The interests of Palmer residents may be adverse to those of the residents of an unorganized borough on issues such as property taxes and state funding of programs such as education.

There is evidence of some socio-economic integration between

the Mat-Su Borough areas and the Anchorage areas of District 26. However, considerable testimony indicated that the Mat-Su residents were more naturally linked to Palmer and Wasilla than they were to Anchorage. Moreover, we find it significant that Palmer, Wasilla and the area between them were placed in three separate districts despite the fact that these communities share most of their public facilities.

District 28 also does not contain relatively socio-economically integrated areas. It too combines a region of Mat-Su with an unorganized borough. It also includes part of the primarily rural Denali Borough. Moreover, District 28 fails for its lack of compactness. The corridor which extends into the Mat-Su Borough was prompted by a desire to attain mathematical equality among legislative districts. However, we have previously noted that population deviations up to 10 percent require no justification and that the Board may use larger deviations in order to effectuate the requirements of article VI, section 6. Kenai Peninsula Borough v. State, 743 P.2d 1352, 1260 (Alaska 1987). The Board's failure to create a compact district is not justified by rigid adherence to mathematical equality.

District 34 also fails for its lack of relative socio-economic integration. This district links two areas with almost no socio-economic integration. The Mat-Su Borough communities in this district are rural and thus share few common interests with the suburban Fairbanks and military areas of the Fairbanks North Star Borough.

We thus hold that the configuration dividing the Mat-Su Borough among five districts is invalid. The Governor's plan unfairly dilutes the proportional representation the

residents of the Mat-Su Borough are guaranteed. A municipality should not be made to contribute so much of its population to districts centered elsewhere that it is deprived of representation which is justified by its population. The plan also results in four districts which are not relatively socio-economically integrated and one district which is not sufficiently compact.

C. ELECTION DISTRICT 35.

Under the Board's plan, District 35 encompasses a vast portion of interior and northern Alaska.27 Its boundaries extend from Point Hope on the northwest coast to the border of Alaska and Canada on the east, and from Barrow in the north to Tyonek in the south. Thus constructed, District 35 also includes the area between the Brooks Range and the Arctic Ocean, which is commonly referred to as the North Slope, and traditionally inhabited by the Inupiaq Eskimo. To the south, District 35 extends across the Brooks Range to include much of the sparsely populated river drainages of interior Alaska28 traditionally inhabited by the Athabaskan Indians.

Judge Weeks described the joining of the North Slope Inupiaq and the Interior Athabaskan areas into one district as "probably the single worst combination that could be selected if a board were trying to maximize socio-economic integration in Alaska." The linkage of these geographically divided and culturally distinct areas has been described as a "worst case scenario."

The record indicates that the Board formed the boundaries of District 35 with little consideration of the relative socio-economic integration of the people who live there. Board Chair Vezey testified that he placed little reliance on a

socio-economic study of the area. Mr. Vezey also noted that there was no testimony from Inupiaq or Athabaskan witnesses favoring linkage of the areas. Further, Board member Pickrell recalled no discussion by the Board regarding joining the Inupiaq and Athabaskan areas. The record also demonstrates minimal past and present socio-economic integration between the Inupiaq and Athabaskan cultures. Brenda Itta-Lee, an Inupiaq community leader from Barrow, and Georgianna Lincoln, a representative in the state legislature and Athabaskan community leader from Rampart, both testified regarding the physical separation of the two cultures and the historical, linguistic and economic differences between the cultures. Evidence introduced at trial indicates that the average annual per capita resident income on the North Slope exceeds $26,000 while in the Doyon Athabaskan region the average is less than $6000. Social scientists who testified at trial described the actual socio-economic integration between the Inupiaq and Athabaskan as insignificant.

Based on the record, we conclude that District 35 violates article VI, section 6 of the Alaska Constitution because it does not encompass, as nearly as practicable, a relatively integrated socio-economic area.

D. THE ALEUTIAN ISLANDS.

The Board's plan divides the Aleutian Islands between two districts.29 The eastern Aleutians are in District 39, and the western Aleutians in District 37. On its face this severance violates the contiguous territory requirement of article VI, section six of the Alaska Constitution.30 Although the parties did not raise this issue, the separation of the Aleutian Islands is so plainly erroneous

that we address the issue sua sponte. Thus, in exercise of our authority under article IV, section two of the Alaska Constitution, we hold that the separation of the Aleutian Islands into two districts violates article VI, section six of the Alaska Constitution.

IV. POPULATION BASE

The Board used the 1990 census as its population base. However, the Board did not subtract from the census data military personnel who were stationed in Alaska at the time the census was taken, but who did not consider themselves Alaska residents. The Governor did not vary the population base from the Board's recommendation.

Previously we held that the exclusion of non-resident military personnel (NRMP) from the population base is constitutionally permissible. However, we have never decided whether exclusion was constitutionally required. We have not addressed this issue before because NRMP have been excluded from the population base in every previous district reapportionment, with the exception of the interim plan we devised for the 1972 elections following Egan v. Hammond, 502 P.2d 856, 870 (Alaska 1972).

The state argues that the inclusion of NRMP was a policy choice it was allowed to make, and that we should defer to that choice. The state argues further that inclusion of NRMP is permissible because it is impossible to accurately estimate the number of military personnel who are not residents. It notes that this question is different with this reapportionment because the United States Army and Air Force no longer make personnel data available to the state. The state maintains that in light of this, it acted within

its discretion by including all military personnel in the population base.31

The respondents argue that exclusion is constitutionally required since inclusion would violate the reapportionment provisions and the equal protection clause of the Alaska Constitution. They argue that the effect of the inclusion is the dilution of the voting power of residents of areas of Alaska without large military populations.

In Egan, we implemented an interim plan without a NRMP exclusion because "it was not possible to compile sufficiently accurate data to provide a reasonable basis for excluding any number of military from the population base." 502 P.2d at 870. However, we also recognized "the need for a permanent plan which achieves a level of accuracy of [the military population's] voting participation which is closer than either including or excluding all military as a class."32 502 P.2d at 870. "[T]he challenge is to arrive at the best approximation of the population to be counted without losing sight of the fact that the right of equal representation is also an individual and personal right." Egan, 502 P.2d at 869.

We therefore hold that exclusion is not constitutionally required if it is not possible to accurately identify those military personnel who are non-residents.33 However, it is necessary to consider alternative plans for obtaining a sufficiently accurate plan for estimating the number of NRMP. Id. (noting that it was "incumbent upon [this court] to discuss alternative plans which may be available to handle the problem"). See also Groh v. Egan, 526 P.2d 863, 868 (Alaska 1974) (finding that the Board's careful examination of alternatives supported the conclusion that

the state's choice of population base was rational).

The key determination is whether the Board's efforts in "discussing the alternatives" were sufficient to support its conclusion that compiling accurate data was impossible. The trial court found that a "hard look" was required. The hard look requirement is consistent with our previous acknowledgment that the state has a compelling interest in attempting to exclude NRMP. Carpenter, 667 P.2d at 1213 (identifying the "compelling state interest" as "the prevention of the dilution of its residents' voting strength"). See also Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

Judge Weeks identified six "legitimate reasons" for including the NRMP. He also found that although the extent of non-residency among the military was determinable, it was unclear whether it was possible to make a reliable determination of the enumeration districts in which non-resident, off-base military personnel lived. Despite these findings, he concluded that the Board did not take a "hard look" at this issue. The inclusion of all military personnel in the population base was thus not justifiable.

Judge Weeks apparently believed that the reasons stated by the Board for including NRMP were post hoc justifications. Also he found it significant that the Board's legal advisor advised strongly to exclude NRMP.

At its March 4, 1991 meeting, the Board adopted the policy that the population base for the reapportionment would be the 1990 census data. The Board decided that it would not

adjust the census data to account for NRMP.

In its Report and Proposed Plan, the Board discussed several methods for determining the appropriate adjustment to be made. The Board discussed the method used by the 1973 Board whereby the number of Alaska residents on a military base was determined by multiplying the number of registered voters on the base by the statewide person-counted/registered-voter ratio. The number of "residents" obtained was then divided by the number of adults living on the base to derive a percentage of residents. When the same method was applied to the 1990 data, all the military bases showed a greater than one hundred percent resident percentage.

The Board explained that other available survey methods were not adequate. It indicated that it had received expert advice that the survey method used in the Department of Labor study made that study inadequate to serve as a basis for making an adjustment. The Board also stated that it had solicited surveys from two political pollsters in Alaska and had been rejected.34 The Board explained that "a poll taken a significant period of time after the Census enumeration 'would be a sampling of a different set of people with possibly changed attitudes.'" (quoting Egan, 502 P.2d at 887). Finally, the Board eliminated Permanent Fund Dividend applications, Military Leave and Earning statements, and registered voter data bases as reliable sources of information about residency.35

The Board attempted to discover what other alternatives existed. As noted, the Board received expert opinion that an accurate survey was methodologically impossible. Even when the Board was told that a statewide survey was

possible, it was told that identifying the NRMP in each district would be impossible.36 The Board discussed the expert opinion at its March 4 meeting and agreed with the proposal of director Babcock that, at least as an initial guideline, the survey could not be performed. Additionally the Board determined that the inclusion of NRMP would not result in a rural/urban bias. The Board thus concluded that its original guideline of using the census data as its population base was proper.

Based on what we have previously required of reapportionment boards, we conclude that the Board's "look" was "hard" enough. It is not necessary to attempt a survey or statistical analysis when a thorough examination reveals that such a survey is not possible. Groh, 526 P.2d at 868-69. Rather, we need only be assured that the Governor's authority was "exercised in a rational as opposed to an arbitrary manner." Id. at 868. Although we have found a "thorough and exemplary exploration" to be persuasive in proving that the Board's decision was rational, we have not required it. Groh, 526 P.2d at 868. The Board's consideration of alternatives and expert advice was sufficient examination.

V. PROCEDURAL DEFECTS (OPEN MEETINGS AND PUBLIC RECORD ACTS)

Judge Weeks concluded that the Board violated the Open Meetings Act37 and the Public Records Act38 as it formulated its reapportionment plan. However, he also determined that "[b]ecause of the other decisions in this case, the public interest is better served by not voiding the plan on the basis of Open Meetings Act violations." He did not grant relief on the basis of the Open Meetings Act or the Public

Records Act.

We agree with Judge Weeks that these Acts generally apply to the activities of the Reapportionment Board. However, since he did not grant relief on the basis of either Act, we decline to determine the extent of their application to specific activities. Similarly, we decline to determine whether an independent constitutional basis exists for ensuring public access to the Board's meetings. Accordingly, we affirm only the trial court's determination that the Open Meetings Act and Public Records Act apply generally to the activities of the Reapportionment Board.

VI. CONCLUSION

We AFFIRM the superior court's conclusion that the plan's formulation of Districts 1, 2 and 3 violates article VI, section 6 of the Alaska Constitution, because the districts are not "socio-economically integrated and they easily could have been." We also AFFIRM its conclusion that the configuration which divides the Mat-Su Borough among five districts (designated 6, 26, 27, 28 and 34) is invalid, since it unfairly dilutes the proportional representation guaranteed to the Mat-Su Borough's residents. Further, we AFFIRM its conclusion that District 35, which joins the North Slope Inupiaq and the Interior Athabaskan areas, violates article VI, section 6 of the Alaska Constitution because it does not encompass a relatively integrated socio-economic area.

We conclude independently that the separation of the Aleutian Islands into two districts violates the contiguous territory requirement of article VI, section 6 of the Alaska Constitution.

We AFFIRM the superior court's conclusion that the Open Meetings Act and Public Records Act apply to the Board. We decline to address its conclusion that the public interest would not be served by voiding the plan on the basis of Open Meetings Act violations.

We REVERSE the superior court's conclusion that the Board failed to make a reliable determination regarding the inclusion or exclusion of non-resident military personnel. The Board's consideration of various alternatives and expert advice was a sufficient "hard look" at this issue.

The case has been remanded to the superior court with directions to remand the 1991 Proclamation of Reapportionment and Redistricting Plan to the Board for reformulation consistent with
our Order of June 8, 1992, and this opinion.

MOORE, Chief Justice, concurring, in part, and dissenting, in part.

To the extent indicated in the attachment to today's opinion marked "APPENDIX C," I continue to dissent. Otherwise, I concur in the action that we have taken in this case, and in the opinion of the court.

BURKE, Justice, concurring, in part, and dissenting, in part.

To the extent indicated in the attachments to today's opinion marked "APPENDIX B" and "APPENDIX C," I continue to dissent. Otherwise, I concur in the action that we have taken in this case, and in the opinion of the court.

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APPENDIX A: Governor Hickel's 1991 Reapportionment Plan (Final Plan)

APPENDIX B: Order, May 28, 1992, Alaska Supreme Court

APPENDIX C: Corrected Order of Remand, June 8, 1992, Alaska Supreme Court

APPENDIX D: Order, June 11, 1992, Alaska Supreme Court

APPENDIX E: Memorandum and Order, June 18, 1992, Superior Court Judge Larry Weeks

APPENDIX F: Memorandum and Order, June 19, 1992, Superior Court Judge Larry Weeks

APPENDIX G: Order, June 25, 1992, Alaska Supreme Court

APPENDIX H: 1992 Interim Reapportionment Plan, June 25, 1992

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1. Article 2, section 10 of the Alaska Constitution provides as follows:

> Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for reapportionment and redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of reapportionment and redistricting. An accompanying statement shall explain any change from the plan of the board. The reapportionment and redistricting shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

2. The Board later modified its policy regarding equal population among districts. It adopted a motion which directed the staff to:

> use up to a 10 percent variance in preparing the final three statewide alternative scenarios, for the purposes of compliance with the federal Voting Rights Act. Any other variance from the Board's two percent guideline must be justified by the need to comply with the Alaska Constitutional requirement that each district contain as nearly as possible a relatively integrated socio-economic area, or by limitations in the technology or data bases used by staff in preparing the statewide alternatives.

3. The final plan which was reviewed in this case is attached as Appendix A. It contains detail maps of the Southeast and Matanuska-Susitna Borough Districts, as well as a statewide map.

4. In April 1992 the U.S. Department of Justice notified the State that it would not object to the Governor's plan.

5. Article VI, section 11 of the Alaska Constitution provides:

> Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform his reapportionment duties or to correct any error in redistricting or reapportionment. . . . Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

6. The five cases which were consolidated included: Alaska Democratic Party v. Hickel, Case No. 3AN-91-8539 Civil; Matanuska-Susitna Borough v. Hickel, Case No. 3AN-91-8520 Civil; Demientieff v. Hickel, Case No. 4FA-91-1730 Civil; Leavitt v. Hickel, Case No. 2BA-91-81 Civil; and Southeast Conference v. Hickel, Case No. 1JU-91-1608 Civil. All parties participated fully in the trial before Judge Weeks.

7. On June 11, 1992, we disapproved of Judge Weeks' instruction that wherever possible native influence districts must include a native population of at least 35%. See Appendix D.

8. These are attached as Appendices E and F, respectively.

9. Our order of June 25, 1992 is attached as Appendix G The map which depicts the interim plan of apportionment approved by this court on June 25, 1992, is attached as Appendix H.

10. The requirement of relative socio-economic integration is given some flexibility by the constitution since districts need be integrated only "as nearly as practicable." Alaska Const. art. VI, 6. However, the flexibility that this clause provides should be used only to maximize the other constitutional requirements of contiguity and compactness. The governor is not permitted to diminish the degree of socio-economic integration in order to achieve other policy goals.

11. Black's Law Dictionary defines gerrymandering as:

> A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines.

Black's Law Dictionary (6th ed. 1990).

We have previously stated: "Gerrymandering is `the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes. The term `gerrymandering,' however, is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls.'" Kenai Peninsula Borough, 743 P.2d at 1367 n.28 (quoting Davis v. Bandemer, 478 U.S. 109, 164 (1986)) (citations omitted).

The word "gerrymandering" has an unusual etymology. The word derives from "the fancied resemblance to a salamander (made famous by caricature) of the irregularly shaped outline of an election district in northeastern [Massachusetts] that had been formed for partisan purposes in 1812 during [Elbridge] Gerry's governorship." Webster's Third New International Dictionary (3d ed. 1969).

12. We did not decide whether these characteristics were specifically necessary to pass muster under article VI, section 6 of the Alaska Constitution. Instead we merely found that a rational state policy existed in effectuating the constitutional mandate of relative socio-economic intervention. Kenai Peninsula Borough, 743 P.2d at 1361.

13. The Alaska Equal Protection clause provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law . . . ." Alaska Const. art. I, 1.

14. The Federal Equal Protection clause provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, 1.

15. We also articulated this theory in Groh:

> We conclude that in the absence of a showing that the manner of reapportioning a state was improperly motivated or had an impermissible effect, deviations of up to ten percent require no showing of justification. The state, however, has the burden of showing that deviations in excess of ten percent are "based on legitima e considerations incident to the effectuation of a rational state policy."

526 P.2d at 877 (quoting White v. Regester, 412 U.S. 755, 764 (1973)) (footnote omitted).

16. In Mahan v. Howell, the United States Supreme Court approved a deviation of 16.4 percent based on the preservation of political subdivision boundaries. 410 U.S. 315 (1973). That deviation has been seen by many as the outer limit which the Supreme Court will allow. See Travis v. King, 552 F. Supp. 554, 562 (D. Haw. 1982).

17. We recognized in Groh that it was reasonable to avoid combining two areas populated by residents who had a history of conflict. We rejected the suggestion that this factor

alone justified the underpopulation of the district comprised of one of these areas. We noted that no explanation had been offered "why other areas could not have been added to the district so as to create less of a variance." 526 P.2d at 878. Upon objection to the redistricting plan, however, we found sufficient justification for the Board's overrepresentation of District 16 (Bristol Bay):

> It is now apparent that the only alternative to the Board's original districting of that area is to disregard an impassible mountain range, the natural barrier formed by Cook Inlet, the lack of direct transportation or communication links, the corporate boundaries of the Kenai Peninsula Borough, the cohesiveness of interests of residents of that Borough and the disparate interests of the population of the Bristol Bay area. We now find that legitimate considerations incident to the implementation of rational state policy justify the overrepresentation of House District No. 16 (Bristol Bay) as originally designated and override mathematical requirements.

Id. at 879. Given the lack of reasonable alternatives to the initial plan, as well as the Board's good faith effort in adding to the district, we reversed our initial order invalidating the plan.

18. In the context of discrimination against a political group, the intent requirement is probably minimal. As Justice White noted in Bandemer, "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129. See Laurence H. Tribe, American Constitutional Law 13-9, at 1082 n.9 (2d ed. 1988).

The Supreme Court has also required a showing of discriminatory intent in the context of discrimination against a racial group. Mobile v. Bolden, 446 U.S. 55, 62, 66 (1980). However, Congress responded to the Bolden decision by amending section 2 of the Voting Rights Act so as to do away with the intent requirement. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 3, 96 Stat. 134. See L. Tribe, supra, 13-8, 1078-80.

19. See page 2 of Appendix A.

20. Although a reapportionment plan may split boroughs in forming election districts, the division of a borough which otherwise has enough population to support an election district will be an indication of gerrymandering. There must be some legitimate justification for not preserving the government boundaries in such a case.

21. The city of Saxman urged the governor not to split Saxman from the rest of the Borough. The Ketchikan Indian Corporation, the Sealaska Corporation and the Grand Camp of

the Alaska Native Brotherhood all objected to the Governor's planned splitting of the Borough.

22. Our conclusion underscores the error in the Board's methodology in reconciling the requirements of the Voting Rights Act with the requirements of the Alaska Constitution. The Board was advised to expect that any challenges to the reapportionment plan would come under the newly amended section 2 of the Voting Rights Act. Consequently, the Board accorded minority voting strength priority above other factors, including the requirements of article VI, section 6 of the Alaska Constitution. This methodology resulted in proposed district 3, a district which does not comply with the requirements of the Alaska Constitution. However, proposed district 3 is not required by the Voting Rights Act, either.

Article IV of the United States Constitution provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . ." This mandates that provisions of state law, including state constitutional law, are void if they conflict with federal law. To the extent that the requirements of article VI, section 6 of the Alaska Constitution are inconsistent with the Voting Rights Act, those requirements must give way. However, to the extent that those requirements are not inconsistent, they must be given effect. The Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.

The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.

In our order of June 8, 1992, we directed that the superior court, in drafting an interim plan, give priority to the Voting Rights Act over the requirements of article VI, section 6 of the Alaska Constitution. In that context, expediency mandated that an interim plan be formulated in time for the 1992 elections, and that compliance with the Voting Rights Act be ensured. In drafting a permanent plan, however, the Board's design will not be compelled by expediency. The Board shall ensure that the requirements of article VI, section 6 of the Alaska Constitution are not unnecessarily compromised by the Voting Rights Act.

23. The Island District approved by this court as part of the 1992 interim plan excludes the urban areas of Ketchikan and Sitka and respects all local government boundaries in Southeastern Alaska. While it is not compact, non-compactness appears to be necessary in order to comply with the Voting Rights Act and it is, in any case, more compact than the proposed configuration of District 3. See Appendix H.

24. See page 3 of Appendix A.

25. Because of this corridor, District 28 became known as

and is referred to in briefing as the "Oosik District."

26. Dividing the municipality's excess population among a number of districts would tend to dilute the effectiveness of the votes of those in the excess population group. Their collective votes in a single district would speak with a stronger voice than if distributed among several districts.

27. See page 1 of Appendix A.

28. The district includes the Koyukuk River valley, much of the area drained by the Yukon River from a point upstream from Russian Mission to the Canadian border, and much of the Kuskokwim River drainage upstream from a point near Stony River.

29. See page 1 of Appendix A.

30. In our order of remand, we noted that the Aleutians must be joined together in one district unless their separation is mandated by federal law. Since federal law does not mandate their separation, the contiguous territory requirement of the Alaska Constitution controls.

31. The Board was advised that it would be extremely difficult to accurately identify the NRMP because the U.S. census allowed certain military personnel to allocate themselves to other states. Further, they were told that the United States Army and Air Force would no longer release residency information because of the Privacy Act and Civil Rights Act. The Board was also advised that it might face Department of Justice preclearance problems if the NRMP were included.

32. This need was recognized in light of the threat of "unbalanced representation" resulting from the inclusion of NRMP. Egan, 502 P.2d at 870. Thus the constitutional concern is one of equal protection. The reapportionment provisions favor the use of census data. "Alaska's constitution requires that the requisite population total be arrived at by use of the census data. It does not mandate a population base composed exclusively of registered voters, citizens who have previously voted in Alaska, or only those people living in Alaska with the intention of making Alaska their home." Id. at 861.

33. However, the estimation of the percentage of NRMP need not be any more precise than the approximation of other portions of the population base. See Egan, 502 P.2d at 869.

34. The evidence of these solicitations are personal phone conversations between Babcock and the solicited pollsters. There is no indication as to the reason the pollsters declined to conduct the survey.

35. These were the only alternatives considered at the March 4, 1991 meeting at which the initial "guidelines" were adopted. At this meeting the Board was presented with and accepted the argument that the census was the only feasible population base.

36. The Board also claims that the effect of inclusion was minimal due to the very low NRMP population. However, the Board did not produce any significant data supporting this assertion.

37. AS 44.62.310-.312.

38. AS 09.25.110-.140.

HYUNDAI CONSTRUCTION CO., LTD., and National Surety Corporation, Appellants,

v.

KALMBACH, INC., Appellee.

No. 1604.

Supreme Court of Alaska.

Nov. 10, 1972.

Appeal from Superior Court, Third Judicial District; Edward V. Davis, Judge.

Richard B. Collins and Daiil Park, Anchorage, for appellants.

Kenneth D. Jensen, of Jensen & Harris, Anchorage, for appellee.

OPINION

Before RABINOWITZ, C. J., and CONNOR and BOOCHEVER, JJ.

PER CURIAM.

This appeal arises out of a contract awarded by the State of Alaska in December 1969 to Hyundai for construction of the Hurricane Gulch Bridge near Cantwell, Alaska. Hyundai, together with National Surety Corporation, furnished the State of Alaska with payment and performance bonds as required for public works construction by AS 36.25.010. Thereafter Hyundai subcontracted with Kalmbach for certain aspects of the bridge construction. Several months later Hyundai found Kalmbach's performance unsatisfactory and terminated its subcontract with Kalmbach.

Pursuant to AS 36.25.020[1] Kalmbach filed suit against Hyundai and National Surety under the contractor's payment bond for the amount unpaid on the subcontract at the time of termination. Kalmbach also sued for damages for breach of the subcontract and for rentals of equipment which Hyundai was alleged to have rented after its termination of the subcontract. Hyundai counterclaimed asserting it was damaged by Kalmbach's breach of the subcontract. After trial by jury Kalmbach was awarded $141,020.96 for labor and materials supplied and $100 for Hyundai's breach of contract. Additionally, the jury returned a verdict in Hyundai's favor in the amount of $5,528 on its counterclaim.

In this appeal appellants have attempted to assert numerous specifications of errors. Our study of appellants' brief and the record in the case at bar has left us with the conclusion that appellants' assertions of error are without substance. In short we hold that the judgment entered below should be affirmed.

Affirmed.

EVANS, J., not participating.

1. Alaska's statute is substantially similar to 40 U.S.C. § 270a et seq., the "Miller Act." The state version provides that persons supplying labor and material for a contractor on a public works project may proceed against the payment bond in the name of the state

William A. EGAN, Governor of Alaska, et al., Petitioners,

v.

Jay S. HAMMOND et al., Respondents.

No. 1711.

Supreme Court of Alaska.

July 21, 1972.

Opinion Sept. 29, 1972.

Review from the Superior Court, Third Judicial District, Anchorage, Edward V. Davis, J., in reapportionment case. On objections to interim reapportionment plan, the Supreme Court, Rabinowitz, J., held that it is constitutionally impermissible to discriminate against class of individuals in legislative reapportionment plan merely because of nature of their employment. The Court, in later opinion of Boochever, J., held that legislative re-

apportionment plan was invalid, where there was no adequate justification for variances which ranged from plus 23.35 to minus 45.93% in house districts and from plus 26.14 to minus 7.2% in senate districts, but that some military personnel might be excluded as permissible device for limiting impact of transients and nonresidents on legislative districting.

Objections overruled.

Decision of Superior Court affirmed in part and reversed in part and the case remanded with directions.

Boochever, J., dissented and filed opinion as to objections to interim plan.

1. States ⇐27

It is constitutionally impermissible to discriminate against a class of individuals in legislative reapportionment plan merely because of nature of their employment. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

2. States ⇐27

Census data was required to be employed in determining total population base for purposes of formulating an interim reapportionment plan for legislative elections. Const. art. 6, § 3; U.S.C.A. Const. Amend. 14.

3. States ⇐27

In fashioning interim apportionment plan for legislative elections, military personnel or civilians who were living in Alaska and enumerated in most recent census but who did not at time possess intent of making Alaska their home would not be excluded from total population. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

Opinion of Sept. 29, 1972

4. Constitutional Law ⇐225(1)

The equal protection clause requires that the states make an honest and good-faith effort to construct districts, in both houses of its legislature, as nearly of equal population as practicable. U.S.C.A.Const. Amend. 14.

5. States ⇐27

Two separate justifications for deviation from ideal population figures in the apportionment of state legislatures are: variance occurring because of uncontrollable factors, despite a good-faith effort to achieve mathematical precision, and factors incident to effectuation of a rational state policy, but the latter justification is greatly limited. U.S.C.A.Const. Amend. 14.

6. States ⇐27

Only after good-faith effort has been made to achieve precise mathematical equality in reapportionment of state legislatures may variances be permitted and then state has burden of justifying in detail each such variance. U.S.C.A.Const. Amend. 14.

7. States ⇐27

Need for numerical adjustment is very focus of mandate to reapportion state legislatures. U.S.C.A.Const. Amend. 14.

8. States ⇐27

Legislative reapportionment plan was invalid, where there was no adequate justification for variances which ranged from plus 23.35 to minus 45.93% in house districts and from plus 26.14 to minus 7.2% in senate districts. U.S.C.A.Const. Amend. 14.

9. Elections ⇐18
States ⇐27

Military personnel as a class cannot be deprived of right to vote and cannot be arbitrarily eliminated in population base used to design legislative apportionment scheme. U.S.C.A.Const. Amend. 14.

10. Constitutional Law ⇐225(1)
States ⇐27

Alaska constitutional provision specifying that reapportionment shall be based upon civilian population within each election district violated Federal Constitution insofar as it sought to exclude military as a class. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

11. States ⇐27

Although it is unconstitutional to exclude military as a class in reapportioning state legislature upon basis of popula-

tion, some military personnel may be excluded as permissible device for limiting impact of transients and nonresidents on legislative districting. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

12. States ⇐27

If even one person is disenfranchised on any irrational ground, legislative districting scheme rendering that result is invalid. U.S.C.A.Const. Amend. 14.

13. States ⇐27

With respect to legislative districting, attempt must be made to arrive at best approximation of population without losing sight of fact that right of equal representation is also an individual and personal right. U.S.C.A.Const. Amend. 14.

14. Constitutional Law ⇐225(1)
States ⇐27

Upon adequate notice and opportunity to register before use of master voter registration list for legislative reapportionment purposes, plan based upon current voter registration would be permissible under Federal Constitution in attempt to give accurate assessment of military population present in state with intent to make Alaska their home and also plans based on accurate data of state citizenship or state residency could meet standards of federal equal protection clause. U.S.C.A.Const. Amend. 14.

15. Constitutional Law ⇐49

Unconstitutional provisions of Alaska Constitution requiring that reapportionment be based upon civilian population within each election district as reported by the census is not severable; thus the entire provision is invalid. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

16. Action ⇐6

Inasmuch as the apportionment plan was unconstitutional, question as to political affiliation of members composing advisory reapportionment board was moot and, since appointments to board were made many months before final plan was promulgated by governor and interested parties had ample time to appeal from moment appointments were made, judgment on the issue as to composition of board was not required. Const. art. 6, § 8.

17. States ⇐27

Inasmuch as governor in creating legislative reapportionment plan was not acting from political considerations and performed his function in good faith, any error in composition of advisory reapportionment board with respect to political affiliation of its members was rendered harmless error. Const. art. 6, § 8.

18. States ⇐27

Purpose of constitutional provision that appointment to advisory reapportionment board shall be made without regard to political affiliation is to prevent appointment of board whose efforts might result in politically motivated reapportionment plan. Const. art. 6, § 8.

19. States ⇐27

Constitutional requirement that appointments to advisory reapportionment board be made without regard to political affiliation was not equivalent of requiring a bipartisan board but, in reviewing validity of appointment, germane considerations include: the political affiliation of members of board, nature of their activities in partisan politics, particularly if from one political party only, and the expertise and general qualifications which members bring to the board. Const. art. 6, § 8.

20. States ⇐27

Creation of single-member legislative districts from multimember districts was within powers available to governor under constitutional provision authorizing him to redistrict by changing size and area of election districts. Const. art. 6, § 6.

21. States ⇐27

Governor's general power to reapportion legislature includes right to utilize tool of designated seats within multimember districts. Const. art. 6, § 6.

22. States ⇐27

A need to truncate terms of incumbents may arise when reapportionment results in permanent change in district lines which either exclude substantial numbers of constituents previously represented by incumbent or include numerous other voters who did not have voice in selection of that incumbent. Const. art. 6, § 6.

23. States ⇐27

Governor has power to terminate state senate terms as incidental to his general reapportionment powers. Const. art. 6, § 6.

24. States ⇐27

Under Alaska Constitution, governor, with assistance of reapportionment board, has implied power to reapportion senate on interim basis. Const. art. 6, § 6.

John E. Havelock, Atty. Gen., Richard W. Garnett, III, Asst. Atty. Gen., Juneau, for petitioners.

Clifford J. Groh, of Groh, Benkert, Greene & Walter, Anchorage, for respondents.

OPINION IN RE OBJECTIONS TO INTERIM REAPPORTIONMENT PLAN

Before BONEY, C. J., and RABINOWITZ, CONNOR, ERWIN and BOOCHEVER, JJ.

RABINOWITZ, Justice.

In our Decision and Order of May 26, 1972,[1] this court declared the reapportionment plan embodied in the December 30, 1971, Proclamation of Reapportionment and Redistricting unconstitutional under the equal protection and supremacy clauses of the Constitution of the United States of America. We reached this conclusion for the reason that the proposed plan in its overall reapportionment of the Senate and House of Representatives would have established election districts which failed to encompass "as nearly equal population proportions as is practicable." To insure compliance with the equal protection requirements of Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny, it was further determined that an interim reapportionment and redistricting plan, designed to meet the imminent 1972 elections, required formulation. In furtherance of this task, two Masters were appointed to assist the court in fashioning an appropriate interim reapportionment plan.

On May 26, 1972, the appointed Masters were given the following instructions in pertinent part:[2]

> 1. By use of the official Census of 1970, you should establish a population base for the State of Alaska. This population base should include military personnel who were enumerated in the 1970 Census.
>
> 2. You should make an inquiry to determine whether or not the number of nonresident military personnel included in the 1970 Census can be determined. If a determination can be made, then you should subtract the number from the total which you have arrived at in paragraph 1 above. You should also state the methods in detail by which you arrived at this determination.

After receipt of the Masters' Report,[3] an "Order Establishing an Interim Reapportionment Plan for 1972 Legislative Elections" was entered on June 14, 1972.[4] In its relevant part this order stated:

> By use of the Official Census of 1970, the Court determines that the total population base for the State of Alaska shall

1. This document is attached hereto as part of an appendix to this opinion. Also included in the appendix are the Reference to Masters, Masters' Report, Order Establishing an Interim Reapportionment Plan, and Order Denying Objections to Interim Reapportionment Plan.

2. The complete letter of instructions to the masters is attached hereto as part of the appendix.

3. The Report is included in the appendix attached hereto.

4. This document is included in the appendix attached hereto.

be 302,361. This figure includes the military population residing in the State of Alaska at the time of the Official Census of April, 1970. In the time available to the Court for the preparation of the interim plan, the Court could find no feasible method of excluding some or all of the military personnel from the total population base. Moreover, computations revealed that changes in representation under the interim plan due to the inclusion of military personnel were minimal.

[1-3] Subsequent to the entry of this court's order establishing an interim reapportionment plan, petitioners filed objections thereto on the stated grounds:

> The Court erred in instructing the masters that the population base should include all military personnel who were enumerated in the 1970 census and in allowing nonresident military personnel enumerated by the census to be counted for the purpose of determining the population size and shape of particular districts. . . .

Petitioners contended that the effect of the inclusion of all enumerated military personnel was to give greater political power to those communities which adjoin major military installations. In arguing for preservation of the civilian population concept,[6] petitioners state that Alaska's legislature established a presumption against residency of military personnel except on affirmation of intent by the person involved that he chooses to be an Alaska resident.[6] In overruling petitioners' objection to the inclusion in the interim plan's population base of all military personnel who were enumerated in the 1970 Census, in our order of June 20, 1972,[7] we said in part:

> [We] could find no feasible basis for the exclusion of part or all of the military population from the population base required for interim reapportionment. Under the Alaska Constitution this base must include all residents of the State of Alaska as enumerated in the decennial census. The base is not limited to voter population. Neither the 1971 reapportionment plan nor the materials relied upon by the petitioners provide a legal basis for identifying nonresident military personnel in order to eliminate them from the population base.
>
> In the absence of reliable data, the elimination of the military from the population base as a class of persons would be a denial of equal protection of the law, prohibited by the Fourteenth Amendment to the United States Constitution. (Footnotes omitted.)

Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609, 617 (1964), instructs that it is constitutionally impermissible to discriminate against a class of individuals merely because of the nature of their employment. Given Davis v. Mann, this court is nevertheless under the duty, pursuant to article VI, section 3 of the Alaska constitution, to employ census data in determining the total population base for purposes of formulating an interim reapportionment plan.[8] The census practice of enumeration is as follows:

> In accordance with census practice dating back to 1790, each person enumerated in the 1970 census was counted as an inhabitant of his usual place of residence, which is generally construed to mean the place where he lives and sleeps most of the time. This place is not necessarily the same as his legal residence, voting residence or domicile.[9]

In light of the unconstitutionality of the civilian-military distinction made in article VI, section 3 of the constitution of Alaska for purposes of determining the requisite population base and this provision's further requirement that Alaska's population base be computed from census data, we concluded that in fashioning an interim reapportionment plan no lawful requirement or reliable basis existed for isolation and exclusion from the total population base of those military or civilians who were living in Alaska and enumerated in the 1970 census but did not at the time possess the intent of making Alaska their home. Alaska's constitution requires that the requisite population total be arrived at by use of the census data. It does not mandate a population base composed exclusively of registered voters, citizens who have previously voted in Alaska, or only those people living in Alaska with the intention of making Alaska their home.[10]

It is for these reasons that this court decided that petitioners' objections to the inclusion of all military personnel, who were enumerated in the 1970 census in the total population base for purposes of determining an interim reapportionment plan should be overruled.[11]

BOOCHEVER, Justice (dissenting).

I dissent from so much of the court's order as overrules petitioners' objection to inclusion, under the court's interim reapportionment plan, of all military personnel who were enumerated in the 1970 Census for the purpose of determining the population size and shape of particular districts.

I agree with the majority that it is impermissible to discriminate against a class of individuals because of the nature of their employment without more being shown, Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 12 L.Ed.2d 609, 617 (1964), just as it is unconstitutional to deprive members of a class such as the military of their right to vote, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965).

The United States Supreme Court, however, has recognized the problems created by including in population counts proportionately large numbers of military personnel (and other transients) having few ties with the state in which they are physically present. In Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), the Court affirmed the use of a registered voter base for Hawaii knowing that this system eliminated a much higher proportion of military than civilian persons. The Court indicated its approval of state citizen population as a permissible population base. *Id.* at 92-95, 86 S.Ct. at 1296-1298, 16 L.Ed. 2d at 391-92.

The use in Alaska of the April 1970 Census figures for civilians in effect established a state citizen population base for

5. Alaska Const. art. VI, § 3 provides in part: "Reapportionment shall be based upon civilian population within each election district as reported by the census."

6. In support of this argument, petitioners cite AS 15.05.020. The 1971 Reapportionment Plan includes Coast Guard Personnel, 3,752 resident aliens, and all military dependents. These persons cannot be classified as citizens of the State of Alaska under the test urged by petitioners.

7. This order is included in the appendix attached hereto.

8. *See* note 1, *supra*. In reaching the conclusion that census data must be employed, we do no more than hold that for purposes of fashioning an interim reapportionment plan the unconstitutional limitation in art. VI, § 3 of the Alaska constitution is severable.

9. Census Report PC(1)-C3, Alaska, Appendix A, at App-1.

10. *See* note 6, *supra*.

11. The relative effect of eliminating all military personnel, of eliminating only military personnel housed in group quarters, or of including all military personnel in this court's interim reapportionment plan, would be to produce only a slight change in the base population figure and to necessitate some minor redrawing of district lines; it would not change the number of legislators in any given district. On the other hand, elimination of military personnel housed in group quarters would result in substantially increased population variances among the election districts in comparison with the minimal variations present in the interim reapportionment plan as it now stands. For example, the variation in the Juneau district would shift from the present +4.3 to +10.2; in the Matanuska-Susitna district from +1.5 to +7.4; in the Aleutian district from +3.4 to −37.3; in the Yukon-Koyukuk-Kuskokwim district from +1.0 to −6.5; and in the Fairbanks district from +0.1 to −7.1. Excluding military personnel living in group quarters would correct the Ketchikan discrepancy from −22.5 to −18.0.

other than military. The April date effectively eliminated the large number of summer tourists and transient construction and fishing employees, leaving to be counted with minimal exceptions those voluntarily living in the state with the intention of making Alaska their home.[1]

While voting statistics are not synonymous with records of state citizenship, they do furnish a significant indication of a relatively definable military group's nexus with the state. Of the 9,818 census population of military personnel and civilian employees 18 years of age and over residing on the Elmendorf and Ft. Richardson bases, only 102 persons or approximately 1 percent voted as Alaskans in the November 3, 1970 election. At Eielsen and Ft. Wainwright, 172 of 9,997 or 1.7 percent so voted. Slightly higher figures of 8.8 percent and 4 percent voted at Adak and Kodiak, while none of Shemya's 1,131 voted. Civilians were also present on most of the bases so that the percentage of military personnel voting on the bases was in all probability even more minuscule.[2] Approximately 52 percent of the remaining Alaskan population over 18 years of age residing off the bases voted in the same election. (Masters' Report, Table 9) Moreover, according to the files of the Alaska Command, there are only 190 Alaskan "residents of record" among Army and Air Force personnel stationed in Alaska.

In my opinion, some adjustment with reference to counting military personnel is necessary in order to accomplish the substantive purpose of establishing equal population districting "as nearly as practicable."[3] If those physically in Alaska were to be counted in the middle of the summer when tourists and transient workers are present in vast numbers, a distorted population base would result. The counting of all military personnel regardless of their actual state residency results in a similar distortion.

As indicated in footnote 2 above, of Adak's population of 4,995 officers, enlisted men and dependents, and 450 civilians (a total of 5,445) only 165 could be induced to register as Alaskan voters, even after an extensive registration campaign. Under the court's interim reapportionment plan the ideal number of people to be represented by one legislator was fixed at 7,559. In areas such as the district embodying Adak, a relatively small number of voters would be represented by one legislator. The inequity of counting all military personnel is further illustrated by the fact that a decision to place the Ft. Richardson total population of 10,751 in a new district including Eklutna, Birchwood, Eagle River and Chugiak, as opposed to the Anchorage Northeast District, would change the representation of each by one legislator while involving a shift of less than 102 voters based on the 1970 elections.[4]

Even for an interim plan I feel that a more equitable solution is both feasible and constitutional.

I would deduct from the population base to be used for apportionment those members of the military, unaccompanied by dependents, living in military barracks, on ships, etc. These constitute 51.9 percent of the total number of military personnel enumerated in the census. (Masters' Report, p. 886) The location of such military personnel is readily ascertainable and is set forth in Table 7 of the Masters' Report submitted to this court.[5]

Admittedly, there is no completely accurate means at our disposal for determining the number of both civilian and military persons enumerated in the census who are not Alaskan citizens. It is readily apparent, however, that the proportion of military who are not Alaskan citizens so far exceeds the proportion of nonresident civilians who may have been included in the April 1970 enumerations, that no discrimination to the military as a class will result from eliminating the military personnel unaccompanied by dependents who reside in barracks, on ships, etc. That portion of the military personnel who reside neither in their own homes nor in rented private quarters obviously have the fewest ties with the state. There are doubtlessly many other non-Alaskan citizens among the remaining off-base military personnel and their dependents so that the elimination of only the 51.9 percent constituting the personnel unaccompanied by dependents residing in barracks, on ships, etc. will actually result in the inclusion of a substantially higher number of military personnel than in all likelihood are Alaskan citizens.

The Alaska Constitution dictates that, to the extent permitted by the United States Constitution, military personnel should not be included in the population base. There can be no other reason for stating "[r]eapportionment shall be based upon *civilian* population within each election district as reported by the census." (Emphasis mine.)[6]

While I agree with the majority that all military personnel may not be excluded from the population base, the interim plan should follow as closely as feasible the intent indicated by the Alaska Constitution. For that reason the portion of the military in group quarters should be excluded as representing the minimum number of military who are not Alaskan citizens. As stated in Burns v. Richardson, "The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting, [sic] a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification." 384 U.S. at 92, 86 S.Ct. at 1297, 16 L.Ed.2d at 391 n. 21. I am convinced that this pointed statement by the United States Supreme Court provides a method for us to more closely follow our own Alaska Constitution without drifting from the course of the equal protection clause of the United States Constitution. Thus, I respectfully dissent from the decision to include all of the military in the population base.

OPINION SEPT. 29, 1972

Before RABINOWITZ, C. J., and CONNOR, ERWIN and BOOCHEVER, JJ.

BOOCHEVER, Justice.

This case arises out of the 1971 reapportionment of the Alaska legislature pur-

1. A small number of aliens who would not be eligible for state citizenship are included in the census count. Military personnel also include some aliens.

2. In a memorandum submitted to the court the Lieutenant Governor of Alaska stated that the military population of Adak consisted of 4,995 officers, enlisted men and dependents, and 450 civilians. Despite an intensive voter registration effort only 165 were registered to vote as of June 1972.

3. Kirkpatrick v. Preisler, 394 U.S. 526, 528, 89 S.Ct. 1225, 22 L.Ed.2d 519, 523 (1969). Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

4. The court was petitioned to make such a change. The proposed change was not, however, adopted.

5. If my colleagues had agreed to such a deduction, some slight changes would have had to be made in the districts as previously established in the interim plan. With the assistance of the Masters such alterations would not have been unduly difficult to accomplish and in my opinion would have resulted in further decreasing the population variances present in the interim reapportionment plan, especially with reference to the only substantial population variance, that of the Ketchikan District.

6. Alaska Const. art. VI, § 3. Since both the court's interim plan of reapportionment and the 1971 plan utilized census figures, I do not here reach the question of whether some other basis for determining population for reapportionment purposes may now be used in view of the unconstitutionality of a portion of the provision. I do not necessarily agree with the court's apparent conclusion that the elimination of the "civilian" requirement may be severed from the requirement of using the census as a basis for population. It may well be that the two provisions are not separable. Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062, 1078 (1932); Dorchy v. Kansas, 264 U.S. 286, 289-290, 44 S.Ct. 323, 68 L.Ed. 690, 689-690 (1924).

suant to the mandate of article VI of the Alaska Constitution. The constitution provides for decennial reapportionment of the House of Representatives.[1] The authority to reapportion the House is vested in the Governor of the state, with the advice of a reapportionment board.[2] Since the adoption of the Alaska Constitution in 1956 the United States Supreme Court has ruled that both houses of a state legislature must be apportioned according to population.[3]

Because the Alaska Constitution made no provision for reapportionment of the Senate, we held in Wade v. Nolan [4] that on an interim basis until amendment of the Alaska Constitution the Governor had the power to reapportion the Senate in the same manner as specified by the constitution for the reapportionment of the House.

In 1971, following the 1970 decennial census, no amendment having been made to the Alaska Constitution, the Governor reapportioned both houses of the Alaska legislature. Thirteen members of the Alaska legislature then challenged the validity of the 1971 plan.[5] They urged that the percentage variations from the population norms for legislative districting violated the equal protection clauses of both the United States and the Alaska Constitutions; that the exclusion of the military from the population base was a denial of equal protection; that the Advisory Reapportionment Board was not constituted in the manner required by the Alaska Constitution; that the Governor lacked power to subdivide existing multi-member districts; that the Governor lacked power to create "designated seats" within multi-member districts; that the Governor was without authority to require incumbent Senators to stand for mid-term elections; and that the Governor exceeded his constitutional power by reapportioning the Senate.

1. Alaska Const. art. VI, § 3.
2. Alaska Const. art. VI, § 8.
3. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).
4. 114 P.2d 989 (Alaska 1986).
5. Alaska Const. art. VI, § 11.

The superior court held for the plaintiffs that the variances from population norms were so great as to render the plan invalid; that the Governor lacked the power to subdivide existing multi-member districts and to designate seats within such districts; and that the Governor could not prematurely terminate the terms of senators elected for four years.

The superior court held for the defendants that the military were properly excluded from the population base; that the Advisory Reapportionment Board was properly constituted; and that the Governor did possess the power to reapportion the Senate. The trial court directed that the matter of reapportionment of the Alaska State Legislature be sent back to the Governor and the Advisory Reapportionment Board for further consideration in accordance with the decision. Both the plaintiffs and the defendants below filed petitions for review from the superior court holdings adverse to their respective positions.

This court was mindful of the need for a speedy decision to enable election officials to prepare registration lists and ballots, to disseminate information and to afford time for election campaigns in the impending primary elections.[6] The petitions for review were filed on April 26, 1972. The time for filing briefs was accelerated and oral arguments were heard on May 23, 1972. During the course of those oral arguments, counsel were requested to recommend to this court procedures to be followed in the event that the 1971 plan was found to be constitutionally defective. It was suggested that the court fashion its own interim plan, and the Attorney General further recommended that Masters be appointed by the court.

6. The date of filing for candidacies was May 31, 1972. It was extended by this court in accordance with its powers over reapportionment matters first to June 15, 1972 and then to June 30, 1972. Connor v. Johnson, 402 U.S. (88), 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971).

Having found in our Decision and Order of May 24, 1972,[7] that the 1971 plan contained variances from population norms which could not meet the criteria set forth by the United States Supreme Court, we reluctantly concurred with the suggestion of counsel that the court fashion an interim plan of reapportionment for the forthcoming 1972 primary and general elections. The court appointed Masters to assist in the formulation of such a plan.

The Masters presented a written report and conferred with the court on June 13, 1972. The report was modified in accordance with determinations made by the court. After objections filed by the parties were considered by the court, an Order Establishing an Interim Reapportionment Plan for the 1972 Legislative Elections was issued on June 14 with the modified report of the Masters appended thereto.[8] Because that plan is merely an interim plan, it is necessary to discuss and rule on each of the issues raised on appeal so that the Governor and his Advisory Reapportionment Board will have sufficient guidelines to devise a constitutionally acceptable permanent plan.

I. POPULATION VARIANCES

At the outset we recognize the difficulty of creating districts of equal population while also conforming to the Alaska constitutional mandate that the districts "be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area."[9] When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state. Surprisingly small changes in district boundaries create large percentage variances from the ideal population.[10]

Despite the possibility of belaboring this opinion we feel obliged to set forth a few of the facts which make it difficult to fit Alaska's reapportionment plan into standards established for the 48 contiguous states which preceded it into the Union. Alaska has a total land area of 586,400 square miles—as large as the entire Louisiana Purchase, and one-fifth the total area of the continental United States. Its boundaries embrace four time zones. The state contains the highest mountain on the North American continent, glaciers that exceed the size of the State of Rhode Island, and a coastline longer than the total coastline along the remainder of the continental United States. Mountain ranges which equal or exceed the length and height of the Rockies divide Alaska into five relatively isolated regions which in turn are subdivided by river systems and other geographic factors such as broad expanses of frozen tundra challenging the most advanced roadway engineering.

The 1970 Census reveals a population of 302,361 persons including members of the Armed Forces.[11] There is less population in the State of Alaska than in the cities of Omaha, Nebraska or Toledo, Ohio. The contrasting ethnic backgrounds, cultural interests and economic activities of this Alaska population are detailed in the Report of the Masters.[12]

When confronted with conditions so different from those of any other single state

7. The Order for an interim plan of reapportionment and the Report of the Masters are attached to this opinion as Appendix I.
8. Appendix I.
9. Alaska Const. art. VI, § 6.
10. Based on 1970 census figures, the population norm per representative is 7,550 so that a change of boundaries involving only 76 people would result in a one percent variation in the population ratio. (Masters' Report, Table A, p. 889)
11. Census Report PC(1)-C3, Alaska.
12. Appendix I, pp. 880-891.

in the continental United States, it is readily apparent that it becomes well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states. The situation is more analogous to that of the State of Hawaii, whose unusual difficulties [13] were recognized as potentially requiring special remedies by the United States Supreme Court in Burns v. Richardson.[14]

[4] Nevertheless, the initial standard to which a state legislative apportionment plan must be held is that set forth by the Supreme Court in Reynolds v. Sims: [15]

> [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.[16]

Although the 1971 plan represented a substantial improvement in the calculus of reapportionment,[17] the new plan's variances still conflict with the guidelines set forth by the United States Supreme Court. We are, therefore, compelled to hold that the plan violates the United States constitutional guarantee of equal protection.

In the earlier reapportionment cases, the United States Supreme Court refused to articulate a strict test for what was required by the equal protection clause. In Reynolds v. Sims [18] the Court noted that "[w]hat is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." Hence the present guidelines for reapportionment evolved on a case-by-case basis. In Swann v. Adams,[19] percentage variances in the Florida Senate from +15.09 to −10.56 and in the Florida House of Representatives from +18.28 to −15.27 were held to be impermissible "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the population of the various legislative districts . . . ." The degree of rigidity in the requirement of equality reached its zenith in Kirkpatrick v. Preisler [20] where population variances from +3.13 to −2.84 percent were held to be invalid. The Missouri Assembly had rejected a plan with smaller variances. The Court stated:

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case . . . . [T]he "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.[21]

[5] Thus the present standard for reapportionment allows two separate justifications for deviation from the ideal population figures. The first is that variance occurring because of uncontrollable factors, despite a good faith effort to achieve mathematical precision. The second acceptable deviation is that which "the State must justify" the implication being that while it was a controllable deviation, other factors "incident to the effectuation of a rational state policy" [22] can be advanced in justification. However, as the Supreme Court cautioned at an early date in Reynolds v. Sims, acceptable state policies are greatly limited.

> [N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation . . . . Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

> A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions.[23]

[6] Only after a good-faith effort has been made to achieve precise mathematical equality may variances be permitted; and then the state has the burden of justifying in detail each such variance.[24]

The Report of the Governor's Advisory Reapportionment Board offers some of the reasons which justify greater percentage variations in Alaska districts "in terms of

13. The unique circumstances surrounding reapportionment in Hawaii are ably described in the opinion of Judge Pence in Burns v. Gill, 316 F.Supp. 1285 (D. Hawaii 1970).

14. 384 U.S. 73, 90-98, 86 S.Ct. 1286, 16 L.Ed.2d 376, 390-93 (1966).

15. 377 U.S. 533, 577, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506, 536 (1964).

16. The procedure followed by Hawaii in reapportioning its legislature in 1968 is illustrative of such "honest and good faith effort". A committee of three Senators and eight Representatives held 30 hearings before submitting its recommendations to the entire Constitutional Convention. After 15 hours of debating over a three-day period the apportionment provisions were adopted. The committee

> heard testimony from over 53 witnesses—political scientists, statisticians, attorneys and others—reviewed judicial decisions, analyzed apportionment and districting provisions of other state constitutions and reviewed numerous publications on the subject. Then, utilizing all those resources, the Committee formulated and adopted districting criteria. The Committee engaged an independent team of computer programmers, a statistician, and appropriate staff members, and turned over to that team the primary work of formulating and analyzing districting plans. That team, using a computer upon data gleaned from the 1968 registered voter figures for election precincts, as well as corresponding census tracts, prepared various districting plans and maps according to the Committee's criteria. No member of the Committee or any other delegate was involved in any preparation of the various plans. That team developed 30 house districting plans covering the several islands
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> . . . . .
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> The foremost criterion, of course, was that the average number of registered voters per legislator shall be as nearly equal as possible. Burns v. Gill, 316 F.Supp. 1285, 1289 (D.Hawaii 1970) (Footnotes omitted.)

17. The Alaska legislature was first reapportioned in 1965. The Governor's power to reapportion the Senate was challenged in the case of Wade v. Nolan, 414 P.2d 689 (Alaska 1966). In that case, however, the plaintiffs did not question the validity of the numerical variations among districts. By the time of the Governor's proposed plan six years later, the 1965 plan engendered population variances ranging from +104.57 to −65.40 percent in the House of Representatives and from +20.19 to −23.72 percent in the Senate. In the 1971 plan, population variations were reduced to a range of +23.75 to −45.03 percent in the House, and to a range of +20.14 to −17.22 percent in the Senate.

18. 377 U.S. 533, 577-578, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506, 537 (1964).

19. 385 U.S. 440, 443-444, 87 S.Ct. 569, 17 L.Ed.2d 501, 504 (1967).

20. 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969).

21. 394 U.S. at 530-531, 89 S.Ct. at 1228, 1229, 22 L.Ed.2d at 524-525 (citation omitted).

22. Reynolds v. Sims, 377 U.S. 533, 579, 84 S.Ct. 1362, 12 L.Ed.2d 506, 537 (1964).

23. *Id.* at 579-580, 84 S.Ct. at 1391, 12 L.Ed.2d at 537-538.

24. Kirkpatrick v. Preisler, 394 U.S. 526, 532, 89 S.Ct. 1225, 22 L.Ed.2d 519, 526 (1969); Kilgarlin v. Hill, 386 U.S. 120, 122, 87 S.Ct. 820, 17 L.Ed.2d 771, 774 (1967); Swann v. Adams, 385 U.S. 440, 443-446, 87 S.Ct. 569, 17 L.Ed.2d 501, 504-506 (1967).

rational state policy forwarded as factors unique to Alaska." The report notes for example that in some isolated areas a local population would necessarily be divided between contiguous districts, achieving numerical precision at the grave expense of depriving that community of any political power or attention from campaigning candidates.

[7] For other districts, however, the Advisory Reapportionment Board offers little or no explanation for the percentage deviations which were created. For example, no explanations are given for the variations in the Yukon-Kuskokwim House District 15, the Nome House District 19, and the Yukon-Kuskokwim Senate District K which respectively were −9.2 percent, −16.7 percent and −17.29 percent from the population norm. Such disparities as exist in the Wade Hampton District 20 of −28.4 percent, and in the Bethel House District 21 of +4.9 percent cannot be justified simply because a combination of pre-existing districts or a readjustment of district lines does not produce any other "benefits" than a numerical adjustment. The need for numerical adjustment is the very focus of the mandate to reapportion. In too many districts we are forced to conclude that the disparities are without adequate justification in terms of rational state policies to meet the stringent standards established by the United States Supreme Court.

[8] It is significant to note that in no case coming before the Supreme Court have population variances approaching those of the 1971 plan been upheld, while less substantial variances have been repeatedly rejected as unconstitutional.[25] Judged by the standards set out above, we are compelled to hold that the 1971 plan is invalid since there is no adequate justification offered for the variances which range from +23.35 to −45.93 percent in the House districts, and from +26.14 to −7.2 percent in the Senate districts.[26]

II. MILITARY PERSONNEL

The Alaska Constitution specifies that "[r]eapportionment shall be based upon civilian population within each election district as reported by the census."[27] The validity of this provision was not questioned by the parties in Wade v. Nolan,[28] although the 1965 plan eliminated military personnel from the population base. The 1971 reapportionment plan similarly limited the population base to civilians.[29] The plaintiffs below have challenged the validity of this constitutional provision, contending that the

25. *E. g.*, Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969) (variations from +3.13 to −2.84 percent held unconstitutional); Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967) (variations from +14.84 to −11.64 percent held unconstitutional); Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967) (variations from +15.09 to −10.58 percent held unconstitutional). *Cf.* Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971) (variations from −4.8 to −7.1 percent upheld).

26. With the single exception of the Ketchikan district, the range of variations in this court's interim plan is from +4.3 to −2.7 percent in the House, and from +4.3 to −2.3 percent in the Senate. The Ketchikan variation in both House and Senate is −22.5 percent. The reasons for the Ketchikan variance are explained in the Report of the Masters at p. 892. Due to the pressure of time in adopting interim plans, the United States Supreme Court has been much more liberal in countenancing variations which might not otherwise be acceptable. *E. g.*, Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S.Ct. 820, 17 L.Ed.2d 771, 774 (1967). *See also* Burns v. Gill, 316 F.Supp. 1285, 1288 (D. Hawaii 1970) saying, "[N]o one particular area of deviation or variance from the ideal of absolute equality of voting power, per se, invalidates an apportionment plan."

27. Alaska Const. art. VI, § 3.

28. 414 P.2d 689 (Alaska 1966).

29. With the exception of members of the United States Coast Guard, uniformed military personnel were eliminated. Military dependents were counted as part of the civilian base. Coast Guard personnel were counted as civilians because they operate under the control of the Department of Transportation.

elimination of military personnel as a class violated the equal protection clauses of the United States and Alaska Constitutions.

In Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609 (1964), underrepresentation of certain districts was attempted to be justified by the state noting that a substantial number of military personnel resided in the deficient districts. In rejecting this argument, the Court stated:

> Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.[30]

In Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), a Texas attempt to deprive military personnel of the right to vote in a state election simply because of their military status was held unconstitutional.

[9-11] These cases make clear that military personnel as a class cannot be deprived of the right to vote, and that they cannot be arbitrarily eliminated in a population base used to design an apportionment scheme. But while the clause of the Alaska Constitution seeking to exclude military as a class is unconstitutional, that is not to say that some military cannot be excluded as a permissible device for limiting the impact of transients and nonresidents on legislative districting.

[12, 13] It is also necessary to distinguish the degree of precision required in dealing with representational rights as against the strict right to vote. Carrington v. Rash indicates that if even one person is disenfranchised on any irrational ground, the scheme rendering that result must be declared invalid. On the other hand, fixing equal population counts for each legislative district is a more ephemeral and elusive goal when the mathematical precision achieved one day is destroyed the next by Alaskan society's chronic mobility. Given the fact that dilution of a voter's influence is not completely avoidable, the challenge is to arrive at the best approximation of the population to be counted without losing sight of the fact that the right of equal representation is also an individual and personal right.[31]

In light of these considerations, it becomes important to evaluate the accuracy and recency of the information relied on by the Governor's Advisory Reapportionment Board. Their report to the Governor merely stated that

> [u]niformed military personnel who are residents of Alaska and therefore, arguably not excludable under the United States Constitution were so few in number as to be negligible.

The only support for this statement offered in evidence at the trial below was a letter received from an officer of the Alaska Command at the time of the 1965 reapportionment, indicating that among the military stationed in Alaska there were only 111 "residents". There is no indication in the letter of the accuracy of the source for this information. The officer warned in his letter "that this cannot be considered an absolutely accurate figure, as military personnel records do not contain an entry showing what can be called a 'legal residence' for voting purposes. The record shows only the place the person prefers to consider as his permanent home."[32] Without inquiring to up-date the 1965 figure, or obtaining other information on the military from any source, the Board excluded all military personnel from the population base. Hence we were forced to conclude in our Order Denying Objections to the Interim Reapportionment Plan, filed June 20, 1972, that

30. 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609, 617 (1964).

31. Reynolds v. Sims, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506, 527 (1964).

32. In the 1970 general elections there were 632 votes cast in precincts located solely on military installations. (Masters' Report, Table 9) There are no available statistics as to what proportion of those, if any, were civilians.

> [i]n the absence of reliable data, the elimination of the military from the population base as a class of persons would be a denial of equal protection of the law, prohibited by the Fourteenth Amendment to the United States Constitution.

In the short time available for devising an interim reapportionment plan, a majority of this court decided that it was not possible to compile sufficiently accurate data to provide a reasonable basis for excluding any number of military from the population base.[33] Thus we included all military personnel with an eye to the fact that our plan would only apply to this year's election, and that a more accurate assessment of the military vote can be achieved in the process of devising a permanent decennial apportionment scheme.[34]

We recognize that the substantial military population present in the state because of military orders and without intention to make Alaska their home can easily give an unbalanced representation to areas abutting their bases. But we are also mindful of the need for a permanent plan which achieves a level of accuracy of their voting participation which is closer than either including or excluding all military as a class. Thus it is incumbent upon us to discuss alternative plans which may be available to handle the problem.[35]

The United States Supreme Court in Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), permitted the use of a registered voter base for Hawaii, knowing that this system eliminated a much higher proportion of military than civilian persons. Further, the Court indicated its approval of state citizen enumeration as a permissible population base.[36]

[14] Alaska has a master voter registration list[37] and the court takes judicial notice that active efforts have been made to register all eligible voters. Upon adequate notice and opportunity to register before use of such a registration list for reapportionment purposes, it would appear that an apportionment plan based on current voter registration would be permissible under the federal constitution. Likewise plans based on accurate data of state citizenship or state residency could meet the standards of the federal equal protection clause.[38]

Another problem, however, would be involved in the use of any but a census population base. As noted above the Alaska Constitution specifies that: "Reapportionment shall be based upon civilian population within each election district as reported by the *census*." (Emphasis added.) Since we have held that the provision is invalid insofar as it is based on "civilian population", a question is presented as to whether the balance of the provision is separable so as to continue to be effective, or in the alternative whether the entire provision should be stricken leaving some flexibility of choosing a population base for a new, permanent apportionment plan.

Similar problems have frequently arisen with reference to legislation. In Dorchy v. Kansas, 264 U.S. 286, 289-290, 44 S.Ct. 323, 324, 68 L.Ed. 686, 689-690 (1924), Justice Brandeis set forth the following criteria for determining the effect on the remainder of a statute when part is found unconstitutional:

> A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad . . . . But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.

In Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062, 1078 (1932) the standard was phrased as follows:

> The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

These criteria would appear to apply equally to a state constitutional provision as to an act of the legislature. To enforce the balance of the section in question requiring exclusive use of the census, the court should be able to find that the constitutional provision would have been enacted independently of the void reference to "civilian population".[39]

The members of the Constitutional Convention must have considered the fact that many military personnel present in Alaska do not regard this state as their home and do not actively participate in its affairs. Yet the large number of such personnel concentrated in small areas of the state is capable of distorting the representational base. Although the minutes of the Constitutional Convention are silent on the subject, it appears highly likely that this was the reason that the convention limited the reapportionment base to civilian population.

[15] If the requirement to use census figures were to be retained after striking the provision which limited the base to civilian population, this apparent intent might be frustrated. Only skeletal information of location and mobility characteristics of the military can be extrapolated from census data. Because the equal protection clause of the United States Constitution requires more specific factual justification for eliminating portions of the military from the population base, we conclude that the Board and the Governor should be permitted to use alternates to the census base.[40] We thus hold that the provisions of that portion of article VI, section 3, requiring that "reapportionment shall be based upon civilian population within each election district as reported by the census" is not severable. While we so hold, we remain hopeful that before a permanent plan is created, the legislature will initiate procedures to up-date the reapportionment provisions of the Alaska Constitution by an appropriate constitutional amendment.[41]

33. *But see* dissenting opinion of Justice Boochever in Egan v. Hammond, Op. No. 815 (Alaska, July 21, 1972).

34. This court's opinion in Egan v. Hammond, *supra* n. 33, discusses in greater detail the reasons for the inclusion of all military personnel in the court's interim plan of reapportionment.

35. The alternatives here discussed are not intended to be an all inclusive list, but are illustrative of constitutional means of treating the problem.

36. 384 U.S. at 91, 86 S.Ct. 1286, 16 L.Ed. 2d at 380.

37. AS 15.07.120.

38. In the *Burns* case the Court noted that: The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting, [sic] a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification.
384 U.S. at 92, 86 S.Ct. at 1287 fn. 21, 16 L.Ed.2d at 381, n. 21.

39. Springfield Gas & Elec. Co. v. Springfield, 292 Ill. 236, 126 N.E. 739 (Ill. 1920), aff'd 257 U.S. 60, 42 S.Ct. 24, 66 L.Ed. 131 (1921); New Jersey Chapter, American Institute of Planners v. New Jersey State Bd. of Professional Planners, 48 N.J. 581, 227 A.2d 313 (N.J.1967).

40. In reaching this conclusion we are mindful of the great danger that statistical data from different sources can inadvertently be corrupted or misconstrued in the process of assimilation. We trust that the Board and the Governor will also be mindful of this possibility, and will include in the reapportionment process the statistical expertise which is necessary to ensure that such errors will not occur.

41. Suggested in Wade v. Nolan, 414 P.2d 689, 700-701 and by Justice Rabinowitz, concurring at 700. Counsel for plaintiffs stated in their briefs that a resolution initiating such an amendment would be enacted at the 1972 legislative session, but no such resolution was passed.

III. COMPOSITION OF THE ADVISORY REAPPORTIONMENT BOARD

[16] Plaintiffs have contended that the reapportionment board was not constituted as required by article VI, section 8, of the Alaska Constitution, which specifies in part: "Appointments shall be made without regard to political affiliation." There were no Republican members appointed to the reapportionment board. Since we have found that the 1971 reapportionment plan is unconstitutional, the question as to the composition of the board has become moot and we therefore do not reach that issue at this time.[42]

[17, 18] We also note that the parties stipulated that the Governor in creating the reapportionment plan was not acting from political considerations and that he did perform his function in good faith. Thus if there was error in the composition of the board such error was rendered harmless, as the obvious purpose of the constitutional provision was to prevent the appointment of a board whose efforts might result in a politically motivated reapportionment plan.

[19] Under our decision it will be necessary to refer this matter to a reapportionment board for formulation of a permanent plan. Thus, although it is not necessary for us to rule at this time on the question of whether the 1971 reapportionment board was validly constituted, it is incumbent upon us to set forth some criteria which we determine applicable in deciding whether a board has been appointed "without regard to political affiliation", so as to withstand challenge.[43] At the outset, we recognize that this phrase is not the equivalent of requiring a "bi-partisan" board.[44] Nevertheless, in reviewing the validity of the appointment, some (although not necessarily all) of the following considerations would appear to be germane: The political affiliation of members of the board; the nature of their activities in partisan politics, particularly if from one political party only; and the expertise and general qualifications which members bring to the board.

42. *Cf.* Doe v. State, 487 P.2d 47, 53 (Alaska 1971). In that case we stated the general proposition that "we will refrain from deciding questions where the facts have rendered the legal issues moot" except "where the matter is one of grave public concern and is recurrent but is capable of evading review . . . ." We do not feel that the issue presently before us evinces the same elusiveness which would require our judgment at this time. Appointments to the Advisory Reapportionment Board are made many months before a final plan is promulgated by the Governor, and interested parties have ample time to appeal from the moment the appointments are made.

43. The defendants quite properly point out that the reapportionment board was convened on May 20, 1971, and that it conducted widely publicized hearings throughout the state during the summer of 1971. Hence the doctrine of laches might well further bar questioning the composition of the board after awaiting the outcome of its work involving the expenditure of substantial funds and the devotion of much time and effort. There was ample opportunity to bring a suit long before the completion of the board's functions. McCrocklin v. Fowler, 285 F. Supp. 41, 45 (E.D.Wis.1968) (alternate holding). *Accord*, Gersten v. United States, 384 F.2d 850, 852, 176 Ct.Cl. 633 (1966); Nelson v. Lord, 4 Alaska 174, 182-83 (1910).

44. At the Alaska Constitutional Convention, in the discussion of the original draft of section 8 which used the word "nonpartisan" the following explanation was given:

> HELLENTHAL: The word was chosen deliberately. Now an alternative and perhaps the one that the delegate has in mind would be "chosen from each of the major parties." *That alternative was specifically rejected* because [the committee] felt it placed emphasis upon political considerations on this board which as has been pointed out, it is hoped to keep as objective as possible. Now it is true and the Committee realized that "*nonpartisan*" *doesn't mean that you cannot belong to a political party* . . . . [On] the contrary to use the political language, would emphasize politics, and *it is the whole purpose of this article to de-emphasize politics.* (Emphasis added.)

Convention Minutes, p. 1058.

IV. CREATING SINGLE-MEMBER DISTRICTS FROM MULTI-MEMBER DISTRICTS

The Alaska Constitution specifically authorizes the Governor to redistrict "by changing the size and area of election districts . . . ."[45] subject to certain restrictions set forth in the constitution. It is thus clear that the Governor is authorized to redistrict by changing boundaries and areas. The creation of single-member districts from multi-member districts would appear to be a concomitant power under the authorization to redistrict. Furthermore, this authority is inherent in the general power to reapportion the legislature. Redistricting is inseparable from reapportionment and the Governor should be able to authorize any constitutional device to accomplish the task. The Oregon Supreme Court in its recent review of that state's reapportionment set forth the applicable principles as follows:

> Apportionment is accomplished by changing legislative district lines and an integral part of apportionment is making a choice between fixing legislative district lines along a single-member district plan or a multi-member district plan. This is a decision that the legislature would have had to make if it had done the reapportioning. It must be made by the Secretary of State or whatever body makes the apportionment.[46]

[20] Where the method or motive of districting rather than the mathematical precision of the apportionment is being challenged, the Supreme Court of the United States has consistently required that the challenger bear the burden of proving unconstitutionality.[47] The plaintiffs below failed to meet this burden of proof and we hold that the creation of single-member districts from multi-member districts was within the powers available to the Governor.

V. DESIGNATION OF SEATS WITHIN MULTI-MEMBER DISTRICTS

The 1971 plan provided that each seat within the multi-member districts of Anchorage and Fairbanks should be designated alphabetically, and that each candidate for office within that district should indicate at the time of filing the particular lettered seat for which he seeks election. The plaintiffs challenged the authority of the Governor to designate seats within multi-member districts.

[21] The Governor's general power to reapportion includes the right to utilize the tool of designated seats. The reasoning set forth in Hovet v. Myers,[48] gives support to this position. An identical problem arose in the case of Moss v. Burkhart,[49] wherein the court in redistricting the Oklahoma legislature authorized designated seats. If a court has such power under its general authority to reapportion, a Governor authorized specifically by a state constitution to reapportion should be held to have similar power.

VI. TERMINATING LEGISLATORS' TERMS

[22, 23] The 1971 Reapportionment Plan provided for termination of all Senators' terms, with the exception of two Senators whose districts were not altered. Under the 1971 plan the areas to be represented by the remaining Senators were changed, and particularly the Anchorage senatorial districts had drastic changes in that the Senators no longer were to run at large. A need to truncate the terms of incumbents may arise when reapportionment

45. Alaska Const. art. VI, § 6.

46. Hovet v. Myers, 489 P.2d 984, 989 (Or.1971).

47. *E. g.*, Whitcomb v. Chavis, 403 U.S. 124, 144, 91 S.Ct. 1858, 29 L.Ed.2d 363, 376 (1971). *Cf.* Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S.Ct. 820, 17 L.Ed.2d 771, 774 (1967).

48. 489 P.2d 984, 989 (Or.1971).

49. 320 F.Supp. 149, 158 (W.D.Okl.1993), aff'd sub nom., Williams v. Moss, 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1026 (1964).

results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent. The discretionary authority to require mid-term elections when necessary is well established.[50] We accordingly hold that the Governor had the power to terminate Senate terms as incidental to his general reapportionment powers.[51]

VII. GOVERNOR'S AUTHORITY TO REAPPORTION

[24] The Governor's authority to reapportion the Senate was also challenged by the plaintiffs below. In Wade v. Nolan this question was discussed in detail, and we concluded that under the Alaska Constitution the Governor with the assistance of the reapportionment board had the implied power to reapportion the Senate on an interim basis.[52] Since there has been no amendment to the constitution, our decision on that point remains unaltered.

Plaintiffs below indicated that the legislature was prepared to initiate a constitutional amendment pertaining to reapportionment. Since the constitution does not specifically provide for Senate reapportionment and impermissibly limits the reapportionment base to civilian population, we strongly urge that an appropriate amendment to the constitution be prepared and presented to the electorate.

The decision of the superior court is affirmed in part and reversed in part in accordance with the provisions of this opinion. The case is remanded to the superior court for the purpose of referring the matter of a permanent reapportionment plan to the Governor with the assistance of an advisory board to be appointed by him in accordance with the provisions of the Alaska Constitution.

APPENDIX I

1. Decision and Order of May 26, 1972.
2. Reference to Masters, May 26, 1972.
3. Masters' Report.
4. Order Establishing an Interim Reapportionment Plan.
5. Order Denying Objections to Interim Reapportionment Plan.

DECISION AND ORDER

This matter was heard by the court on May 24, 1972, upon petition for review and cross-petition for review. The court recognizes the extreme difficulty of the task confronted by the Governor and the Reapportionment Board in reapportioning the State of Alaska because of its differing climates, topography, ethnic composition, socio-economic interests and distribution of its relatively sparce population. However, under the mandate of various decisions of the United States Supreme Court, we make the following determinations and order:

1. The reapportionment plan proposed by the Governor of Alaska in his Proclamation of Reapportionment and Redistricting of December 30, 1971, is unconstitutional in that its overall reapportionment of the Senate and House of Representatives results in proposed election districts that do not contain as nearly equal population proportions as is practicable. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964); Wade v. Nolan, 414 P.2d 689 (Alaska 1966). Under the Equal Protection and Supremacy Clause of the Constitution of the United States of America, the constitutional right to vote of every citizen of Alaska is protected against impermissible dilutions and impairments flowing from malapportionment of either the House of Representatives or the Senate. In order to effectuate this constitutionally protected right to vote, we are obliged to declare the reapportionment plan of December 30, 1971, invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. To insure compliance with the Equal Protection Clause in regard to the forthcoming 1972 primary and general elections for the State Legislature this court must formulate an interim reapportionment and redistricting plan. Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 675–676, 84 S.Ct. 1429, 12 L.Ed.2d 595, 607 (1964). The Lieutenant Governor is to conduct the 1972 primary and general elections for the State Legislature pursuant to the interim reapportionment and redistricting plan which this court will adopt.

3. In order to fashion an interim plan this court will appoint one or more masters to assist it.

4. Upon receipt of the report of the master or masters, this court will consider the manner in which the House and Senate districts shall be reapportioned. This court will then proceed to adopt an interim plan of reapportionment which, as nearly as practicable, considering the allotted time, reflects the standards which have been made binding upon the states by the United States Supreme Court. Ely v. Klahr, 403 U.S. 108, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971); Reynolds v. Sims, 377 U.S. 533, 586, 84 S.Ct. 1362, 12 L.Ed.2d 506, 541 (1964).

5. In the event this court determines that the exigencies of the situation preclude the fashioning of an interim constitutional reapportionment plan by June 15, 1972, this court will enter a further order specifying the plan under which the Lieutenant Governor shall conduct the 1972 primary and general elections for the State Legislature, together with the dates that such elections will be held. Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971).

6. A full opinion discussing and determining the issues which were raised in the petition and cross-petition will be filed in due course.

Dated at Juneau, Alaska, this 26th day of May, 1972.

Georg. F. Boney

Chief Justice

Jay A. Rabinowitz

Associate Justice

Roger G. Connor

Associate Justice

Robert C. Erwin

Associate Justice

Robert Boochever

Associate Justice

50. Mann v. Davis, 238 F.Supp. 458 (E.D. Va.1964), aff'd, 379 U.S. 694, 85 S.Ct. 713, 13 L.Ed.2d 698 (1965); Moss v. Burkhart, 220 F.Supp. 149, 157 (W.D. Okl.1963), aff'd sub nom., Williams v. Moss, 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1020 (1964); Sims v. Amos, 336 F.Supp. 924, 940 (M.D.Ala.1972); Butcher v. Bloom, 420 Pa. 305, 216 A.2d 457, 459 (1966).

51. In the interim plan promulgated by this court, Senate terms of incumbent Senators were not terminated. The interim plan did not contain the drastic reapportionment of the Anchorage Senatorial districts. We felt that it was preferable not to shorten the terms of Senators, particularly as this may become a necessity upon the formulation of a permanent plan. The additions or substitutions of geographical areas under the interim plan have not so materially changed the population base which elected each of the Senators as to prevent him from adequately representing his designated district. There is ample authority for permitting Senators to serve out their terms *under an interim plan* even when the boundaries of their districts have been changed. Mann v. Davis, 238 F.Supp. 458 (E.D.Va.1964), aff'd, 379 U.S. 694, 85 S.Ct. 713, 13 L.Ed.2d 698 (1965); Moss v. Burkhart, 220 F.Supp. 149, 158 (W.D. Okl.1963), aff'd sub nom., Williams v. Moss, 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1020 (1964); Sims v. Amos, 336 F.Supp. 924, 940 (M.D.Ala.1972); Butcher v. Bloom, 420 Pa. 305, 216 A.2d 457, 459 (1966).

52. 414 P.2d 689, 700 (Alaska 1966).

Clifford J. GROH et al., Appellants,

v.

William A. EGAN, Governor of Alaska, et al., Appellees.

No. 2233.

Supreme Court of Alaska.

Sept. 13, 1974.

Action was brought challenging validity of plan for reapportionment of the Alaska legislature. The Superior Court, Third Judicial District, Anchorage District, James K. Singleton, J., dismissed and appeal was taken. The Supreme Court, Boochever, J., held that use of 1970 census data as basis for reapportionment plan adopted in 1973 was not unreasonable; that formula used to exclude transient military personnel from data base did not discriminate against military personnel; that State failed to demonstrate that individual variances from the mean in certain districts were based on legitimate considerations incident to the implementation of a rational state policy; that division of Greater Anchorage area into six election districts was not improper; and that it was within governor's discretionary authority to require mid-term elections in Greater Anchorage area following adoption of the plan, Fitzgerald, J., concurred in part, dissented in part and filed opinion.

Affirmed in part and reversed in part.

Erwin, J., dissented and filed opinion.

1. States ⇐27(3)

Supreme Court does not have constitutional authority to decide what is preferable between alternative rational plans for legislative reapportionment. Const. art. 6, §§ 3, 8, 11.

2. States ⇐27(2)

Constitutional authority to reapportion the legislature resides in the executive, not the courts. Const. art. 6, §§ 3, 8, 11.

3. States ⇐27(10)

Supreme Court views a legislative reapportionment plan promulgated under the constitutional authority of the governor in the same light as it would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. Const. art. 6, §§ 3, 8, 11.

4. Administrative Law and Procedure ⇐760

Supreme Court has authority to review constitutionality of administrative action but may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency; wisdom of a given regulation is not a subject for review.

5. States ⇐27(10)

On appeal from dismissal of action challenging validity of legislative reapportionment plan, Supreme Court would consider matter de novo upon record developed in the superior court. Const. art. 6, §§ 3, 8, 11.

6. States ⇐27(3)

Governor may select from among different available statistical compilations in preparing a legislative reapportionment plan. Const. art. 6, § 3.

7. States ⇐27(10)

Supreme Court's review of governor's use of 1970 census data for purposes of adopting legislative reapportionment plan in 1973 was restricted to determining whether governor's authority to choose census data as population base was exercised in a rational as opposed to an arbitrary manner. Const. art. 6, §§ 3, 8, 11.

8. States ⇐27(5)

Governor's use of 1970 census data for purposes of adopting legislative reapportionment plan in 1973 was not improper, despite contention that there were more accurate and current data available. Const. art. 6, § 3.

9. States ⇐27(5)

Elimination of portion of military personnel within the state from population base for purpose of legislative reapportionment plan did not constitute an unconstitu-

tional employment classification on theory that civilian transients were not treated equally, as civilian transients were not present in significant numbers at time census data were obtained, civilian transients were not included in census population though military were so included and special nature of military transients created reasonable basis to distinguish between military and civilian transients. U.S.C.A.Const. Amend. 14.

10. States ⇐27(5)

Formula for exclusion of transient military personnel from population base used for legislative reapportionment purposes whereby statewide ratio of those registered to vote in November 1970 election and number counted in April 1970 census was applied to those registered to vote in locations populated exclusively by the military and their dependents to determine nonresidency factor did not discriminate against the military as class or improperly exclude military personnel based on the nature of their employment. U.S.C.A.Const. Amend. 14.

11. States ⇐27(5)

In absence of showing that manner of reapportioning state legislature is improperly motivated or has an impermissible effect, deviations between legislative districts of up to 10% require no showing of justification; however, state has burden of showing that deviations in excess of 10% are based on legitimate considerations incident to the effectuation of a rational state policy. U.S.C.A.Const. Amend. 14.

12. Constitutional Law ⇐225(1)
States ⇐27(5)

State authorities failed to demonstrate that individual variances from the mean in certain legislative districts which were malapportioned in excess of a 10% maximum comparative variance were based on legitimate considerations incident to the implementation of a rational state policy and, therefore, such variance denied residents of underrepresented districts equal protection. U.S.C.A.Const. Amend. 14.

13. States ⇐27(5)

Underrepresentation of certain legislative districts created by legislative reapportionment plan could not be justified on theory that variance was caused by desire to preserve boundaries of regional corporations established under the Alaska Native Claims Settlement Act and to establish homogeneous groupings of native peoples where none of the districts had the boundaries of a native corporation and makeup of population to the north and east of one area alleged to have unique native composition did not vary significantly from that of adjoining villages within the district. Alaska Native Claims Settlement Act, §§ 2 et seq., 3(b), 7, 43 U.S.C.A. §§ 1601 et seq., 1602(b), 1606.

14. States ⇐27(7)

Patterns of housing, income levels and minority residency within Greater Anchorage Borough lacked necessary significance to justify underrepresentation of three legislative districts in the Borough by 5.9, 6.5 and 8.6%.

15. States ⇐27(7)

Underrepresentation of Juneau legislative district by 14%, overrepresentation of Wrangell-Petersburg district by 9.3% and overrepresentation of Aleutian Chain district by 6.5%, which disparities would result from adoption of legislative reapportionment plan, were justified by valid historical and geographic considerations.

16. States ⇐27(7)

Constitutional requirement that legislative districts be formed from contiguous, compact, and relatively integrated socioeconomic areas does not prohibit smaller districts within such areas. Const. art. 6, § 6.

17. States ⇐27(7)

Division of Greater Anchorage area into six election districts was not improper, despite contention that area constituted a single integrated socioeconomic area which should not have been fragmented. Const. art. 6, § 6.

18. States ⇐27(3)

Where legislative reapportionment plan substantially altered senatorial districts in Greater Anchorage area so that districts from which four "hold-over" senators had been elected no longer existed and new districts had vastly changed boundaries, it was within governor's discretionary authority to require mid-term elections, thus truncating terms of four incumbents.

Kenneth P. Eggers, Clifford J. Groh, Groh, Benkert & Walter, Anchorage, for appellants.

James N. Reeves, Asst. Atty. Gen., Anchorage, Norman C. Gorsuch, Atty. Gen., Juneau, for appellees.

Ben T. Delahay, Borough Atty., Soldotna, as amicus curiae for Kenai Peninsula Borough.

Before RABINOWITZ, Chief Justice, and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, Justices.

OPINION

BOOCHEVER, Justice.

For the third time, we are confronted with a challenge to the reapportionment of the Alaska legislature.[1] In Egan v. Hammond, we held that the 1971 reapportionment of the Alaska legislature, which was promulgated pursuant to the mandate of Art. VI of the Alaska Constitution, was unconstitutional under the equal protection and supremacy clauses of the United States Constitution. Due to the imminence of the 1972 elections we adopted an interim plan of reapportionment for the 1972 legislative elections. The case was thereafter remanded to the superior court which on January 13, 1973 issued an order, pursuant to our mandate, requesting the governor of the State of Alaska, with the assistance of an advisory board appointed by him, to develop a permanent reapportionment plan for the Alaska legislature. The governor appointed an advisory board which, after conducting numerous public hearings, submitted a report and proposed plan of reapportionment[2] which was adopted by the governor on December 11, 1973.

Suit was commenced in the superior court challenging the validity of the plan. After trial of the case, Judge Singleton entered a judgment on May 14, 1974 dismissing the action on the merits. Appellants raise the following issues on appeal:

1. Population variance between districts was excessive.
2. The division of the Greater Anchorage area into six districts violated the Alaska constitutional requirement that districts be formed of contiguous and compact territories containing as nearly as practicable a relatively integrated socio-economic area.
3. There was no need to truncate the terms of four senators, and termination of their terms constituted a denial of equal protection.
4. The use of a formula establishing the number of military personnel to be included in the population base violates the due process and equal protection clauses of the United States and Alaska constitutions.
5. Failure to base the plan on the latest population data resulted in malapportionment.

Because of the imminence of the 1974 elections, we expedited briefing and heard arguments on June 4, 1974. On June 6, we entered an order approving all aspects of the plan except the composition of specified house and senate districts, which we found exceeded permissible constitutional

1. *See* Egan v. Hammond, 502 P.2d 856 (Alaska 1972) and Wade v. Nolan, 414 P.2d 989 (Alaska 1966).

2. The report was unanimously approved by the five-member board, with the exception of the districting of the Anchorage area, to which portion of the report two members dissented.

limits regarding population variances without adequate justification.[3]

The case was remanded to enable the governor of the State of Alaska, if he desired, to resubmit the plan to the Advisory Reapportionment Board for the purpose of revising it and bringing the districts specified within constitutional standards.[4] We stated in our order that a full opinion would follow.

I

STANDARD OF REVIEW

Besides determining whether the reapportionment plan meets constitutional requirements, we must settle upon an appropriate standard of review applicable in Alaska reapportionment cases. Article VI of the Alaska Constitution provides for reapportionment of the House of Representatives by the governor after each decennial census. Although no comparable provision governs reapportionment of the senate, we have held that the Senate, too, must be similarly reapportioned in order to conform to constitutional requirements imposed by the United States Supreme Court.[5] Section 11 of Article VI confers original jurisdiction on the superior court to hear challenges to the reapportionment plan, and provides that "On appeal, the cause shall be reviewed by the supreme court upon the law and the facts."

[1, 2] Appellants argue that this constitutional authority confers upon the supreme court the power to decide what is preferable between alternative rational plans. We do not so construe our authority, for if that were the case, there would be little reason to provide for the governor to promulgate the reapportionment plan after receiving the recommendations of the Advisory Reapportionment Board.[6] The constitutional authority to reapportion resides in the executive, not the courts. Jurisdiction is conferred on the courts only when an application is made to compel the governor, "[T]o perform his reapportionment duties or to correct any error in redistricting or reapportionment."[7] It cannot be said that what we may deem to be an unwise choice of any particular provision of a reapportionment plan from among several reasonable and constitutional alternatives constitutes "error" which would invoke the jurisdiction of the courts.

[3, 4] We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. We have stated that we shall review such regulations first to insure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary. Of course, additionally, we always have authority to review the constitutionality of the action taken, but we have stated that a court may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency, and that the wisdom of a given regulation is not a subject for review.[8] The superior court indicated that it applied these criteria to its review of the reapportionment plan, and we shall apply like standards in our review of the law and facts raised by this appeal.

[5] One other aspect of our review function pertains to the weight to be given to the decision of the superior court. When the reapportionment article was first proposed at the constitutional convention, original jurisdiction for review was vested in the supreme court. After discussion, it was deemed more practical to have original jurisdiction in the superior court, but the delegates indicated a preference for the application by the supreme court of a standard other than the familiar "abuse of discretion" test in reviewing the decision of the superior court. The draft was amended to specify that "[o]n appeal, the cause shall be reviewed by the supreme court upon the law and the facts."[9] The minutes of the Constitutional Convention indicate that the drafters of this provision intended that appellate review be in the nature of a de novo proceeding, but without additional evidence being presented.[10] Accordingly, in reviewing the reapportionment plan we shall consider the matter de novo upon the record developed in the superior court.

II

USE OF THE 1970 CENSUS DATA

In determining the population base to be used for reapportionment, the Advisory Board relied upon the 1970 decennial census. Appellants contend that there were more accurate and current data available, and that it was improper not to utilize them.

Article VI, Section 3 of the Alaska Constitution provides that, "[R]eapportionment shall be based upon civilian population within each election district as reported by the census." In Egan v. Hammond, we held that the elimination of military personnel as a class was unconstitutional, and that the "civilian population" clause could not be severed from the requirement that

3. A copy of the order of remand is appended hereto as Exhibit A.

4. The governor did resubmit the plan to the Board, which recommended changes in the various districts, and the governor has submitted the revised plan to this court.

5. *See* Egan v. Hammond, 502 P.2d 850, 871 (Alaska 1972); Wade v. Nolan, 414 P.2d 680, 700 (Alaska 1966).

6. Art. VI, §§ 3 and 8, Alaska Constitution.

7. Art. VI, § 11 of the Alaska Constitution provides:

> Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform his reapportionment duties or to correct any error in redistricting or reapportionment. Application to compel the governor to perform his reapportionment duties must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting or reapportionment must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

8. *See* Klogery v. Chapdelaine, 504 P.2d 831, 834–835 (Alaska 1972); Kelly v. Zamarello, 480 P.2d 908, 911 (Alaska 1971).

9. Alaska Constitution art. VI, § 11.

10. The intent was best articulated by Delegate McLaughlin:

> I believe, Mr. Johnson, in answer to you, there was one addition that Mr. Taylor desired. He desired not only a review on the law, but he wanted to make sure that the supreme court could review all the facts as presented in the superior court. He wanted in substance a trial de novo without any other evidence than the evidence presented in the superior court. That's why he insisted that the law and facts appear there.

Minutes, Constitution Convention 1947. Previously, the following exchange had taken place between Delegates Taylor and Hellenthal:

> Taylor: . . . Why in this proposed article, did you confer upon the supreme court of the State of Alaska original jurisdiction to try disputes as to reapportioning?
>
> Hellenthal: That language came identically from the language of the Hawaii Constitution which was recently adopted, and we felt that the matter of such supreme importance as this should be conferred on the supreme court and that they should be given original jurisdiction. There might be a better court.
>
> Taylor: Do you not believe that the superior court could be more available to any disgruntled voter . . . and allow the supreme court of Alaska to be the appellate court . . . ?
>
> Hellenthal: Of course their review would be confined to review of legal matters and not facts. Perhaps it was thought that the supreme court was a bit more detached than a superior court.
>
> Taylor: But if the district courts abuse their discretion, you can always raise that in the appellate court.
>
> Hellenthal: But as you know and I know as lawyers, to raise the question of abusive [sic] discretion you have got to be awfully right.
>
> Taylor: Could you not in your proposal put it that the superior court should have original jurisdiction and that the supreme court would be the appellate court and also could find as to the facts? (Minutes, pp. 1859-60).

reapportionment be based exclusively upon census data. We concluded that alternatives to the census base could be utilized.[11] Thus, there is no longer a specific constitutional mandate as to the population base to be utilized by the governor. On the other hand, it has never been held that the due process or equal protection clauses of the United States or Alaska constitutions dictate reapportionment upon some population base other than that of decennial census.[12] In fact, in Reynolds v. Sims, the United States Supreme Court stated:

> In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.[13]

[6] While *Reynolds* indicates that it is not necessary to reapportion more frequently than decennially, it does not really address itself to the question of what population data may be used. There can be little question but that the general principle of equalizing votes per persons can best be achieved by use of the most current accurate data reasonably available. We indicated in Egan v. Hammond, that in the absence of a constitutional amendment reestablishing specific guidelines, the governor has the power to select alternative bases for reapportionment purposes. We referred to the permissibility of a registered voter, state citizenship or state residency base.[14] Similarly, the governor may select from among different available statistical compilations.

[7, 8] Since the governor's authority to choose census data as a population base is not limited by either the state or the federal constitution, our review is restricted to whether that authority has been exercised in a rational as opposed to an arbitrary manner. The report of the Reapportionment Advisory Board evidences thorough and exemplary exploration of the possibility of using more current statistics. Only after alternatives were carefully examined was the determination made to use the 1970 census data. As to the rationality of that decision, we agree with the findings of the superior court:

> The Advisory Reapportionment Board examined the feasibility of such an update. Its statistical technician (who is otherwise the employee of the Research and Analysis Section who is responsible for preparing that office's annual estimates) and its counsel sought the advice of Dr. George Rogers on this matter and were informed that it would be impossible to update the 1970 data in a statistically meaningful way with the geographical specificity required for reapportionment. The Board also took this question up with Ronald Evans, federal census coordinator at the University of Alaska's Institute for Social, Economic and Government Research, who advised that updated population data was not available and that it would be possible to contract with the Census Bureau to obtain a special census for reapportionment purposes at a cost of about $250,000. For these reasons, and in addition because the Annual Estimates represent population in July rather than in April and cannot effectively be extrapolated with geographic specificity, it was not unreasonable for the Board to conclude that it could not effectively update 1970 census data.

The use of the 1970 census data under those circumstances did not constitute error.

11. 502 P.2d at 870-871.

12. Justice Brennan in his dissent in White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314, 334 (1972), asserted that a reapportionment plan must be "grounded on the most accurate available data", and that unreliability of data may necessitate invalidation of a plan. No holding of the United States Supreme Court, however, implies that decennial census data is not constitutionally appropriate, and Justice Brennan did not address himself to the question of how current reapportionment data must be.

13. 377 U.S. 533, 583, 84 S.Ct. 1362, 1393, 12 L.Ed.2d 506, 540 (1964).

14. 502 P.2d at 870.

III

MILITARY PERSONNEL

The Advisory Board sought to eliminate from the data base, to the extent that reliable information could be developed on which to do so, all nonresidents who could be statistically identified. The Board found that approximately 26 percent of the census population consisted of military personnel and their dependents, substantial numbers of whom were not residents of the state.[15] A complicated formula was established whereby 28,581 of the approximately 78,998 military and military dependents,[16] were eliminated from the population base. Appellants contend that the elimination of a portion of the military personnel from the population base constitutes an unconstitutional employment classification violative of due process and equal protection.[17]

In Egan v. Hammond, we wrestled with the thorny problem of accounting for military personnel in the Alaska population base. Since many of the considerations there discussed are still controlling on this issue, we shall summarize the basic rationale of that case.[18] We held invalid the constitutional requirement that reapportionment shall be based upon civilian population within each election district as reported by the census for the reason that military personnel as a class could not be eliminated arbitrarily. We pointed out, however, that by holding such elimination unconstitutional we were not saying "that some military cannot be excluded as a permissible device for limiting the impact of transients and nonresidents on legislative districting." Reference was made to the possibility of using a registered voter base, which has been approved in Burns v. Richardson,[19] or employing a state citizen or state residency basis. We expressed what has now proved to be a vain hope that the legislature would update the reapportionment provision of the Alaska Constitution with an appropriate constitutional amendment.

15. The masters we appointed collected the following data regarding participation of military personnel in the 1970 general election: Elmendorf and Fort Richardson, 102 voters of 9,445 population over age 18; Eielson and Fort Wainwright, 172 voters of 10,276 population over age 18; Shemya Station, no voters among 1,085 population over age 18; Kodiak Station, 78 voters of 1,717 population over age 18. In these six enumeration districts populated by military personnel and their dependents, there were thus only 352 voters from an adult population of 22,523 or less than 1.6 percent. Approximately 52 percent of non-military adults voted in the same election. Egan v. Hammond, 502 P.2d at 900, *see* 502 P.2d at 902 (Boochever, J., dissenting). If voting can be taken, as we believe, to be an indication of a person's desire to make a state his home, the desires of Alaska-based military personnel have been clearly expressed in the negative. Of all the military personnel in Alaska, only 100 claimed to be residents of record according to the Alaska Command at the time of Egan v. Hammond, *id.* at 902, and nothing in the record indicates that this figure has changed significantly.

16. In April 1970, the census indicated that there were 32,113 uniformed military personnel in the state. Figures provided by the Alaska Command and other sources indicated approximately 1.46 military dependents for each uniformed military personnel in July 1973. Assuming the same ratio in 1970, there were 46,885 military dependents and personnel in 1970. Thus, military personnel and their dependents accounted for 78,998 of the state's 1970 population of 302,301. Although the Board originally sought to eliminate nonresident military and nonresident dependents, the exclusionary formula was finally applied only to uniformed personnel.

17. *See* Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609, 617 (1964): Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.

18. *See* 502 P.2d at 868-871.

19. 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

[9] In the absence of any constitutionally mandated population base, the Advisory Board sought information regarding Alaska's transient population. Military personnel were found to be the most prominent component, and on the basis of its data the Board found a certain proportion of the military to be excludable from the population base. The dissent finds error in the decision to exclude military transients from the apportionment population base primarily because the Board failed to treat civilian transients equally. For three reasons we find the Board's decision reasonable: (1) it was reasonable for the Board to conclude that civilian transients are not present in significant numbers in April, when the census data was obtained; (2) even if transients were present, they were not included in the Alaska census population, although all military stationed in Alaska were so included; (3) the special nature of military transience creates a reasonable basis to distinguish between military and civilian transients.

Initially we believe the Board was justified in concluding that civilian transients were not included in the 1970 Alaska census figures. The 1970 census data, upon which the exclusion was based, was obtained in April. The seasonality of tourism in Alaska is well known; although published data on tourist presence is not readily available, the absence of tourists in the state during school months and before the spring thaw is common knowledge. The likelihood that any number of tourists could have been included in Alaska's census population is, therefore, minute. The seasonality of much of Alaska's employment market has been authoritatively documented over several decades.[20] Specific data bearing out the general trend in recent years, and the 1970 census year in particular, is available through the Alaska Workforce Estimates prepared on a monthly basis by the Research and Analysis Section of the Employment Security Division of the Alaska Department of Labor. A review of those documents for 1970 shows the presence in April 1970 of a total statewide labor pool of 109,972 employable civilians.[21] That figure is but 7,000 more than the January ebb and over 17,000 less than the 127,144 peak in July.[22] The actual number of persons employed showed a similar pattern of increase and decline; for instance, in the food processing industry, which is inextricably tied to the highly seasonal fishing industry,[23] total employment doubled from 6,700 in April to 13,600 in July.[24]

Even if non-military transients were contacted by census takers in Alaska, it does not follow that they were included in Alaska's population. The census enumerates a person according to his "usual place of residence".[25] That clause is "generally

20. *See* Rogers, G. W. and Cooley, R. A., Alaska's Population and Economy, 127-30 (1962); Rogers, G. W., The Future of Alaska, 106-07 (1962); Rogers, G. W., Alaska, The Economy and the Labor Force, 78 Monthly Labor Rev. 1375 (1955); *cf.* Rogers, G. W., Alaska Regional Population and Employment, University of Alaska S.E.G. Report No. 15 at 30, 91 (1967). *See generally* Research and Analysis Section, Empl. Security Div., Alaska Dept. of Labor, Alaska Workforce Estimates by Industry and Area, 1965-72. The workforce estimates are prepared under mandate of the United States Department of Labor to the state to make available to the public, "accurate and timely area manpower and job market information for decision-making purposes." [11] United States Department of Labor, Employment Security Manual § 9020, *implementing* 20 C.F.R. § 602.6, *implementing* 29 U.S.C. § 301 *et seq.* We harbor no reluctance to take notice of such authoritative sources documenting a well known aspect of the Alaska economy. Civil Rule 43(a)(2)[c] and 43(a)(2)[d].

21. Research and Analysis Section, Empl. Security Div., Alaska Dept of Labor, Revised 1970 Alaska Workforce Estimate (1972).

22. *Id.*

23. *See generally* authorities cited at note 20, *supra*.

24. Research and Analysis Section, Empl. Security Div., Alaska Dept. of Labor, Revised 1970 Alaska Workforce Estimate (1972).

25. Bureau of the Census, Social and Economic Statistics Administration, United States Department of Commerce, Characteristics of the Population, Part A at v. (1971).

construed to mean the place where [a person] lives and sleeps most of the time."[26] Transient individuals in Alaska in April 1970 were not necessarily counted as Alaska residents. For example, the residence of tourists was attributed to their state of origin.[27] The same was true where a short-term worker was encountered in Alaska.[28] Those persons who were counted as residents of Alaska lived and slept here "most of the time", and it would be difficult to find a basis for excluding them from the population base.

Servicemen were treated very differently from civilians by the census, however:

> Members of the Armed Forces living on military installations were counted, as in every previous census, as residents of the area in which the installation was located. Similarly, members of the Armed Forces not living on a military installation were counted as residents of the area in which they were living. Crews of U.S. Navy vessels were counted as residents of the home port to which the particular vessel was assigned. . . .[29]

Thus the census fails to cull out the nonresident from the military census population, although it does so with respect to the civilian population.[30] In that distinction alone lies justification for the Board's excluding of nonresident military persons without also attempting to eliminate civilian nonresidents.

Finally, in concluding that the exclusion of the military cannot be reconciled with "the board's tolerance toward civilian transients" and comparing the exclusion of military personnel to a durational residency requirement, the dissent in our opinion ignores the fundamental reason for the exclusion of some military personnel—their want of any contact with the state beyond mere presence. Although some may volunteer for such duty, military personnel are ordered to report to the Alaska Command. Recognizing the involuntary nature of military assignment, common law courts, including the territorial district court,[31] have long stated that a person who enters the military retains the residence and domicil he established before entering the

26. *Id.*

27. *Id.* at vi.

28. *Id.* The rules followed by census enumerators to decide residence questions further support the understanding that civilian transients are not included in Alaska's census population in a significant number. Persons who maintained a permanent residence elsewhere than Alaska but were encountered in Alaska because of seasonal employment would have been classified as "Person who has more than one home and divides time between them", and the assigned residence would have been "Place where he spends largest part of calendar year." Bureau of the Census, United States Department of Commerce, Enumerator's Handbook Pub. D-507 [Rule 11] at 76. (The rules may also be found in other versions of the handbook, Publications D-500, D-520 and D-520.) Thus, the census included as Alaska residents only those transients who spent a majority of the year in Alaska. For the Board to seek to determine who among them actually considered themselves to be state citizens would be a Herculean task, if it could be accomplished at all. Persons who were in Alaska as seasonal laborers when their families were enumerated in other states would also have been referred back as residents of the locale of the family household. *Id.* [Rule 1] at 75. Only homeless migrants could have been included as Alaska residents, had such persons been present in the state. The relevant rule assigns "Persons in places which have shifting populations composed mainly of persons with no fixed residence, such as convict camps, highway and other construction camps, and camps for migratory agricultural workers," a residence in the camp where they are found. *Id.* [Rule 16] at 77. The thought that any significant number of people could have been encountered in agricultural or construction camps in Alaska on April 1, 1970 defies experience.

29. Bureau of the Census, *supra* note 25 at v.

30. The census does place college students where they attend school. The Board made an effort to determine the percentage of college students who were nonresidents. The number was found to be statistically insignificant.

31. Wilson v. Wilson, 40 Alaska 610, 621 (D.C.Anch.1945). The legislature in enacting AS 09.55.100 rendered nugatory the portion of *Wilson* which held that a serviceman may not sue for divorce within the state of assignment. *See* Lauterbach v. Lauterbach, 392 P.2d 24 (Alaska 1964).

military.[32] Most of these courts accept the principle that those in the military may acquire a domicil of choice where they are billeted, but the first Restatement of Conflict of Laws denied even that opportunity to some,[33] and the Second Restatement considers a new domicil "difficult to establish."[34] The principle that a military person retains his entrance domicil and residence has been embodied in a federal statute which exempts servicemen from virtually every form of taxation on income or personal property in the state where they are stationed unless they are domiciled there.[35]

As a result of the common and statutory law and the economics of military life, the serviceman and his family may remain completely aloof from the state of assignment, neither utilizing its services nor contributing to its treasury or public life.

We hold that it was reasonable for the Board to exclude some proportion of military personnel not merely because of their transience, but because a significant number of Alaska-based military personnel exercise an option to be non-Alaskans, despite their physical presence here. This phenomenon is well demonstrated by the minuscule voter registration on military

32. *See* Stifel v. Hopkins, 477 F.2d 1116, 1122 (8th Cir. 1973); Ellis v. Southeast Constr. Co., 260 F.2d 280, 281-282 (8th Cir. 1958); Prudential Ins. Co. of America v. Lewis, 306 F.Supp. 1177, 1184 (N.D.Ala.1969); Kopasz v. Kopasz, 107 Cal.App.2d 308, 237 P.2d 281, 285-286 (1951); Means v. Means, 145 Neb. 441, 17 N.W.2d 1, 3 (1945); Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713, 715-716 (1961); Wiseman v. Wiseman, 216 Tenn. 702, 393 S.W.2d 892, 895 (1965).

33. Restatement of Conflict of Laws, § 21 comment c. (1934).

34. Restatement (Second) of Conflict of Laws, § 17 comment *d*. (1971):

> A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, will probably not acquire a domicil there though he lives in the assigned quarters with his family. He must obey orders and cannot choose to go elsewhere. On the other hand, if he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duties, he retains some power of choice over the place of his abode and may acquire a domicil. To do so, however, he must regard the place where he lives as his home. Such an attitude on his part may be difficult to establish in view of the nomadic character of military life and particularly if he intends, upon the termination of his service, to move to some other place.

We recognize, of course, that durational requirements for establishment of residence or domicil often suffer constitutional defects. State v. Adams, 522 P.2d 1125 (Alaska 1974); State v. Van Dort, 502 P.2d 453 (Alaska 1972). We deal here not with a durational requirement, but with the question of whether an individual may be considered a resident for purposes of apportionment.

35. 50 U.S.C.A. App. § 574 provides:

> (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile, in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders . . . .

enclaves. It is thus not offensive to notions of equal protection to exclude from the population base even military personnel who have lived in Alaska for substantial periods of time, so long as those people have exercised their option to remain residents and domiciliaries of other states.

We turn, then, to the specific exclusion effected by the Board. The Board requested the military authorities in Alaska to compile and furnish data on Alaska's military and military-related population, and to furnish comments and suggestions concerning methods of identifying state residents among them. The Alaska Command reported that as of July 1, 1973, of the 18,581 uniformed military persons at the five major installations in Anchorage and Fairbanks, only 200, or 1.07 percent, are reflected as Alaska residents in personnel records. Since such figures probably are not promptly changed when personnel decide on a change of residence, they are of somewhat dubious value. They do show, however, that a substantial portion of the military population do not regard themselves as residents of Alaska.

The Board finally adopted a modification of a plan employed by the State of Washington in its recent reapportionment. The Washington plan was based on the premise that in any group of citizens approximately the same number will register to vote.[36] Therefore, the number of citizens could be extrapolated from the number of registered voters if the number of registered voters was known, but the number of residents was not. The statewide ratio of citizens to registered voters was 2.2:1. This ratio was then applied to the number of registered voters in the Fort Lewis-McCord Field military complex and in other military establishments occupying complete census enumerating districts. The number of military state residents (2.2 times the number of registered voters) was then subtracted from the total number of military persons present in the state, and the difference was deemed to represent the number of transient military personnel. The computation resulted in the exclusion of 58,507 persons—estimated to be nonresidents of the total of 60,143 military personnel. A corresponding downward adjustment was effected in the districts in which they had been counted (only 1,636 were included in the population base). A three-judge federal court adopted the reapportionment plan containing this formula which had been the result of a stipulation of some of the parties to the case. Two intervenors who were not parties to the stipulation appealed to the United States Supreme Court alleging in part that the method used unconstitutionally failed to include all of the military personnel. On appeal, the United States Supreme Court without opinion affirmed the order adopting the statistical reapportionment method.[37]

36. We do not find the dissent's suspicion of voter registration as an index of state citizenship of military personnel tenable. First, there is no contention that military personnel are subjected to some invidious discrimination in voter registration. In fact, there is evidence in the record that special efforts have been made to convince military personnel to register to vote, and that those efforts have failed. Nor do we consider the low percentage of registration or voting in bush areas to have any bearing upon the fairness of a voter-registration-based statistic, since the travel, communication, language, and cultural barriers of residents of those areas are not experienced by the vast majority of Alaska's military personnel. In any event, any statistical skew produced by low registration or voting in bush areas would lead, in the Board's exclusion formula discussed *infra*, to a result more favorable to military personnel as a class than that which would obtain if larger numbers of civilians registered and voted. There is every reason to believe that military personnel who desire to be Alaska residents and domiciliaries will register to vote because voter registration is a prime index of intention to become a resident or domiciliary. For like reason, we think that those who do no want to become Alaskans demonstrate that intention by refusing to register to vote. *See* Egan v. Hammond, 502 P.2d at 862 n. 2 for an example of the dismal results of efforts to register military persons as Alaska voters. Similar examples appear in the record of this case.

37. Washington State Labor Council AFL-CIO v. Prince, 400 U.S. 808, 93 S.Ct. 63,

The Alaska Advisory Board ascertained that the ratio between those registered to vote in the November 1970 Alaska election and the number counted in the April 1970 census was 1 to 2.717. This ratio was applied to those registered to vote in six locations populated exclusively by the military and their dependents.[38] A total of 1,049 persons were registered to vote in those military areas, thereby indicating 2,850 state residents (1,049 x 2.717). The census population within the sample area was 41,659, of whom 25,231 were estimated to be adults. Utilizing only the adults in the sample area, the Board found that approximately 11 percent were estimated to be residents (2,850/25,231), and accordingly 89 percent were nonresidents. Applying the 89 percent nonresidency factor to each place in which military personnel were counted resulted in a deduction of 28,581 from the total uniformed military population and corresponding deductions in each census district.

[10] There are obviously certain assumptions which had to be made in evolving the formula used, and admittedly there are inexactitudes. Any error, however, is bound to have resulted in more military and their dependents being counted than are actually residents of the state. For instance, the exclusionary formula was applied only to uniformed military personnel and not their dependents. Dependents of military persons may be assumed, for the most part, to have the same residential characteristics as the uniformed personnel upon whom they are dependent. There was an approximate total of 78,998 military and dependents counted in the 1970 census. Since but 28,581 were deducted, the actual percentage counted as residents was approximately 65 percent. Based on all statistical information available, this percentage is in all likelihood much higher than the actual percentage of military and military dependents who are residents of the state.[39] While an exclusion of a larger percentage of military personnel and dependents may be justified, we have not been presented with an issue as to overrepresentation of the military. We conclude that there was no discrimination against all military as a class and no improper exclusion of military personnel based on the nature of their employment.

IV

POPULATION VARIANCES

The 1973 reapportionment plan contains a maximum deviation in the House of Representatives of 29 percent, the Juneau district being underrepresented by 14 percent and the Nome district overrepresented by 15 percent. In the Senate, the maximum deviation is 22.4 percent.[40] Of 40 house seats, 22 derive from districts where representation deviates by five percent or more from the mean, and of 20 senate seats, 11 are situated in districts characterized by similar deviations. Since the deviations in both the house and the senate were, of course, both below and above the mean, the total deviations between several pairs of districts were in excess of ten percent. Appellants contend that such variances in population dilute and impair the right to vote of Alaskans in the underrepresented districts, in violation of the equal protection clauses of the United States and Alaska constitutions.

In Egan v. Hammond, we discussed the then-applicable constitutional criteria, first delineating the unique problems involved in attempting to secure equal population districts in Alaska:

> When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state. Surprisingly small changes in district boundaries create large percentage variances from the ideal population.[41]

We concluded:

> Thus the present standard for reapportionment allows two separate justifications for deviation from the ideal population figures. The first is . . . variance occurring because of uncontrollable factors, despite a good faith effort to achieve mathematical precision. The second acceptable deviation is that which "the State must justify"—the implication being that while it was a controllable deviation, other factors "incident to the effectuation of a rational state policy" can be advanced in justification. However, as the Supreme Court cautioned at an early date in Reynolds v. Sims, acceptable state policies are greatly limited.[42]

Since our opinion in Egan v. Hammond, there have been three United States Supreme Court opinions somewhat ameliorating the rigid standards previously applied. In the first of this trilogy, Mahan v. Howell,[43] a Virginia reapportionment plan involving a maximum variation of 16.4 percent [44] (one district was overrepresented by 6.8 percent and another underrepresented by 9.6 percent) was held to be justified by the state policy of following political subdivision boundary lines. The court recognized that the states had been accorded more latitude with respect to state legislative reapportionment than with respect to congressional redistricting.[45] While reaffirming the holding of Reynolds v. Sims that:

> [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.[46]

the court in *Mahan* emphasized that:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[47]

In Gaffney v. Cummings,[48] the Supreme Court upheld a reapportionment plan for the Connecticut General Assembly involving a maximum deviation of 7.83 percent although a proposed plan had been submitted involving a much smaller deviation. In establishing the reapportionment plan, the apportionment board had followed a policy

31 L.Ed.2d 68 (1972). *See also* In re Opinion of Justices, 111 N.H. 146, 276 A.2d 825 (1971), wherein the New Hampshire Supreme Court decided in an advisory opinion that excluding from the population base military personnel who have not met reasonable residence requirements was constitutionally permissible.

38. Approximately 60 percent of Alaska's military live in these six locations.

39. The largest claim to representation was detailed in our masters' report, where it was reported that 25 to 30 percent of military personnel and dependents in Alaska answered affirmatively to a census question whether their residence was the same in 1976 as it was in 1965. Assuming that pure duration creates voting residency, the 65 percent inclusion is more than double the allowance which could be argued for. *See* Egan v. Hammond, 502 P.2d at 880.

40. The Juneau senate district is underrepresented by 11 percent, and the Bethel district overrepresented by 8.4 percent.

41. 502 P.2d at 865 (footnote omitted).

42. *Id.* at 867 (footnote omitted). *See* Reynolds v. Sims, 377 U.S. at 579-580, 84 S.Ct. at 1390-1391, 12 L.Ed.2d at 537-538.

43. 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), modified, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973).

44. *But see* opinion of Brennan, J., dissenting, indicating that the maximum variation might well have been 23.6 percent. 410 U.S. at 336, 93 S.Ct. at 991, 35 L.Ed.2d at 337.

45. 410 U.S. at 322, 93 S.Ct. at 984, 35 L.Ed.2d at 329.

46. 410 U.S. at 324-325, 93 S.Ct. at 985, 35 L.Ed.2d at 330, *quoting from* Reynolds v. Sims, 377 U.S. at 577, 84 S.Ct. at 1390, 12 L.Ed.2d at 536.

47. *Id.*, *quoting from* Reynolds v. Sims, 377 U.S. at 579, 84 S.Ct. at 1391, 12 L.Ed.2d at 537.

48. 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973).

of "political fairness" aimed at establishing "a rough scheme of proportional representation of the two major political parties."[49]

The Supreme Court concluded:

> We think that appellees' showing of numerical deviations from population equality among the Senate and House districts in this case failed to make out a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment, whether those deviations are considered alone or in combination with the additional fact that another plan could be conceived with lower deviations among the State's legislative districts. Put another way, the allegations and proof of population deviations among the districts fail in size and quality to amount to an invidious discrimination under the Fourteenth Amendment which would entitle appellees to relief absent some countervailing showing by the State.[50]

Although the Court found in its previous decisions the principle that, "[T]he larger variations from substantial equality are too great to be justified by any state interest so far suggested", nevertheless it also held that, "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination. . . ."[51] The Court recognized that state reapportionment is the task of the organ of state government selected to perform it,[52] and that even though a slightly better plan could be created, that fact did not establish an invidious discrimination under the fourteenth amendment.

[11] Finally, in White v. Regester,[53] a Texas reapportionment plan was upheld although it contained a maximum population variance between the largest and smallest district of 9.9 percent. No acceptable state policy was advanced to support the deviations. However, only 23 districts were over or underrepresented by more than three percent, and only three of those districts by more than five percent. The Court held that it did not consider relatively minor population deviations among state districts to so dilute the franchise in underrepresented districts so that individuals in those districts were deprived of fair and effective representation:

> Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy," Reynolds v. Sims, 377 U.S. at 579 84 S.Ct., at 1391, 12 L.Ed.2d 506; Mahan v. Howell, supra, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone.[54]

According to Justice Brennan, *White* established a rigid demarcation line:

> [T]he Court today . . . reason[s] . . . that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971), where we held that a total deviation of 11.9% must be justified by the State, one can reasonably surmise that a line has been drawn at 10%; deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.[55]

We conclude that in the absence of a showing that the manner of reapportioning a state was improperly motivated or had an impermissible effect, deviations of up to ten percent require no showing of justification.[56] The state, however, has the burden of showing that deviations in excess of ten percent are "based on legitimate considerations incident to the effectuation of a rational state policy".

[12] We thus must ascertain whether the state has met its burden of justification here. As indicated in our order of June 6, 1974, we find that House districts No. 22 (Nome), No. 16 (Bristol Bay), No. 12 (Anchorage West), No. 20 (Fairbanks), No. 11 (Anchorage South), No. 9 (Anchorage Spenard), and No. 17 (Bethel), and Senate districts J (Anchorage West), M (Bristol Bay-Bethel), O (Fairbanks), G (Anchorage Spenard) and I (Anchorage South) are malapportioned in excess of a 10 percent maximum comparative variance, and that the appellees failed to demonstrate that the individual variances from the mean in those districts were based on legitimate considerations incident to the implementation of a rational state policy.[57]

[13] We find it necessary to discuss briefly the reasons advanced by the Advisory Board in attempting to justify the disparities in each of the districts referred to above. We are convinced that the Board made a good faith effort, but unfortunately we find that the reasons advanced by the Board do not withstand close scrutiny under the standards enunciated by the United States Supreme Court. In many instances, one of the principal reasons advanced by the Board was the preservation of the boundaries of regional corporations established under the Alaska Native Claims Settlement Act. Under that Act, the state was divided into 12 regions, and separate corporations were established for each region. By the division it was sought to establish homogeneous groupings of Native[58] peoples having a common heritage and sharing common interests.[59] The use of such corporate boundaries in districting might constitute justification for some population deviation. Following corporate boundaries was stated as a reason for the composition of House districts 22 (Nome), which was 15 percent overrepresented, 16 (Bristol Bay), which was 10.9 percent overrepresented, and 17 (Bethel), which was 6.3 percent overrepresented. We find, however, that none of those districts has the boundaries of a Native corporation. Each included substantial portions of more than one corporate region.

Additionally, it was suggested that the Nome area had a unique Native composition. But the makeup of the population both to the north and east does not vary significantly from that of the adjoining villages within the Nome boundaries. The mining potential in the area and the need for a "common port facility" do not constitute considerations incident to the implementation of a rational state policy so as to justify a disparity of 15 percent overrepresentation.

49. *Id.* at 738, 93 S.Ct. at 2324, 37 L.Ed.2d at 303.

50. *Id.* at 740, 93 S.Ct. at 2325, 37 L.Ed.2d at 304-305.

51. *Id.* at 745, 93 S.Ct. at 2327, 37 L.Ed.2d at 307.

52. *Id.* at 751, 93 S.Ct. at 2330, 37 L.Ed.2d at 311. The Court pointed out that constitutional violations could occur even though districts were equal or substantially equal in population as, for example, when multi-member districts are so established as to invidiously minimize the voting strength of racial or political groups.

53. 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314.

54. *Id.* at 764, 93 S.Ct. at 2338, 37 L.Ed.2d at 323.

55. *Id.* at 770, 93 S.Ct. at 2345, 37 L.Ed.2d at 331 (Brennan, J., dissenting).

56. The challengers' briefs are silent on the issue of whether the governor's plan had the purpose or effect of discriminating impermissibly against any racial, ethnic or political group. At oral argument, counsel for the challengers, who is also a state senator from Anchorage, conceded that the record did not demonstrate any such discrimination.

57. The attempted justifications are to be found in the report and proposed plan of the Governor's Advisory Reapportionment Board. The testimony at the trial of this case produced little if any evidence to supplement the justifications set forth in the report.

58. "Native" is basically defined in the Act as a citizen of the United States who is ¼th degree or more Alaska Indian, Eskimo or Aleut, or combination thereof. 43 U.S.C.A. § 1602(b).

59. 43 U.S.C.A. § 1606.

No valid reasons were advanced for the 10.9 percent overrepresentation with reference to House District 16 (Bristol Bay). We can agree with the Board's decision not to combine the Bristol Bay area with the Aleutian Chain because of conflicts between the residents of the two areas, but that does not explain why other areas could not have been added to the district so as to create less of a variance.

District 20 (Fairbanks) is a multi-member district electing six house members. It is 7.4 percent overrepresented, and no valid reasons were set forth as to why additional areas could not be included so as to reduce the variance.

The explanation advanced for District 17 (Bethel) having 6.3 percent overrepresentation was the inclusion of a portion of the Calista Native Corporation Region and utilization of one of the boundaries of that region. In view of the fractionation of Calista revealed by reference to the maps, the reason advanced cannot justify the discrepancy under the Supreme Court guidelines.

Finally, Anchorage districts 9, 11 and 12 were underrepresented respectively by 5.9, 6.5 and 8.6 percent. Having made the policy decision to divide Anchorage into six districts, the Advisory Board endeavored to identify like socio-economic areas, based on the cost of housing, the concentration of minorities, income levels, the need for transit systems and growth and development plans. It is clear from the testimony, however, that there are few if any homogeneous areas within the Anchorage Borough; the patterns of housing, income levels and minority residency criss-cross extensively.

The Board's apparent effort was directed at compliance with the Alaska constitutional mandate that districts contain "as nearly as practicable a relatively integrated socio-economic area."[60] Some guidance as to the meaning of the term "socio-economic area" may be garnered from the minutes of the Constitutional Convention.

It appears that Delegate Hellenthal advocated the use of the term, describing it as follows:

> [w]here people live together and work together and earn their living together, where people do that, they should be logically grouped that way.[61]
>
> . . . . . .
>
> It cannot be defined with mathematical precision, but it is a definite term, and is susceptible of a definite interpretation. What it means is an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits. It has, as I say, no mathematically precise definition, but it has a definite meaning.
>
> . . . . . .
>
> It is in common use among political scientists.
>
> . . . . . .
>
> I think it is a political and economic term rather than a legal term.[62]

It would appear from that discussion that a community such as the Greater Anchorage Borough might be considered as a socio-economic area, but that it becomes extremely difficult to fragment the area with geographic nicety according to the patterns endeavored to be followed by the Board. As was stated in The Report of the Masters, appended to the decision in Egan v. Hammond: "Close scrutiny of population characteristics in Anchorage do [sic] not reveal clearly delineated ethnic ghettos."[63] And at least as far as the election of legislators is concerned, Alaska does not seem to be afflicted with the racial miasma adversely affecting other sections of the United States.[64]

60. Art. VI, § 6 Alaska Const.

61. Minutes, Constitutional Convention 1836.

62. *Id.* at 1873.

63. 502 P.2d at 801.

64. Many Alaska Natives have been elected to the legislature, and two have been elevated to the position of President of the Senate. Appellants point out that a black was elected to the House from a district with an insignificant minority population. [Holland Dep. 34]

[14] The testimony in the court below indicated that there are few if any homogeneous socio-economic areas within the Greater Anchorage Area Borough, and that patterns of housing, income levels and minority residency are difficult to delineate. While such patterns may form a basis for districting, they lack the necessary significance to justify the substantial disparities of 5.9, 6.5 and 8.6 percent. In an urban area such as Anchorage, more mathematical exactness can be achieved than in the sparsely settled portions of the state where pockets of culturally and economically divergent populations may be separated by geographic barriers. We hold that appellees have failed to meet the constitutional burden of justifying the discrepancies found in Districts 9, 11 and 12.

[15] On the other hand, we do find that the burden was met with reference to House districts 2 (Wrangell-Petersburg), 4 (Juneau), 14 (Kodiak), and 15 (Aleutian Chain). With reference to the Juneau and Wrangell-Petersburg areas, the Board was confronted with the difficult problem of juggling the more contiguous, compact, relatively integrated socio-economic areas of Southeast Alaska without extending a substantial distance into an unrelated area separated by immense natural barriers. Yakutat, the northwestern-most settlement in Southeast Alaska, which is itself separated by great distance from the other communities in the region, is 225 air miles from the nearest population center in the Southcentral region, Cordova. There are valid considerations both historically and geographically for not endeavoring to span that gap. Within the Southeast area, Juneau is substantially underrepresented, exceeding the norm for a two-member district by 14 percent. The Board, however, presented a rational basis for not severing Skagway and Haines from the district, the only logical alternative which would reduce the underrepresentation. There are close transportation ties between Juneau, Haines and Skagway by daily scheduled air flights and frequent ferry service; a Juneau-Haines highway connection has been planned. The district is quite distinct from the rest of the Southeast region by virtue of the nature of its development and the fact that it is almost entirely composed of portions of the mainland, rather than the islands of the archipelago; historically the three communities have always been closely linked, with Juneau serving as an economic hub for Haines and Skagway.

District 2 (Wrangell-Petersburg) is the other Southeastern district with a substantial deviation—9.3 percent overrepresentation. The Board stated valid considerations for this variation, which necessarily implemented the rational state policy, expressed in the Alaska Constitution, of achieving, as nearly as practicable, contiguous, compact territory containing a relatively integrated socio-economic area.[65]

We likewise find adequate justification for the 6.5 percent overrepresentation in the vast and remote Aleutian Chain District. The district includes all of the area of the Aleut League Corporation. There appears to be no feasible means of adding additional areas of population to this district without worsening the imbalance al-

65. As the Board explained:

> The orientation of this entire district is fishing, fish processing, forest products, and tourism, and nearly all of its communities partake of all of these activities. They are integrated by the Southeast System of the Alaska Marine Highway and by numerous air taxi operators and a scheduled commercial airlines. The population is a mixture of natives and non-native [sic]. The only option for reducing the slight overrepresentation which the district may enjoy would be to reach into the Juneau district from the south or west, taking part of Douglas, Juneau, or Haines. Such a course would either effectively disenfranchise that part of Douglas or Juneau engrafted to the district or would require a bisection of the Haines Borough, further submerging its institutional voice in the legislature. Extending into Prince of Wales Island or the Sitka district would only magnify the slight numerical advantage already inevitable for those districts.

ready present in District 14 (Kodiak). By the same token, Kodiak, which is overrepresented by 5.7 percent, does not readily present an alternative, as it is surrounded by the Aleutian Chain District.

Since the senate districts combined house districts and utilized the same boundaries, the identical reasons for approving or disapproving the disparities are applicable. We thus find it necessary to hold that Senate Districts G (Anchorage Spenard), I (Anchorage South), J (Anchorage West), M (Bristol Bay-Bethel), and O (Fairbanks) exceed permissible constitutional limits as to population variances, and that appellees have failed to demonstrate that such variances are based on legitimate considerations incident to the implementation of a rational state policy.

V

DISTRICTING OF THE GREATER ANCHORAGE AREA

Appellants complain of the division of Anchorage into six election districts, contending that the area constitutes one integrated socio-economic area which should not be fragmented.

[16] We have previously upheld the authority of the governor to create single-member districts from multi-member districts.[66] The power to create such single-member districts applies to integrated soci-economic areas as well as to other areas. We do not construe the Alaska constitutional requirement that districts be formed from contiguous, compact, relatively integrated socio-economic areas to prohibit smaller districts within such areas. The smaller districts would still conform to the constitutional standard. It is conceivable, for example, that the population of Anchorage could vastly increase. It surely could not have been contemplated by the framers of the Constitution that a compact, contiguous, and socio-economically integrated metropolis of perhaps 500,000 persons could not be districted.

[17] The Advisory Board was confronted with competing policy considerations with reference to the desirability of keeping the ballot simple, encouraging qualified candidates to run for public office, and ensuring maximum voter participation, as opposed to avoiding undue fragmentation of the community. The majority of the Board found that:

> At-large representation would produce an unwieldly primary ballot with well over 100 candidates. Two districts—each to elect eight representatives and four senators—would still produce a cumbersome total of candidates and would be a more complicated ballot than is presented to voters in any part of Alaska.

The governor adopted the plan advocated by a majority of the Board, whereby the city was divided into six districts. While substantial arguments have been advanced both for and in opposition to the Board's decision, we cannot say that it is not based on rational as opposed to arbitrary considerations. Therefore, under the standard of review which we have adopted, the decision of the Board must be upheld.

Arguments have also been advanced as to the manner of delineating the districts, aside from the population imbalances discussed previously. We do not find that the boundaries lack a rational basis. Since we are not free to impose our judgment as to the wisdom of the particular partitions, we cannot entertain the argument that Anchorage could have been divided more prudently.

The superior court did not err in upholding this portion of the reapportionment plan.

VI

THE TERMINATION OF SENATORIAL TERMS

Because the reapportionment plan substantially altered the senatorial districts in the Greater Anchorage area, the governor

66. Egan v. Hammond, 502 P.2d at 873.

ordered that new elections must be held in 1974 for all senate seats in these districts. Formerly, the area constituted one senatorial district from which eight senators were elected, four being selected to four-year terms at each biennial election. The four incumbents whose terms would otherwise have extended to 1976 thus had the balance of their terms of office truncated.

Appellants contend that there was no need to terminate senatorial terms. The principal argument advanced, however, is not directed to the authority of the governor to terminate the terms of incumbents under the Anchorage reapportionment plan establishing six new districts, but to the appellants' preference that members of the senate should represent "larger, broader, socio-economic constituencies and should be elected area wide." Reference is made to a Senate Resolution expressing similar sentiments.[67]

[18] While the governor might have favorably considered the policies of having senators from Anchorage elected at large, there were valid reasons for him to exercise his discretion by dividing the area into six districts. In the previous section of this opinion, we stated our reasons for upholding the governor's decision to redistrict the Anchorage area. Once this portion of the reapportionment plan has been approved, appellants' principal argument evaporates. Since the district from which the four holdover senators were elected no longer exists and the new districts have vastly changed boundaries, it was within the governor's discretionary authority to require mid-term elections. When confronted with the same question in Egan v. Hammond, we stated:

> A need to truncate the terms of incumbents may arise when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent. The discretionary authority to require mid-term elections when necessary is well established.[68]

Counsel refers to the decision of the Supreme Court of California in Legislature v. Reinecke.[69] There a masters-recommended reapportionment plan which provided for hold-over senators to continue to serve for the balance of their terms was upheld as having a rational basis. The court considered the desirability of continuing the orderly operation of the four-year staggered term system whereby half of the senators would hold over at each session. Although it recognized a "resulting inequality among electors", the court found that the mere two-year duration of such inequality was not sufficiently egregious to require truncation of terms.[70]

If we had the original decision to make, we might well be persuaded by similar reasons to have the four senators continue to serve the balance of their terms. We conclude, however, that valid reasons were presented for truncating the terms and, accordingly, we affirm the trial court's decision upholding that portion of the reapportionment plan.

Affirmed in part and reversed in part.

ERWIN, J., with whom CONNOR, J., joins, dissenting.

ORDER

This case is before the Supreme Court of Alaska on appeal from a judgment entered by Superior Court Judge James K. Singleton in favor of appellees. Appellants below have raised a number of objections to the proclamation of reapportionment and redistricting issued by Governor William A. Egan on December 11, 1973, adopting a plan submitted by the Gover-

67. S.Res. 1, 8th Legis.2d Sess. (1974).

68. 502 P.2d at 873-874 (footnote omitted).

69. 10 Cal.3d 396, 110 Cal.Rptr. 718, 516 P.2d 6 (1973).

70. *Id.* 110 Cal.Rptr. at 723-724, 516 P.2d at 11-12.

nor's Advisory Reapportionment Board. After considering the briefs of the parties and hearing oral argument, a majority of the Supreme Court affirms the decision of Judge Singleton on the following issues:

1. The use of the 1970 census data.
2. The use of the formula establishing the number of military personnel and dependents to be included in the population base.
3. The authority of the Governor to establish multiple senatorial districts within the greater Anchorage area.
4. The authority of the Governor to truncate senatorial terms when the districts from which the senators were elected have been substantially changed.

We hold, however, that the superior court's conclusion that all House and Senate districts have been properly apportioned is erroneous. Specifically, House districts No. 22 Nome, No. 16 Bristol Bay, No. 12 Anchorage—West, No. 20 Fairbanks, No. 11 Anchorage—South, No. 9 Anchorage—Spenard, and No. 17 Bethel and Senate districts J Anchorage—West, M Bristol Bay—Bethel, O Fairbanks, G Anchorage—Spenard, and I Anchorage—South exceed permissible constitutional limits as to population variances as delineated by decisions of the United States Supreme Court.[1] Appellees have failed to demonstrate that such variances in the plan are based on legitimate considerations incident to implementation of a rational state policy.

The case is remanded so as to enable the Governor of the State of Alaska, if he so desires, to re-submit the plan to the Advisory Reapportionment Board for the purpose of revising it to bring the districts specified above within constitutional standards.

In revising the proposed plan the Board may alter any district to correct population imbalances. Every effort shall be made to insure that maximum variances in the districts set out above shall not exceed ten (10) per cent. There shall not be a spread exceeding ten (10) per cent in the population of any over-represented district and any under-represented district, excluding the districts of Southeast Alaska, District 14 Kodiak, and District 15 Aleutian Chain, unless such variance is based on legitimate considerations incident to a rational state policy with specific reasons in justification being stated. In assessing permissible population variances the Board may disregard deviations in districts located in Southeast Alaska, District 14 Kodiak, and District 15 Aleutian Chain because variances in those districts are based upon legitimate considerations incident to implementation of a rational state policy. Changes may be made in other districts as may be found necessary.

Unless a revised plan is returned to the court on or before June 20, 1974, the interim plan promulgated by this court by Order Establishing An Interim Reapportionment Plan For 1972 Legislative Elections, dated June 14, 1972,[2] shall be effective for the 1974 legislative elections. Objections to the June 20, 1974, deadline shall be filed on or before three (3) days from the date of this order, setting forth reasons why some date other than June 20, 1974, would be more appropriate. In the event an alternative plan is submitted by the Governor to this court, the court will receive written comments or objections from appellants if filed by 12:00 noon on June 24, 1974. In the event an alternative plan is submitted by the deadline, the court will review it and take whatever action is appropriate.

A full opinion shall follow including dissents of individual justices on different points raised by this appeal.

Dated this 6th day of June, 1974.

ERWIN, Justice, with whom CONNOR, Justice, joins (dissenting).

I dissent from the majority opinion on the ground that the exclusion of all but a small percentage of the military from the reapportionment plan's population base violates the equal protection clauses of the United States and Alaska Constitutions.[1]

In Egan v. Hammond,[2] this court recognized that military personnel as a class cannot be denied the right to vote in a state election or be arbitrarily eliminated from the population base in a reapportionment plan solely because of their military status, although some military may be excluded as a permissible device for limiting the impact of transients and non-residents. One plan suggested in *Egan* for achieving this goal was to limit the population base to state citizens by adopting a registered voter base, even though such a base inherently eliminates a much higher proportion of the military than civilians. But, as we were careful to point out, the equal protection clause of the United States Constitution, and presumably the Alaska Constitution, require specific factual justification for eliminating any portion of the military from the population base. When a particular class of the state's population—namely the military—is singled out in a reapportionment plan for exclusion on the basis of the nature of their employment alone, the burden is squarely upon the proponents of the plan to demonstrate the reasonableness of that course of action, because such an exclusion is prima facie invalid. In the absence of sufficient justification, the military must receive the same treatment as their civilian counterparts.[3]

My examination of the record reveals that appellees clearly failed to justify application of any version of the Washington formula in Alaska. I thus cannot agree with the majority's assumption that the basic principle of the formula is as applicable to Alaska as it was to Washington. On the contrary, I find the majority's acceptance of the formula without sufficient proof of its validity in Alaska to be remarkable in itself, for in upholding many other aspects of the proposed reapportionment plan the majority has repeatedly emphasized Alaska's uniqueness.[4]

I also cannot accept the Board's tolerance of civilian transients while at the same time excluding apparent military transients from the population base. As we indicated in Egan v. Hammond, population bases grounded upon state citizenship are acceptable only when supported by accurate and statistically reliable data for discriminating between citizens and transients.[5] In this case, the Board's assumption that military but not civilian transients would distort the population base is without foundation or justification in

1. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973).
2. Egan v. Hammond, 502 P.2d 856, 927-929 (Alaska 1972).

1. I harbor further misgivings about whether some of the election districts in the reapportionment plan are "relatively integrated socio-economic areas," as required by article VI, section 6 of the Alaska Constitution. However, since a number of these districts have been found to have population deviations in excess of those allowed under federal constitutional standards and have been remanded to the Board for modification, I reserve judgment on this issue until I have had an opportunity to study the modified plan.
2. 502 P.2d 856, 869-870 (Alaska 1972).
3. *See* Mahan v. Howell, 410 U.S. 315, 330–332, 93 S.Ct. 979, 988–989, 35 L.Ed.2d 320, 333-334 (1973); Burns v. Richardson, 384 U.S. 73, 92 n. 21, 86 S.Ct. 1286, 1296 n. 21, 16 L.Ed.2d 376, 391 n. 21 (1966); Carrington v. Rash, 380 U.S. 89, 95-96, 85 S.Ct. 775, 779-780, 13 L.Ed.2d 675, 679-680 (1965); Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609, 617 (1964); Egan v. Hammond, 502 P.2d 856 860, 869 (Alaska 1972).
4. See the discussion in Egan v. Hammond, 502 P.2d 856, 865 (Alaska 1972), emphasizing Alaska's uniqueness.
5. 502 P.2d at 870-871.

the record. And the majority's effort to justify the Board's tolerance toward civilian transients with documentation on Alaska's employment patterns which is not part of the record is patently inconsistent with their earlier conclusion that the duty of this court is to exercise *de novo* jurisdiction based "upon the record developed in the superior court." [6]

In fact, the record is almost completely devoid of data on civilian transients. For example, there is little, if any, support for the majority's observation that at the time of year when the census was taken—April—most of the civilian transient elements were absent from the population base. Without concrete data it cannot be merely assumed that migrants and seasonal employees are not present in the state in significant numbers during the month of April, for it is common knowledge that an increasing number of transients are present in Alaska during the winter months. It also cannot be assumed that because the census counts a person at the place "he lives and sleeps most of the time" most of the civilian transients are necessarily excluded from Alaska's population base. As the majority itself points out, the census enumerates not only those migrants who claim ties to no other state but also those individuals who maintain a permanent residence elsewhere and spend a majority of their time in Alaska. Yet the record reveals that the Board made no effort to determine the impact of these transient groups upon the population base. Surely these transients have no greater contacts with the state than military residents who live here on a year-around basis and whose children attend local schools.[7]

The majority attempts to justify the inclusion of these transient groups in the population base by concluding that it would be a "herculean task" to determine who among them actually consider themselves citizens of Alaska. Again the record fails to support the majority. The record reveals that Robert Sharp, City Manager of Anchorage, testified before the Board that it cost the City only $40,000 in 1968 to conduct a door-to-door canvass of the entire Anchorage area, which has approximately 65 per cent of Alaska's population.[8] Assuming this to be a fair measure of the cost of surveying the incidence of state citizenship among civilians, it becomes apparent that such a survey would hardly be a "herculean task." Even if it were, however, the greater difficulty of determining the incidence of state citizenship among the civilian population is a weak excuse for singling out the military for discriminatory treatment.[9]

The majority goes on to assert that the dissent "ignores the fundamental reason for the exclusion of military personnel—their want of any contact with the state." In support of this cold assertion they cite to a body of law which, in short, indicates only that the involuntary nature of military assignments points toward retention of the domicile established prior to entering the service. They also cite to a federal statute exempting servicemen from various forms of state taxation and then summarily conclude that as a result of this law and the "economics of military life, a serviceman and his family may remain completely aloof from the state of his assignment . . . . ."

This argument is unpersuasive for three basic reasons. One, it ignores the location of the burden of proof; two, it indicates a fundamental misunderstanding of the economic facts of military life; and three, it ignores the fact that the same argument can be made with regard to other classes of federal public servants who serve in Alaska for limited terms but were not excluded from the population base.

First, it is not disputed that a serviceman has an option to remain economically aloof from the state of his assignment, neither contributing to its treasury nor utilizing its services. But the burden nevertheless remains squarely upon the state to establish that each and every military person excluded from the population base in a reapportionment plan has in fact exercised this option. By silently condoning the state's failure to meet this burden, the majority is overruling our holding in Egan v. Hammond respecting the burden of proof on the military exclusion issue.

Second, no doubt the "economics of military life"—which presumably refers to the tax exempt status of servicemen and the bonuses offered nondomiciliaries stationed in Alaska—are largely responsible for the failure of many military personnel stationed in Alaska to publicly admit domicile by registering to vote. But what the majority fails to discern is that an unwillingness to register to vote is not conclusive of a serviceman's intentions or desire to become a state citizen. All that it demonstrates is a perfectly expectable reluctance, even on the part of bona fide military residents, to risk losing significant economic advantages by registering to vote. The "economics of military life" indicate not that the military lack "any contact with the state beyond mere presence" but rather only that the military, both resident and nonresident, are subjected to unique economic pressures to which civilians are not exposed. Forcing military residents to withstand these pressures at the cost of surrendering their fundamental right to be included within the population base effectively penalizes them for exercising constitutional rights.[10]

Third, the same argument regarding minimum contacts with the state that the majority makes with respect to the military also applies to a body of federal public servants who serve for limited terms in Alaska and enjoy many of the same trappings and benefits as the military. Yet the majority ignores the fact that no attempt was made to exclude them from the population base. Certain employees of the federal Public Health Service and the Coast and Geodetic Survey, who enjoy military rank similar to Coast Guard rank, are assigned to Alaska for limited terms of duty, as are certain employees of the Federal Aviation Administration and the Army Corps of Engineers. Certainly these groups should be treated on a par with the military if the military are to be subjected to a state citizenship test.

The majority goes on to point out that the "largest claim" to representation of the military in the population base lies in the 25–30 per cent of military personnel and their dependents who at the time of the 1970 census had lived in the state for more than five years. They then note that the

6. The majority has attempted to bring this material within the reviewable record by judicial notice under Civil Rule 43(a)(2) [c] and [d]. Since this material is reasonably subject to dispute and its accuracy cannot be determined by resort to sources of indisputable accuracy, I do not believe it to be an appropriate subject of judicial notice.

7. Even the state's 3,752 aliens who were enumerated in the 1970 census and consequently included in the population base, were not, like the military, subjected to a state citizenship test. Egan v. Hammond, 502 P.2d 856, 920 n. 2 (Alaska 1972).

8. Transcript of the June 29, 1973, hearing in Anchorage, at 24.

9. The Board did consider the effect of the state's transient college students. But even there, in deciding that their number was statistically insignificant, the Board rested its conclusion upon admittedly inconclusive data based upon durational residency requirements which have been specifically disapproved as criteria for determining voter eligibility. *See* State v. Van Dort, 502 P.2d 453 (Alaska 1972).

10. Another disturbing aspect of "military economics" which is ignored by the majority is that, despite the fact that all military personnel are counted for the purpose of obtaining federal revenue sharing, they are now effectively denied representation in the legislative body which sets the priorities controlling the expenditure of this revenue. Basic fairness would appear to require that a state which accepts federal funds for the purpose of providing local services to military personnel should be required to assure an effective voice to the military in determining how these funds are to be spent. Counting a mere 11 per cent of the military in the population base falls far short of achieving this goal.

present plan includes a far larger percentage—65 per cent—of the military and their dependents than the 25-30 per cent that would be included if a 5-year residency were taken to be conclusive of state citizenship. The majority then observes that the opponents of the military exclusion formula have failed to argue for a higher inclusion figure than 25-30 per cent and imply that the formula is valid because, while it does not provide statistical certainty, it is more than generous to the military.[11]

Again the majority has lost focus of the location of the burden of proof. The burden is not upon the opponents of the plan to argue for a higher inclusion figure but upon the proponents to justify exclusion of any military. Even if it were to the contrary, however, the conclusion that the formula is valid because it resolves doubts in favor of increased military representation does not justify adoption of a formula which discriminates between military and civilian transients. The fact remains that the formula does not accurately reflect residency among the military. It is thus contrary to all notions of fairness and equal protection to utilize it in the reapportionment plan.

I also cannot accept the majority's assumption that voter registration can be taken as an indication of a person's state citizenship in Alaska. In the Hawaii reapportionment plan litigated in Burns v. Richardson,[12] the state's registered voters were accepted as a permissible population base only because this base purportedly produced a distribution of legislators not unlike that which would have resulted from the use of a more conventional population base such as state citizenship or total population. This correlation was undoubtedly due in part to the fact that Hawaii exerted a monumental reapportionment and voter registration effort.[13] The Court in *Burns* was quick to point out, however, that, even though it was accepting a voter registration base in Hawaii, it considered such a population base generally suspect:

> Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process . . .[14]

Thus, at the very least, a voter registration base must be shown to correlate with state citizenship, total population, or some other permissible reapportionment base.

The record amply demonstrates that no such showing has been made in this case. On the contrary, there is substantial evidence that voter registration does not correlate with state citizenship or total population. For example, Alaska alone among the northern states was singled out by the 1965 federal Voting Rights Act[15] as a state that possibly abridges the rights of its citizens to vote because of the low percentage of votes cast by its eligible voters.[16] Although Alaska has since rid itself of that dubious status by a declaratory judgment, that judgment remains reviewable.[17]

11. Note 20 of the majority opinion *supra*.

12. 384 U.S. 73, 92-93, 86 S.Ct. 1286, 1296-1297, 16 L.Ed.2d 376, 391 (1966).

13. See the discussion of this effort in Burns v. Gill, 310 F.Supp. 1285, 1289 (D.Hawaii 1970), *quoted in* Egan v. Hammond, 502 P.2d 956, 960 n. 16 (Alaska 1972).

14. 384 U.S. at 92-93, 86 S.Ct. at 1297, 16 L.Ed.2d at 391.

15. 42 U.S.C. § 1973 et seq. (1970).

16. 1965 U.S.Code Cong. and Admin.News, p. 2445.

17. On August 17, 1966, Alaska was granted a declaratory judgment by the District Court for the District of Columbia in Civil No. 101-66 removing it from coverage under the Voting Rights Act. When portions of the state were again included under a 1970 amendment to the Act, Alaska again secured a declaratory judgment from the same court in Civil No. 21-22-71 removing those portions of the state from coverage under the Act. This latter judgment remains revocable for a period of five years following its entry. 42 U.S.C. § 1973a (1974).

Also, it is not uncommon for a particular segment of Alaska's citizens to exhibit a reluctance to register to vote. For example, statistics compiled from the 1970 census and the 1972 official primary and general election returns reveal that a very low percentage of Alaska's large aboriginal population registers to vote, although they are undeniably state citizens.[18] Without a showing that the military do not exhibit a similar reluctance to register, even though they are citizens, voter registration behavior alone cannot be used to estimate the number of state citizens among the military.

Further, Burns v. Richardson,[19] which recognized that if voter registration is indicative of state citizenship, it may be used as a reapportionment base, was decided before the United States Supreme Court and this court began to move toward de-emphasizing the role of state citizenship in the election process. The recent decisions of Dunn v. Blumstein[20] and State v. Van Dort,[21] which disapprove of durational residency requirements conditioning the right of franchise, severely restrict the use of objective state citizenship tests in determining voter eligibility. And State v. Adams[22] goes even further to suggest that no objective test for state citizenship which inherently infringes upon a fundamental right—*e. g.*, franchise—should be permitted to condition the exercise of that right. Even more importantly, however, these cases squarely place the burden upon the proponent of such a test to demonstrate a compelling justification for it. While I am not persuaded that the compelling state interest standard should be applied to reapportionment, I believe that these cases nevertheless place a heavy burden of persuasion upon the proponents of any reapportionment plan based upon a state citizenship test to demonstrate that the test in fact excludes only non-citizens from exercising their fundamental right of franchise. In this case the proponents have quite clearly failed to meet this burden for they have established no reliable correlation between voter registration and state citizenship. I would thus hold that voter registration has not been demonstrated to be a sufficiently reliable population base for a reapportionment plan in Alaska and remand the case to the Board to change the population base.

Both this case and Egan v. Hammond pointedly illustrate the perils of expedited litigation. Twice within the space of two years this court has been called upon at the eleventh hour to review reapportionment plans under the pressures of an imminent election. And twice these pressures have forced us to make decisions on the basis of records which, in my opinion, have been inadequate. I, for one, hesitate to reach a decision on an issue as far-reaching and important as reapportionment without an adequate record. Were it not for the fact that small numerical variations in the apportionment of people between the election districts are greatly magnified by Alaska's comparatively small population, I would not be so insistent that the record provide adequate justification for each attempt by the Board to depart from the constitutionally mandated goal of mathematical equality. But since a variation of only 68 people causes a one per cent variation in the population of each election district in Alaska, great care must be taken to assure that the exclusion of each and every person from the population base is constitutionally permitted. If any reapportionment case reaches us in the future with an inadequate record like the present one, I will vote to remand the case for further findings.

18. For example, in the 1972 general election only about 10 per cent of the total populations in the predominantly aboriginal communities of Barrow and Bethel voted. Approximately 33 per cent of Alaska's total population voted in the same election.

19. 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

20. 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

21. 502 P.2d 453 (Alaska 1972).

22. 522 P.2d 1125 (Alaska 1974).

OPINION

ON OBJECTION TO THE REVISED REDISTRICTING PLAN PROCLAIMED ON JUNE 14, 1974

BOOCHEVER, Justice.

On June 6, 1974, we remanded this case to enable the governor of the State of Alaska to resubmit the reapportionment plan to the Advisory Reapportionment Board for the purpose of revising it to bring the population of districts specified in our order within federal constitutional standards. In the event a revised plan was submitted on or before June 20, 1974, written comments or objections were to be filed by 12:00 noon on June 24, 1974. The Advisory Reapportionment Board submitted to the governor of the State of Alaska its Proposed Revised Plan of Reapportionment and Redistricting which the governor adopted by proclamation on June 14, 1974. Objections were filed by the appellants. In addition, a notice of objection and a motion for leave to intervene as a party or to file an amicus curiae brief was also filed by the Kenai Peninsula Borough. After denying the Kenai Peninsula Borough motion to intervene but granting the Borough the right to file a memorandum as amicus curiae, the court, upon request for oral argument on the objections, specially heard such arguments on June 26. Counsel for the Borough was permitted to participate in the oral arguments.

The objections filed by the appellants pertained to the redistricting of the Anchorage area, the termination of Anchorage senate terms and the exclusion of some military personnel from the population base. None of these objections was addressed to the revisions set forth in the revised plan proclaimed by the governor on June 14, 1974.[1] The objections reiterated and amplified arguments previously advanced against the original reapportionment plan of December 11, 1973. We have again carefully considered those objections and find no reason to alter our opinion with reference to the issues raised.

The Kenai Peninsula Borough objected to the portion of the revised plan which severed the southern end of the Kenai Peninsula from the Borough, the peninsula and House District No. 13 (Kenai-Cook Inlet) and joined it to House District No. 16 (Bristol Bay) in order to achieve a less-than-five-percent deviation in House District No. 16. The area transferred to District No. 16 comprised about 680 residents or slightly more than ten percent of the entire population of District No. 16, most of which is located across sea and mountains from the Kenai Peninsula area. The Borough points out that the residents of the Kenai area so transferred had interests similar to those of other residents of the Kenai-Cook Inlet District No. 13 and little in common with the residents of House District No. 16 (Bristol Bay). The Borough argues that the residents of the severed portion of House District No. 13 would be disenfranchised because their influence would not be of sufficient weight to receive attention from Bristol Bay District Legislators.

We found in our order of June 6, 1974 that District No. 16 exceeded constitutionally permissible population variances as delineated by decisions of the United States Supreme Court, and that the state had failed to demonstrate that the variance was based on ligitimate considerations incident to the implementation or rational state policy. We stated in out opinion partially rejecting the original plan:

> No valid reasons were advanced for the 10.9 percent overrepresentation with reference to House District 16 (Bristol Bay). We can agree with the Board's decision not to combine the Bristol Bay area with the Aleutian Chain because of conflicts between the residents of the two areas, but that does not explain why other areas could not have been added to the district so as to create less of a variance.

The Reapportionment Board has made a good faith effort to correct the overrepresentation of House District No. 16 by adding to the district the southern end of the Kenai Peninsula. Considerations incident to the implementation of rational state policy have now been advanced to us justifying the original overrepresentation of District No. 16 (Bristol Bay). It is now apparent that the only alternative to the Board's original districting of that area is to disregard an impassible mountain range, the natural barrier formed by Cook Inlet, the lack of direct transportation or communication links, the corporate boundaries of the Kenai Peninsula Borough, the cohesiveness of interests of residents of that Borough and the disparate interests of the population of the Bristol Bay area. We now find that legitimate considerations incident to the implementation of rational state policy justify the overrepresentation of House District No. 16 (Bristol Bay) as originally designated and override mathematical requirements.[2] We accordingly have ordered that the severed portion of the Kenai Peninsula Borough, specifically the southern end thereof where the communities of Seldovia, Port Graham, English Bay, Portlock and Jakalof Bay are located, shall remain in House District No. 13 (Kenai-Cook Inlet) rather than in House District No. 16 (Bristol Bay).

We realize that reasonable arguments can be advanced to show that certain communities might be better represented by different districting. Our previous opinion in this case points out that it is not our function to develop apportionment schemes for the State of Alaska. We are limited in review to determining whether a plan adopted by the governor suffers state or federal constitutional defects alleged by the parties in the litigation before us. In our previous opinion we found no violation of those standards set forth in Art. VI of the Alaska Constitution which have not been made obsolete by decisions of the United States Supreme Court. Particularly where specific objections have not been presented to us, we do not believe it appropriate to substitute out judgment for that of the constitutionally empowered authority regarding the wisdom of delicate adjustments to be made in political boundaries. It is our duty to assure that the reapportionment plan complies with the requirement of substantial mathematical equality established by the United States Supreme Court, with the state carrying the burden to demonstrate that additional deviations are based upon legitimate considerations incident to implementation of a rational state policy. Where that burden was not met, we were compelled to require revision of the plan to conform to what has been described as "the tyranny of numbers". The Board having complied with out request, we accordingly have denied the objections to the revised plan, except where the revision demonstrated to us that the original district was properly formed in implementation of a rational state policy.

ERWIN, J., dissents.

1. The Anchorage districts were somewhat altered in the revised plan, but appellants' objections again touched general concepts of dividing Anchorage into multiple senatorial districts, and the aggregate underrepresentation of the Anchorage area. No federal constitutional question regarding the propriety of the district lines in Anchorage was raised, and we disposed of the state constitutional issues in our prior opinion. Appellants' counsel admitted at oral argument that the Anchorage area taken as a whole would be properly represented within federal constitutional standards by a 16-representative, 8-senator district. We need not further consider whether the current plan, which has the same numerical effect, unfairly represents the Anchorage area.

2. Under the revised plan as amended by our order, the Bristol Bay district is slightly smaller than in the original plan, due to the Board's inclusion of Eek in the revised House District No. 17 (Bethel) where it more properly belongs. Granting the Kenai Peninsula Borough's objection reverses our prior order; in effect, it grants a rehearing based upon newly-discovered evidence, the evidence being the lack of reasonable alternatives to the initial plan. In granting the objection, we do not suggest that we will engage in wholesale redrafting upon request.

FITZGERALD, J., concurs in part and dissents in part.

ERWIN, Justice (dissenting).

While I agree that the revised reapportionment plan meets federal constitutional standards, I am unable to agree with the majority's conclusion that it meets the requirements of Alaska's Constitution. In my opinion, the revised plan includes districts which do not comply with the mandate of article VI, section 6, of the Alaska Constitution.

Whatever the merits of the retreat from precise mathematical equality evident in recent reapportionment decisions of the United States Supreme Court, we should not lose sight of the fundamental principle involved in reapportionment—truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.

If we were constrained solely by numbers, Alaska could obviously be divided into any given number of equally populated districts without regard to other considerations. Such a result would satisfy all federal constitutional requirements but would hardly be consistent with traditional notions of representative government, for it would inevitably lead to absurd combinations of historical, social, economic and geographical boundaries within the state. Fortunately, Alaska's Constitution commands that:

> Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area.[1] Thus, it only is within this framework that equally populated election districts may be constructed. If the search for equal representation is not undertaken within the limits of this constraint, then the underlying rationale for geographical election districts is destroyed.

In my view, the revised plan includes a number of house districts with respect to which the command of article VI, section 6, of the Alaska Constitution was sacrificed in the interest of numerical equality. For example, Fort Greely was included within the Fairbanks District, although it lies over 100 road miles from metropolitan Fairbanks and is located outside of the North Star Borough. Even more objectionable, however, is the fact that Big Delta and Delta Junction, which are five and ten miles respectively closer to Fairbanks along the only highway linking the two areas, were excluded. Many of the dependents of Fort Greely military personnel live, work, and attend school in these communities. If the Big Delta-Delta Junction-Fort Greely community is not a "relatively integrated socio-economic area," it is hard to imagine what is.

There is a similar problem with the addition to the Nome district of the communities of Selawik and Kiana, which are both located near Kotzebue. It is abundantly clear that the Board took this action solely to achieve equality of numbers,[2] for there are no ethnic or commercial ties between these communities and the Nome area and they are separated from Nome by mountains and Kotzebue Sound. In addition, both communities have transportation, economic, and ethnic ties with Kotzebue, not Nome; and, while Kotzebue is part of the same native corporation, Nome is not. In view of all these factors—which lie at the very heart of the concept of socio-economic integration—I fail to discern how such a combination could possibly satisfy article VI, section 6, of the Alaska Constitution.[3]

Yet another example of this failure to comply with the mandate of the Alaska Constitution lies in the Anchorage area. The Anchorage-West district comprising portions of the downtown area, Inlet View, the South Addition, Turnagain, International Airport, Sand Lake and Jewell Lake, includes a diversity of area residents which range from the most urban in Anchorage to the most rural.[4] Further, the district includes no less than four separate service areas—the City of Anchorage, the Spenard Public Utility District, the Sand Lake Service Area, and the Greater Anchorage Area Borough. In my mind, such a district, which includes as many diverse elements as could conceivably be combined within the Anchorage area, is not a "relatively integrated socio-economic area."

These major miscombinations, along with the short-lived Seldovia-Bristol Bay marriage disapproved by the majority, demonstrate the real tyranny of numbers, for they are products of an effort to achieve mathematical equality by shifting about population centers without regard to socio-economic considerations. By making small numerical adjustments to satisfy federal constitutional standards, the board dismembered important socio-economic communities in violation of Alaska constitutional standards.

In my view, major readjustments on a statewide basis are required if the plan is to meet minimum state and federal constitutional standards. The revised plan demonstrates all too clearly that such adjustments cannot be made in a matter of days under pressure of preparations for an imminent election, for a hastily conceived change correcting a minor deficiency in one district often causes major deficiencies in other districts. As a result, rather than improving the plan, such changes only serve to make it less likely to assure truly representative government.

I sympathize with the majority's desire to end this court's unsatisfactory and controversal intrusions into the political thicket of reapportionment. However, regardless of how reluctant we may be to confront this problem, it nevertheless remains our constitutional duty to the people of Alaska to assure a truly representative government. In my opinion, this goal cannot be achieved by making minor adjustments in the present plan. Because the interim plan had far smaller variances in population and unquestionably respected geographical and socio-economic considerations, I would have continued it in effect for the 1974 elections and remanded the revised plan back to the Board to comply with the mandate of the Alaska Constitution. It is better to err on the side of caution than to perpetuate mistakes for the balance of this decade.

FITZGERALD, Justice (concurring in part and dissenting in part). I would accept the governor's revised apportionment plan as submitted. I disagree with the majority that the southern end of the Kenai Peninsula should be separated from proposed House District 16 (Bristol Bay) and incorporated in House District 13 (Kenai-Cook Inlet). My disagreement with the majority is based on the procedural aspects of the Kenai separation issue.

Kenai Peninsula Borough was not a party to the reapportionment action, nor have we decided its standing to become a party. The Borough appeared before this court

1. Alaska Const. art. VI, § 6.

2. The state conceded at oral argument that all the changes made in the revised plan were made solely to meet numerical requirements of the United States Constitution.

3. Separation by mountains and an expanse of water, lack of direct transportation and communication links, and borough boundaries were all factors which the majority cited as justifying severance of the Seldovia area from the Bristol Bay district. I cannot understand why the presence of the same factors dividing the Selawik-Kiana area from the Nome area does not compel a similar conclusion.

4. The board made a point of its desire to avoid diluting the rural vote with the urban vote in the Fairbanks area. No rational reason has been shown for not following a similar course of action in the Anchorage area.

only amicus curiae. The court accepted the Borough's memorandum two days before final argument without providing an opportunity for the litigants to respond. Moreover, the Borough was then given leave to appear before the court at oral argument. As the majority opinion states, reasonable arguments could be advanced on behalf of other communities that different districting would better represent their interests.[1] To accede to the Kenai Borough's objections to the proposed plan may lead to questions of the right for other communities to raise similar arguments. In light of these circumstances I would accept the governor's revised reapportionment plan without the southern Kenai exclusion despite any reservations I may have about the merits of the particular district boundaries.

1. Supra, p. 5.

William Sidney GILBERT, Appellant,
v.
STATE of Alaska and H. A. Boucher, Lieutenant Governor, Appellees.
No 2290.

Supreme Court of Alaska.
Sept. 30, 1974.

Action for declaratory judgment by potential candidate for state senator, seeking declaration that requirement of three-year residency in state and one-year residency in election district for election to legislative office violated the candidate's equal protection rights. The Superior Court, Third Judicial District, Anchorage District, P. J. Kalamarides, J., denied the petition, awarded attorney's fees to the state, and candidate appealed. The Supreme Court, Erwin, J., held that the residency requirement served a compelling state interest and thus did not deny candidate equal protection; but that it was an abuse of discretion to award attorneys' fees against the candidate who had in good faith raised a question of genuine public interest before the courts.

Affirmed in part and reversed in part.

1. Constitutional Law ⇐83(1), 211
Elections ⇐21

Residency requirements for state legislative candidacy of three years in state and one year in election district serve compelling state interests, and thus neither violated potential candidate's rights to equal protection or to freedom of interstate travel, nor did they violate voters' rights to participate in elections. Const. art. 1, § 1; art. 2, § 2; AS 15.25.030; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐209

Where statute challenged as violative of equal protection burdens fundamental or basic right, it can be sustained only upon showing that it promotes compelling governmental interest. U.S.C.A.Const. Amend. 14.

3. Elections ⇐7

Constitutional residency requirements for legislative candidates should be viewed with strict judicial scrutiny, i. e., whether they serve compelling state interest. Const. art. 2, § 2.

4. Costs ⇐172

Award of attorney's fees to state against potential candidate for legislature who in good faith raised issue of constitutionality of residency requirements was abuse of discretion. Rules of Civil Procedure, rule 82.

5. Costs ⇐172

It is not purpose of award of attorney's fees to penalize party for litigating good-faith claim but rather partially to compensate prevailing party where such compensation is justified. Rules of Civil Procedure, rule 82.

6 Costs ⇐172

It is abuse of discretion to award attorney fees against losing party who has in good faith raised question of genuine public interest before courts. Rules of Civil Procedure, rule 82.

John W. Wood, Anchorage, for appellant.

Norman C. Gorsuch, Atty. Gen., Juneau, Timothy G. Middleton, Asst. Atty. Gen., Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER, and FITZGERALD, JJ.

OPINION

ERWIN, Justice.

This appeal involves a challenge to the constitutionality of article II, section 2 of the Alaska Constitution and AS 15.25.030, which collectively conditions eligibility for seeking legislative office upon three years residency in the state and one year in the election district.

Appellant is a citizen of the United States and has been a resident of Alaska

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ALASKA COURT SYSTEM

Representative Joe Green
District 10

Sponsor Statement

HJR 36 - Single Member Districts

HJR 36 proposes to amend Article 6 and Article 14 of the Alaska Constitution.

Article 6 addresses legislative reapportionment. I am proposing changes to reflect rulings by the U.S. and Alaska Supreme Courts, and to enshrine single member legislative districts in the constitution. The U.S. Supreme Court rulings, *Baker v. Carr*, 396 U.S. 267, issued in 1962, and *Reynolds V. Sims*, 377 U.S. 567, issued in 1964, established the so-called "one person, one vote" apportionment rule. The result of these decisions is that all state legislative bodies in the United States are apportioned on the basis of population. The Alaska Constitution, as originally written, bases senate districts partly on population, and partly on geography. The Alaska Supreme Court rulings, *Wade v. Nolan*, Alaska 414 P.2d 689, in 1966, *Egan v. Hammond*, Alaska, 502 P.2d 856, in 1972, and *Groh v. Egan*, Alaska 526 P.2d 863, 1974 establish an equal basis for both civilian and military population.

Section 4 of HJR 36 establishes single member legislative (House) districts. This change essentially "constitutionalizes" the status quo. Single member districts have proven to work well here in Alaska, and in a number of other states. Along with Alaska, several other states have shifted from multi, to single member districts.

Finally, Section 9 of HJR 36 repeals Article 14 of the Alaska Constitution. Article 14 sets out the originial reapportionment schedule, which is now obsolete.

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MEMORANDUM January 28, 1998

SUBJECT: Legislative redistricting and reapportionment (CSHJR 36(JUD))

TO: Representative Joe Green

FROM: Richard A. Glover - RAG
Legislative Counsel

You have asked for clarification of the terms "redistrict" and "reapportionment" as they relate to HJR 36. You also asked which term would be appropriate to use in HJR 36.

In your memo of January 22, 1998, you made reference to testimony by Jack Chenoweth before the House Judiciary Committee on May 5, 1997. Mr. Chenoweth's distinction between the terms "reapportionment" and "redistricting" is correct. Taken independently, a "reapportionment" would be the taking of, or addition to, the representative seats in a political body without changing the number or designation of the people represented[1/]. A "redistricting" would be an abandonment of currently defined boundaries and the designated representation in favor of a newly established set of boundaries with new numbers of representative seats in the political body[2/].

A redistricting power is broader than a reapportionment power, the latter being restricted to adding or subtracting representative seats only. In terms of the Alaska State Constitution as it is currently written, the difference may be moot. In 1972, the Alaska Supreme Court, speaking of the powers to reapportion the house of representatives, noted "[r]edistricting is inseparable from reapportionment and the Governor should be able to authorize any

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[1] This is also supported by the definition from Black's Law Dictionary for apportionment: "The process by which legislative seats are distributed among unit entitled to representation," or for reapportionment "A new apportionment of seats in the House of Representatives among States 'according to their respective numbers....' See Westberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481."

[2] This too is supported by Black's: "'Districting' is the establishment of the precise geographical boundaries of such unit or constituency.' Seaman v. Fedourich, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778, 779".

constitutional device to accomplish the task.[3]" The court appears unconcerned by the use of one term or the other since implying the constitutional power of the governor to reapportion the senate (at least on an interim basis) in Wade v. Nolan[4]. The end result must be a population based system, allowing for equal representation in both houses. It was the decision in Wade that fixed the number of senate districts at 20 "for the 1966 primary and general elections and thereafter until the Alaska Constitution has been amended to provide a valid, permanent reapportionment plan for the Senate."[5]

HJR36 requires senate districts to be composed of two contiguous election districts, and criteria is provided for how to establish the geographic lines of each. Under the old text, the determination of how many seats would represent a particular district in the legislature was determined under Article VI, section 4, specifying the "method of equal proportions." Section 4 would no longer contain that phrase, but that power and directive would be included in the new language in section 3, "Redistricting shall be based upon resident population within each election and senate district as reported by the census." This eliminates the distinction between the terms, instructing the governor to draw the lines in a manner that is based upon the population and consistent with the requirements of the 14th amendment. In an improvement from the original text, the U.S. constitutional requirements of "based upon resident population" can change with court decisions,[6] and no future amendment to the Alaska Constitution will be necessary. In the broader sense of the terms, by redistricting, the governor would be reapportioning, but court decisions have required this to be accomplished with the current redistricting power. There is no new power or requirement conferred by eliminating the term "reapportionment" from the constitution, and doing so avoids future confusion.

Historical notes:

The Constitution of the State of Alaska currently specifically authorizes the governor to redistrict by changing the size and area of election districts subject to certain restrictions set forth.[7] Under the text of the Alaska Constitution, this power applied only to the election districts: the senate districts could only be "modified to reflect changes in election districts..."

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[3] Egan v. Hammond, 502 P. 2d 856 (Alaska 1972)

[4] 414 P. 2d 689

[5] Id. at 701

[6] Although the framers may not have considered this loss of autonomy an "improvement."

[7] Constitution of the State of Alaska, art. VI, section 6; See also, Egan v. Hammond, 502 P. 2d 856, 873.

and a senate district "although modified, shall retain its total number of senators and approximate perimeter.[8]" The original article XIV established 16 senate districts which were continued in the 1961 reapportionment. The subsequent rulings of the U.S. Supreme Court in Baker v. Carr[9] and Reynolds v. Sims[10], held the original area based apportionments of the senate in the Alaska Constitution unconstitutional as a violation of the equal protection clause of the 14th amendment, in that they do not require that the seats in both houses of a bicameral legislature be apportioned on a population basis. In Wade v. Nolan[11], the Alaska Supreme Court heard a challenge to the governor's September 3, 1965 proclamation. The 1965 proclamation established 20 senate districts, and left the election districts unchanged from the 1961 plan. The Wade court held the art. VI sections to mean "representation in the Senate is determined by area rather than population, with no specific provision made for changing this plan.[12]" The court held that the governor had the implied authority to reapportion the senate, and upheld the 1965 proclamation for the 1966 election and "thereafter until the Alaska Constitution has been amended to provide a valid, permanent reapportionment plan for the Senate.[13]" Since the number of senate districts was now equal to the number of senators, the court order precludes any proclamation that alters the number of senators elected from any one district: the ratio is to remain one senator per senate district until the constitution is appropriately amended. It is true that the framers of the constitution used both terms, but at the time, they were doing so in an attempt to base the senate primarily on area and to prohibit the reapportioning of the number of senators elected from each senate district, a procedure that ultimately was held to be unconstitutional. This was, in the words of the Wade court, "entirely consistent with the existing national concept of fairness....[14]"

With this historical background, it is clear that the 20 senate districts are an accident of the 1965 reapportionment plan. Had the plan contained a different number, it is likely that number would be retained today. The Wade court gave the governor the implied authority to reapportion the senate to conform with Reynolds and Carr, and then fixed the apportionment (i.e. the number of senators per senate district) until a constitutional amendment provided for a constitutionally valid procedure to reapportion the senate. Both houses have the continuing requirement of conforming to the population based method of

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[8]Constitution of the State of Alaska, art. VI, section 7.

[9] 369 U.S. 186 (1962)

[10] 377 U.S. 533 (1964)

[11] 414 P. 2d 689

[12] Id. at 692.

[13] Id. at 700-701.

[14] Id. at 700.

representation, and either process, redistricting or reapportionment, may be used to accomplish the goal.

If I may be of further assistance, please advise.

RAG:jdr
98-038.jdr

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MEMORANDUM April 21, 1997

SUBJECT: Redistricting constitutional amendment resolution (Work Order No. 0-LS0939\A)

TO: Representative Joe Green
ATTN: Jeff Logan

FROM: Jack Chenoweth
Legislative Counsel

Although popularly understood as "reapportionment," a term that is used in articles VI and XIV of the Constitution of the State of Alaska, the process of revising state legislative election and senate district lines to achieve equal population is properly styled "districting" or "redistricting."

"Apportionment" is the division of a given number of positions among established political subdivisions in accordance with an existing plan or formula. Every ten years, under article I, sec. 2, cl. 3 of the United States Constitution, the number of authorized members allowed to each of the 50 states in the House of Representatives is redetermined to reflect changes in the respective populations in the states as determined by the census. This redetermination or reallocation of seats among the political jurisdictions is an apportionment, or reapportionment, and the net gain or loss of House seats by each state is the product of that apportionment. Thereafter, within each state, the boundaries of the districts of the members of the House of Representatives are revised into new district boundaries to achieve equal population under a process of "districting" or "redistricting."

Historically, in the state legislatures--and this is true of the Alaska State Senate under the provisions of article VI of the state constitution--one house was often "apportioned" in the sense that members elected to that house were chosen within specific political subdivisions having fixed boundaries such as counties. Some counties or groups of counties elected one member, but more populous counties were assigned multiple members. But, at least since the decision in Reynolds v. Sims, 377 U.S. 533 (1964), holding that both houses of a bicameral state legislature are to be districted on a population basis, reliance on the fixed boundary lines set by counties and other political subdivisions to identify the basis of electing members of one house of the state legislature has been abandoned.

The terminology--the only terminology--properly applicable to the process to be revised within article VI, Constitution of the State of Alaska, is "districting" or "redistricting." I have amended the appropriate provisions of article VI to so provide.

*

If this memo or its attachment prompts questions, please contact me.

JBC:jdr
97-281.jdr

Attachment

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Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Mary Pagenkopf

House Judiciary Standing Committee May 5, 1997 1:32 p.m.

2/3/98

02/03/98 15:19:33	LEGISLATIVE TELECONFERENCE NETWORK SYSTEM PARTICIPANT LIST (TESTIFIERS ONLY) TCN:80203 SCHEDULED FOR:02/03/98 13:30 TO 15:30 PUBLIC HEARING HOUSE FINANCE	LTN1150 BY:JNU FOR:ALL

LOCATION:DELTA JCT.

HB	53	MR.	ART	GRISWOLD	SUPPORTS	TESTIFY
HB	53	MS.	~~PATRICIA~~	~~GRISWOLD~~		TESTIFY
HB	53	MR.	MICHAEL	MCCOWAN	SUPPORTS	TESTIFY
HB	53	MS.	DONNA	GARDINO	SHOULD BE COMPETITIVE	TESTIFY
HB	53	MR.	KEVIN	KELLY	SUPPORTS	TESTIFY
HB	53	MR.	DAVID	WRIGHT	DOES NOT SUPPORT	TESTIFY
HB	53	MR.	BILL	JOHNSON	AGAINST	TESTIFY
HB	53	MS.	SHELLIE	MATHEWS	AGAINST (TOO FAST)	TESTIFY
HB	53	MR.	PATRICK	SCHLICHTING	AGAINST	TESTIFY
HB	53	MR.	PATRICK	DALTON	AGAINST	TESTIFY
HB	53	MR.	ROY	~~BOWDRE~~		TESTIFY
HB	53	MR.	ROBERT	BRADLEY	VOTED YES (WOULD LIKE A REVOTE)	TESTIFY
HB	53	MR.	DANIEL	LUCAS	AGAINST	TESTIFY
HB	53	MR.	DAN	BECK	(SCHOOL DIST.) SUPPORTS	TESTIFY
HB	53	MRS.	LORETTA	SCHOOLEY	(SCHOOL BUS CONTRACTOR EDITOR DELTA PAPER) SUPPORTS	TESTIFY

LOCATION:FAIRBANKS

HB	53	MR.	HUGH	DOOGAN	AGAINST (OLD NUCLEAR SITE)	TESTIFY

LOCATION:KENAI LIO SAM DIGHTON AGAINST
SCHOOL IS TOO CLOSE TO PRISON

LOCATION:MATSU

T.C. EXTENDED TO 4:00

(1) Bob Le[illegible]
private [illegible]
[illegible]
[illegible]

Printed

(4) Thom [illegible]
Architect
[illegible] Sloan | Anchorage

(5) Ed Seattle
Security Consultant

(6) [illegible]
Retired Prison Superintendent [illegible]
Security [illegible], AGAINST

(7) Bob LaResh

House Finance Committee

DATE: Feb 3, 98

PLACE: Capital 519

SUBJECT OF MEETIN

HB 53
HJR 36

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		
(2) K LESLIE KIRK	CONCERNED CITIZENS OF DELTA JUNCTION	PO BOX 261 / DELTA JUNCTION, AK	99737	(907) 895-4047		(Y)	N	/.
Margie Vandor	Dept of Law	AG				(Y)	N	
(26) Bill Parker	Dept Corrections	DOC				(Y)	N	H
(24) Gary Damron	PSEA Em Pub Safety Assoc	P.O. BOX 772592 EAGLE RIVER, AK 99577				(Y)	N	H.
Forrest Browne	DOR	11th - SOB			465-3750	(Y)	N	H.
DUGAN PETTY	DEPT OF ADMIN	STATE OFFICE BLDG			465-5687	(Y)	N	H
(A) Jim Carlos Pres +	Delta	greely Coalit.				Y	N	
(13) Glen Wright	Mayor Delta Junc					Y	N	
~~[illegible]~~						Y	N	
~~Leslie Kirk~~						Y	N	
(3) Frank Prewitt	Pres. ALBIST	& Janet Michaelson			ALBest	Y	N	

P

(4) Tom Livingston Architect Livingston Arch in Anch

Bob LeResche

(5) ED Schulte ~~Tacoma WA.~~ Olympia BJSS Architects Corrections Architect

02/03/98 14:35:13 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1120
MESSAGE FROM: LIOCJEN IN ANCHORAGE JNU

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SPONSOR: HOUSE FINANCE PURPOSE: PUBLIC HEARING

MESSAGE TEXT: DAVE ANDERSON FROM DELTA JUNCTION IS ON
LINE TO TESTIFY

COLN