ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

2977 HSA HJR 33 - HJR 42

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,[5] 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 in-

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 Const 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.

habitant 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

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 +4.6 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 −0.5; 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

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.

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 uaccompanied 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-

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. 686, 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.

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.

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. 414 P.2d 689 (Alaska 1966).
5. Alaska Const. art. VI, § 11.
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 13, 1972 and then to June 30, 1972. Connor v. Johnson, 402 U.S. 690, 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 7,559 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. 880)

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 represents a substantial improvement in the [illegible] apportionment,[17] the new plan does still conflict with the guidelines established 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

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, 90-96, 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, 530 (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 1966 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

> . . . . .
>
> 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 —65.49 percent in the House of Representatives and from +26.19 to —23.72 percent in the Senate. In the 1971 plan, population variations were reduced to a range of +23.75 to —45.93 percent in the House, and to a range of +26.14 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).

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

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 chailenged 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 +15.01 to −10.56 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 condemnancing 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

33. *But see* dissenting opinion of Justice Boochever in Egan v. Hammond, Opn. 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 390.

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 1297 fn. 21, 16 L.Ed.2d at 391, n. 21.

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]

39. Springfield Gas & Elec. Co. v. Springfield, 292 Ill. 236, 126 N.E. 739 (Ill. 1920), aff'd 257 U.S. 66, 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, 364 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. 1958.

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 664, 669 (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 65, 669 (Or.1971).

49. 220 F.Supp. 150, 158 (W.D.Okl.1963), 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

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 1026 (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 1026 (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).

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 [illegible] (1964); Wade v. Nolan, 414 P.2d 689 (Alaska 1966). Under the Equal Protect[illegible] 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.

George F. Boney
Chief Justice

Jay A. Rabinowitz
Associate Justice

Roger G. Connor
Associate Justice

Robert C. Erwin
Associate Justice

Robert Boochever
Associate Justice

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 ⇐

Where
plan substa
tricts in Gr
districts fro
ators had l
and new
boundaries.
cretionary a
elections, th
cumbents.

Kenneth
Groh, Benk
appellants.

James N.
chorage, No
Juneau, for a

Ben T. D
na, as amici
Borough.

Before
and CONN
and FITZGI

BOOCHE

For the
with a chall
the Alaska
mond, we h
ment of the
promulgated
Art. VI of
unconstitutio
and supren
States Cons
of the 1972
plan of rea
lative electi
remanded t
January 13,
to our mand

1. See Egu
(Alaska 19
689 (Alask

es ⇐27(3)

here legislative reapportionment substantially altered senatorial dis- .s in Greater Anchorage area so that .tricts from which four "hold-over" sentors 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 689 (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

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, 874 (Alaska 1972); Wade v. Nolan, 414 P.2d 689, 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.

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

8. *See* Kingery v. Chapple, 504 P.2d 831, 834–835 (Alaska 1972); Kelly v. Zamarello, 486 P.2d 906, 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 . . . an' 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. 1850–60).

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

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.

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.

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 10,270 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 969, *see* 502 P.2d at 862 (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 190 claimed to be residents of record according to the Alaska Command at the time of Egan v. Hammond, *id.* at 862, 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 302,361. 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, 94 (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." III United States Department of Labor, Employment Security Manual § 8020, *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 enumerators to decide residence questions further support the understanding that civilian transients were 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-526.) 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, 10 Alaska 616, 621 (D.C.Anch.1945). The legislature in enacting AS 09.55.160 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 enclaves. tions of the popu who have periods o have exer dent and

We tur effected quested t to compil military and to fu concernin residents mand rep the 18,58 the five and Fairl are reflec nel recor are not p decide on of some show, ho of the n themselve

The B tion of Washing The Wa premise proximat to vote.[36]

32. *See* Stifel v. Hopkins, 477 F.2d 1116, 1122 (6th 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 284, 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. Von 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
>
> . . .

36. We d voter re ship of there is are subje in voter dence in been ma register failed. of regis any hea istration munici residents by the personn produced areas w

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, 409 U.S. 808, 93 S.Ct. 63.

526 P.2d—55½a

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 25,234 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 (2,850/25,234), 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 protec-

34 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 1970 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 886.

40 The Juneau senate district is underrepresented by 14 percent, and the Bethel district overrepresented by 8% percent.

tion 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

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

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.

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.

55. *Id.* at 776, 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 1830.

62. *Id.* at 1873.

63. 502 P.2d at 804.

64. Many Alaska Natives have been elected to the legislature, and two have been elevated

[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-

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. [Hedland Dep. 34]

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

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).

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. 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, 869, 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 sum-

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).

marily 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

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.

527

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, 316 F.Supp. 1285, 128 (D.Hawaii 1970), *quoted in* Egan v. Hammond, 502 P.2d 856, 866 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 reviewable for a period of five years following its entry. 42 U.S.C. § 1973a (1973).

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 19 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 poli-

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.

cy. 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 Jakaiof 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.

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 Nelson Lagoon 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

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.

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 minumum 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

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.

HJR

39

Berrier
1/17/84

DRAFT

IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 39 (State Affairs)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

Proposing amendments to the Constitution of the State of Alaska creating an appropriation reserve fund and limiting increases in appropriations.

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

* Section 1. Article IX, sec. 16, Constitution of the State of Alaska, is repealed and reenacted to read:

SECTION 16. APPROPRIATION LIMITATIONS. Except for appropriations to the Alaska permanent fund and appropriations required to pay the principal and interest on general obligation bonds, appropriations from the treasury during a fiscal year may not exceed the lesser of 95 percent of the unrestricted revenue of the state for the previous calendar year or the amount appropriated in the year this section takes effect adjusted for the cumulative inflation and population growth or decline as defined by law. An appropriation in excess of this limit may not be made unless a state of emergency is declared by the governor as provided by law.

* Sec. 2. Article IX, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 17. APPROPRIATION RESERVE FUND. An appropriation reserve fund is established. Appropriations may not be made from the appropriation reserve fund except for the purpose of repelling invasion, suppressing insurrection, defending the state in war, meeting natural disasters, or ~~redeeming indebtedness of the state outstanding at the time this section becomes effective.~~ appropriations required to pay the principal & interest on G.O. bonds After June 30 of the year

in which the balance of the appropriation reserve fund exceeds the total unrestricted revenue of the state for the preceding 18 months, the balance of the appropriation reserve fund shall lapse into the treasury. The balance of the appropriation reserve fund shall be invested at competitive national market rates. All earning of the fund shall become part of the principal of the fund.

* Sec. 3. Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 29. APPROPRIATION RESERVE FUND. Beginning July 31, 1985, and continuing until June 30 of the year in which the balance of the appropriation reserve fund exceeds the total unrestricted revenues of the state for the preceding 18 months, an amount equal to 8.8 percent of the unrestricted revenue for each month, as determined in accordance with this section, shall be transferred from the treasury to the appropriation reserve fund. Any balance transferred to the appropriation reserve fund under section 30 of article XV shall reduce by the balance transferred the amount required to be transferred in a year by the provisions of this section but no excess amount transferred may be carried forward to reduce the amount required to be transferred in another fiscal year.

* Sec. 4. Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 30. APPROPRIATION LIMITATIONS. After June 30, 1986, and until June 30 of the year in which the balance of the appropriation reserve fund exceeds the total unrestricted revenue of the state for the preceding 18 months, except for appropriations to the Alaska permanent fund and appropriations required to pay the principal and interest on general obligation bonds, appropriations from the treasury during a fiscal year may not exceed the amount appropriated in the

DRAFT

prior fiscal year by more than the cumulative inflation and population growth or decline as prescribed by law. An appropriation in excess of this limit may not be made unless a state of emergency is declared by the governor as provided by law. No less than 25 percent of that portion of the unrestricted revenue of the state which has not been appropriated as allowed by this section shall be transferred from the general fund to the appropriation reserve fund. Refile 1st of each fiscal year

* Sec. 5. Section 1 of this amendment takes effect on July 1 of the year in which the balance in the appropriation reserve fund established in sec. 2 of this amendment exceeds the total of the unrestricted revenue of the state for the preceding 18 months.

* Sec. 6. 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.

AMENDMENT

Offered in the HOUSE By Abood

TO: HJR 39

Page 1, lines 25 and 26:

Delete: "the legislature shall annually appropriate"

Insert: "there shall be transferred"

4/18/83

SUGGESTED AMENDMENTS TO HJR 39 FOR HOUSE STATE AFFAIRS COMMITTEE, 2/8/84

1. PAGE 1, LINE 16, LANGUAGE SHOULD READ, FOR CLARIFICATION, "LESSER OF THE AMOUNT APPROPRIATED IN THE YEAR THIS SECTION TAKES EFFECT ADJUSTED FOR THE CUMULATIVE INFLATION AND POPULATION GROWTH AS DEFINED BY LAW OR 95 PERCENT OF THE UNRESTRICTED REVENUE OF THE STATE FOR THE PREVIOUS CALENDAR YEAR."

2. PAGE 1, LINE 28, LANGUAGE SHOULD READ, TO PREVENT A RUN ON THE RESERVE FOR THE PURPOSE OF RETIRING ALL OUTSTANDING INDEBTEDNESS, "NATURAL DISASTERS, OR AS REQUIRED FOR REDEEMING INDEBTEDNESS OF THE STATE OUTSTANDING"

3. PAGE 2, LINE 1, SHOULD READ, TO OBVIATE THE POSSIBLE EFFECT OF A WIDE SWING IN REVENUES IN ANY ONE YEAR, "IN WHICH THE BALANCE OF THE APPROPRIATION RESERVE FUND EQUALS 1.5 TIMES THE APPROPRIATIONS OF ~~GENERAL FUND~~ UNRESTRICTED REVENUES FOR THE PRECEDING FI[illegible] YEAR." THIS CHANGE SHOULD ALSO BE REFLECTED IN PAGE 2; LINE 11: PAGE 2; LINE 24: PAGE 3; LINE 10.

4. PAGE 3, LINE 1, IN ORDER TO OBVIATE THE EFFECTS OF A LOW REVENUE YEAR DURING THE REVENUE PERIOD, SHOULD READ, "YEAR IN WHICH THIS SECTION BECOMES EFFECTIVE BY MORE THAN THE CUMULATIVE POPULATION AND INFLATION"

5. PAGE 3, LINE 7, SENTENCE SHOULD CONTINUE "ON THE FIRST DAY OF EACH FISCAL YEAR", SINCE NO TIME FOR DEPOSIT IS SPECIFIED IN PRESENT LANGUAGE.

6. PAGE 2, LINE 15, LANGUAGE SHOULD READ "TO THE APPROPRIATION RESERVE FUND AT THE BEGINNING OF EACH MONTH." THIS CLARIFIES LANGUAGE WHICH MIGHT OTHERWISE ALLOW TREASURY TO MAKE DEPOSITS ANNUALLY.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

February 7, 1984

MEMORANDUM

TO: Neil Phelps-Munson
Professional Assistant

FROM: Alexander Hoke
David Teal
Legislative Analysts

RE: Comments on CS HJR 39

As you requested, we have reviewed the House State Affairs Committee work draft of CS HJR 39. We offer the following comments:

Page 1; Line 16. As discussed on an earlier occasion, limiting appropriations to "95 percent of the unrestricted revenue of the state for the previous calendar year...." leaves a residual of 5 percent in the general fund each year. While the interest earnings on this 5 percent residual can be appropriated in future years, the principal will remain in the general fund. This means that the general fund will grow perpetually, potentially raising the general fund balance to $20 billion by the year 2010.

Also, the wording in this section is somewhat ambiguous in that the 95 percent limitation seems to apply to both limiting mechanisms. This ambiguity can be cleared up by reversing the order of the two limiting mechanisms in this paragraph.

Page 1; Line 28. During the period when contributions are being made to the CBB reserve fund, provisions in this section prohibit appropriations from the fund except for the purpose of "redeeming indebtedness of the state outstanding at the time this section becomes effective." Our concern is that with this language, the CBB reserve could conceivably be raided to pay off the State's total indebtedness outstanding which is currently estimated to be about $518 million.

Page 2; Line 2. After carefully considering the mechanism for triggering the automatic start-up of cash-based budgeting, two suggestions come to mind. First, instead of setting the CBB reserve target equal to "total unrestricted revenue of the state for the preceeding 18 months," it might prove useful to set the target equal to "1.5 times

the appropriations of general fund unrestricted revenue for the preceeding fiscal year." This procedure ties future appropriation levels to past appropriation levels regardless of what total revenues may have been for the prior year.

Secondly, since the effective level of appropriations (during the years when contributions to the CBB reserve are being made) is diminished by the amount of annual contributions to the reserve fund, the CBB reserve target might be tied to the effective level of appropriation also. This can be achieved with the following language:

"After June 30 of the year in which the balance of the appropriation reserve fund exceeds 1.5 times the appropriations of general fund unrestricted revenue for the preceeding fiscal year less any appropriations to the appropriation reserve fund,..."

The trigger mechanism described above would lower the target amount needed to start cash-based budgeting by the amount of the final year contributions to the CBB reserve. As a consequence, cash-based budgeting could begin one year earlier, or the annual contribution percentages could be lowered as described later.

Any changes to the definition of the automatic CBB start-up mechanism should also be made in the following locations:

Page 2; Line 11
Page 2; Line 24
Page 3; Line 10

Page 2; Line 12. The percentage for contributions of general fund unrestricted revenue is set at 8.8 percent in the work draft. With the new automatic start-up language stated above, other percentages may be in order. A 10.3 percent monthly contribution of general fund unrestricted revenues would be sufficient to trigger an automatic start of cash-based budgeting in FY 94 according to a 30th percentile revenue forecast. In order to begin cash-based budgeting by FY 93, the monthly general fund contribution percentage should be set at 11 percent, and a front-end contribution of $325 million would have to be made during the current session.

Page 2; Line 29 - Page 3; Line 2. Section 30 sets an appropriation limitation that will be effective during the period of time when contributions are being made to the CBB reserve fund. This provision limits annual appropriations to the previous year's appropriations adjusted for changes in population and inflation. This limitation mechanism may present a problem if there is a single unexpectedly low revenue year during the CBB reserve contribution period. With a single low

year, the appropriation limit for all subsequent years would be tied to the lowest level in the period, whether or not revenues rebound to higher levels.

An alternative is to limit annual appropriations to the amount of the appropriations in the year that this section becomes effective, with adjustments for inflation and population change (as was done in Section 16; Page 1; Line 17).

Page 3; Lines 4-7. There is no provision in this section which sets the timing of contributions from the year-end unappropriated general fund balance. We suggest that language be added to the end of this section which states that this contribution occurs once each year, preferably at the start of the year.

AH/DT

Introduced: 3/18/83
Referred: State Affairs and Finance

BY HAYES, ABOOD, BARNES, BETTISWORTH, COWDERY, FLOOD, LISKA, MARTIN, RINGSTAD, UEHLING, WARD, LINDAUER AND BUSSELL

IN THE HOUSE

HOUSE JOINT RESOLUTION NO. 39

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

Proposing amendments to the Constitution of the State of Alaska creating an appropriation reserve fund.

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

* Section 1. Article IX, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 17. APPROPRIATION RESERVE FUND. An appropriation reserve fund is established. After July 1, 1992, no money in excess of the balance of the appropriation reserve fund at the close of the preceding fiscal year shall be withdrawn from the treasury except for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this section becomes effective. After July 1, 1992, all revenue of the State shall be placed in the appropriation reserve fund and the balance of the appropriation reserve fund shall lapse into the treasury at the close of each succeeding fiscal year.

* Sec. 2. Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 26. APPROPRIATION RESERVE FUND. Beginning with the First Session of the Fourteenth Legislature and continuing through the First Session of the Seventeenth Legislature, the legislature shall annually appropriate from the general fund to the appropriation reserve fund an amount equal to 15 percent of the average gross receipts of the general fund, as determined in accordance with this section. For the purposes of this section, "average gross receipts of the

general fund" is determined by dividing the total amount of money deposited in the general fund and in special accounts within the general fund (other than the appropriation reserve fund) from all sources during the four fiscal years immediately preceding the current fiscal year by four.

* Sec. 3. 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.

Introduced: 3/18/83
Referred: State Affairs and Finance

BY HAYES, ABOOD, BARNES, BETTISWORTH, COWDERY, FLOOD, LISKA, MARTIN, RINGSTAD, UEHLING, WARD, LINDAUER AND BUSSELL

IN THE HOUSE

HOUSE JOINT RESOLUTION NO. 39

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

Proposing amendments to the Constitution of the State of Alaska creating an appropriation reserve fund.

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

* Section 1. Article IX, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 17. APPROPRIATION RESERVE FUND. An appropriation reserve fund is established. After July 1, 1992, no money in excess of the balance of the appropriation reserve fund at the close of the preceding fiscal year shall be withdrawn from the treasury except for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this section becomes effective. After July 1, 1992, all unrestricted revenue of the State shall be placed in the appropriation reserve fund and the balance of the appropriation reserve fund shall lapse into the treasury at the close of each succeeding fiscal year.

* Sec. 2. Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 26. APPROPRIATION RESERVE FUND. Beginning with the First Session of the Fourteenth Legislature and continuing through the First Session of the Seventeenth Legislature, ~~the legislature shall annually appropriate~~ there shall be deposited from the general fund to the appropriation reserve fund an amount equal to 15 percent of the average gross receipts of the general fund, as determined in accordance with this section. For the purposes of this section, "average gross receipts of the

general fund" is determined by dividing the total amount of money deposited in the general fund and in special accounts within the general fund (other than the appropriation reserve fund) from all sources during the four fiscal years immediately preceding the current fiscal year by four.

* Sec. 3. 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.

STATE OF ALASKA
FISCAL NOTE

Revision Date , 1983

I. REQUEST

Bill/Resolution No: HJR 39
Title: Amendments to Constitution to Create Appropriation Reserve Fund
Sponsor: Hayes
Requestor: State Affairs Committee

II. FISCAL DETAIL

Agency Affected: Revenue
Program Category Affected:

BRU, Program of Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 8
OPERATING						
100 PERSONAL SERVICES	-	-	-	-	-	
200 TRAVEL	-	-	-	-	-	
300 CONTRACTUAL	-	-	-	-	-	
400 COMMODITIES	-	-	-	-	-	
500 EQUIPMENT	-	-	-	-	-	
600 LANDS & STRUCTURES	-	-	-	-	-	
700 GRANTS, CLAIMS, ETC.	-	-	-	-	-	
TOTAL OPERATING	-	-	-	-	-	
CAPITAL	-	-	-	-	-	
REVENUE	-	-	-	-	-	

FUNDING: (Thousands of Dollars) (433,200)

GENERAL FUND	-	-	-	(545,900)	(475,800)	(433,
FEDERAL FUNDS	-	-	-	-	-	
OTHER (Specify Source)	-	-	-	-	-	
Appropriation Reserve Fund	-	-	-	524,900	488,150	475,3

POSITIONS: 475,350

FULL-TIME	-	-	-	-	-	
PART-TIME	-	-	-	-	-	
TEMPORARY	-	-	-	-	-	
	-	-	-	-	-	

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis.

Prepared By: Vincent D. Wright 4/13
Division: Revenue - Research
Phone: 465-2173
Date: 4/13/83

Approved by Commissioner: Robert Dobbs
Department: Revenue
Date: 4/18/83

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

IV. Analysis of HJR 39

The effect of these proposed constitutional amendments is to create an appropriation reserve fund (ARF). For each fiscal year from 1986 through 1992 the Legislature would be required to appropriate from the general fund (GF) to the ARF an amount equal to 15 percent of the average gross receipts of the GF excluding the appropriation to the ARF for the four preceding fiscal years. Thus the appropriation to the ARF in fiscal year 1986 would be 15 percent of the total gross receipts of the GF for fiscal years 1982 through 1985 divided by four and so on. Beginning with fiscal year 1993 the entire receipts of the state would be placed in the ARF and only the balance in the ARF at the close of the preceding fiscal year would be put in the GF and made available for appropriations. Thus the amount accumulated in the ARF from fiscal years 1986 through 1992 could be spent in fiscal year 1993 and the receipts from fiscal year 1993 could be spent in fiscal year 1994 and so on.

The amounts shown on the accompanying fiscal note as a reduction in GF revenues represent both the estimated appropriation to the ARF and the resulting reduction in GF investment earnings for the respective fiscal years. The amounts shown as an increase in ARF revenues represent both the estimated appropriation to the ARF for the respective fiscal year and the estimated earnings on the ARF balance from the preceding fiscal year.

Tax Exempt Home Mortgage Bonds (supporting legislation)

HOUSE JOINT RESOLUTION NO. 37, by Reps. Uehling, Barnes, Bussell, Cowdery, Furnace, Lindauer, Liska, Martin, Pestinger, and Ward. Supports passage of H.R. 1176 and S. 137 in the U.S. Congress, amending the Internal Revenue Code to allow certain home mortgage bonds to continue to be tax-exempt. States that the tax-exempt mortgage revenue bond program under 26 U.S.C.103A (P.L. 96-499 Mortgage Subsidy Bond Act of 1980) ends on December 31, 1983, and states that its termination would work a hardship on consumers who are eligible for loans under the Alaska Housing Finance Corporation tax-exempt bond program and similar programs in other states. Resolves that the Alaska Legislature supports passage of H.R. 1176 and S. 137 in Congress to allow continuation of the tax-exempt mortgage revenue bond program. (Identical to SJR 20, page 310.)

Introduced March 16 and referred to the House Special Committee on State Loans, Finance.

Natural Gas (transporting & marketing)

HOUSE JOINT RESOLUTION NO. 38, by Reps. Cowdery, Abood, Barnes, Bettisworth, Bussell, Cato, Glood, Fritz, Fuller, Furnace, Grussendorf, Hurlbert, Koponen, Lacher, Larson, Lindauer, Liska, Martin, M.W. Miller, Pestinger, Phillips, Ringstad, Shultz, Tischer, Uehling, Ward, Wendte and Hayes. Resolves that the state of Alaska fully supports the efforts of all owners of the gas and other parties to secure sales commitments for North Slope gas in any market, including within the state. States that citizens of Japan, Korea, and other trading partners of Alaska, are strongly urged to consider and take advantage of the secure, long-term trading relationship with Alaska and the U.S. that purchase of Alaska's North Slope gas would offer. States that the Legislature calls upon the other owners of the gas, Alaska's delegation in Congress and all other parties with an interest in the gas to explore every means to privately finance and construct a transportation system for the gas.

Resolves that the State of Alaska immeadiately enter into negotiations for the sale of its royalty interest in North Slope gas to in-state users in order that they and the state serve as a catalyst for the construction of a transportation system for Alaska's natural gas. Resolves that the federal government is urged to explore the prospect of making development of gas transportation facilities a National Interst Project of nations on both sides of the Pacific for its long term benefits to this nation and its potential trading partners.

Introduced March 18 and referred to Resources.

Appropriation Reserve Fund (creation of)

HOUSE JOINT RESOLUTION NO. 39, by Reps. Hayes, Abood, Barnes, Bettisworth, Cowdery, Flood, Liska, Martin, Ringstad, Uehling, Ward, Lindauer, and Bussell. Proposes amendment to the state constitution creating an appropriation reserve fund. Amends article 9 (Finance and Taxation) to provide that after July 1, 1992, no money in excess of the balance of the appropriation reserve fund at the close of the preceding fiscal year shall be withdrawn from the treasury except for wars, natural disasters, or redeeming indebtedness outstanding at the time section becomes

HJR 39 (cont'd)

effective. After July 1, 1992 all state revenue shall be placed in the fund and the balance of the fund shall lapse into the treasury at the close of each succeeding fiscal year.

Amends article 15 (Schedule of Transitional Measures) to provide that beginning with the first session of the 14th Legislature and continuing through the first session of the 17th Legislature, the legislature shall annually appropriate from the general fund to the appropriation reserve fund an amount equal to 15% of the average gross receipts of the general fund. The average gross receipts are determined by dividing the total amount of money deposited in the general fund and in special accounts within the general fund from all sources during the four fiscal years immediately preceding the current fiscal year by four.

Provides amendments proposed by resolution be placed before the voters at the next general election.

Introduced March 18 and referred to State Affairs, Finance.

Public School Foundation Program (est. Joint Committee on)

HOUSE CONCURRENT RESOLUTION NO. 23, by Reps. Koponen, Clocksin, Davis, Duncan, Goll, Larson, McBride, M. M. Miller, Szymanski, Vaska, Wendte, Zharoff and Malone. Would establish a Joint Committee on the public school foundation program. Provides the President of the Senate appoint three members and the Speaker of the House appoint three members and the President and Speaker jointly appoint one chairperson to study and make recommendations for improving the public school foundation program.

The committee is to report the scope of its intended research to the legislature no later than May 31, 1983 and make a final report by February 1, 1984. The committee shall have the power to call witnesses, hold hearings, and hire staff. The committee is encouraged to hear witnesses from the Alaska School Board Association, the Office of Management and Budget, the Department of Education, the State Board of Education, the Alaska Council of School Administrators, and other concerned groups. The committee terminates February 1, 1984.

Introduced March 14 and referred to Health, Education & Social Services, Finance.

Public School Foundation Program (state funding)

HOUSE CONCURRENT RESOLUTION NO. 24, by Reps. Koponen, Clocksin, Davis, Duncan, Goll, Larson, McBride, M. M. Miller, Vaska, Wendte, Zharoff and Malone. States that school districts in the state are required by law to prepare local school district budgets by April 1, 1983 and preparation of these budgets requires calculation of the amount to be contributed by the state under the public school foundation program. Resolves that the Alaska State Legislature pledges to appropriate 100 percent of its share of funding under the program so that local districts may have a firm figure on which to base their budget estimates.

Introduced March 14 and referred to Health, Education and Social

CASH-BASED BUDGETING:
A Response To Revenue Uncertainty

EXECUTIVE SUMMARY

House Research Agency
Alaska State Legislature
January 1984

House Research Agency Report 83-A

CASH BASED BUDGETING: A RESPONSE TO REVENUE UNCERTAINTY

EXECUTIVE SUMMARY

Cash-based budgeting (CBB) has been proposed as a means of eliminating the budgeting problems created by uncertain and fluctuating State revenues. Cash-based budgeting (also known as "forward funding") would reduce or eliminate uncertainty by tying the State budget for a given year to the amount of revenues already received and deposited in the treasury during a prior year. Before enacting or signing the budget, the legislature and governor would know exactly how much money was actually available to spend.

Conventional budgeting practices in most states (including Alaska) involve forecasting revenues for the coming fiscal year. Appropriations included in the budget are limited to the anticipated revenues for that year. With approximately 85 percent of Alaska's total revenues dependent on oil taxes and royalties, an error in projecting the price of oil or production level for the coming year can result in substantial miscalculations of total available revenues.

In response to the risk associated with any forecast of future revenues for the State of Alaska, the Department of Revenue began issuing a "risk adjusted" forecast for the FY 84 budget year. The so called "30th percentile" forecast implies that actual revenues are likely to fall short of the projected amount only 30 percent of the time. This means that there is a 70 percent probability that actual revenues will equal or exceed the forecast for that year.

"Revenue Uncertainty" And The Design Of A CBB Program

Given that the objective of the cash-based budgeting proposal is to resolve the "revenue uncertainty" problem, it is important that the concept of revenue uncertainty be fully understood.[1] Revenue certainty relates to the likelihood that incoming revenues will be sufficient to cover budgeted appropriations. If "reasonable certainty" is sufficient for budgeting purposes, one might choose to limit appropriations to the 30th percentile revenue projection (which gives a 70 percent assurance that actual revenues will equal or exceed budgeted appropriations).

---

[1] It is important to recognize that the "revenue uncertainty" addressed by cash-based budgeting relates to a 12 or 18-month time period. The revenue uncertainty associated with a projected long-term revenue decline is not the specific target of cash-based budgeting.

Only when a 100 percent probability exists that revenues will be sufficient to offset budgeted appropriations for the next fiscal year can one say that "revenue uncertainty" has been eliminated. This means that the legislature and governor must know that there is "cash in the bank" sufficient to meet expenditures budgeted for the next year.

The major requirement of a cash-based budgeting program is the creation of a cash reserve from which appropriations can be made.[2] A cash reserve equal to 18-months of expenditures is required if the legislature wishes to begin each session with absolute certainty that there is sufficient cash to meet expenditures budgeted for the next fiscal year. For absolute certainty on July 1 (the start of the budget year), only 12-months of revenues are required in the reserve. Funding of the CBB reserve fund can be structured in two basic ways:

- a single very large deposit would allow for a near-term implementation of cash-based budgeting, or
- smaller annual deposits over a period of years would provide for a delayed start of this budgeting system.

Based on the assumption that the current State government expenditure policy of appropriating total projected revenues applies for the year in which cash-based budgeting begins, an 18-month CBB reserve must contain $4.836 billion to start cash-based budgeting in FY 86, or $5.173 billion for a delayed start in FY 94.

Deferred Implementation of Cash-Based Budgeting

During the current session, legislative attention on cash-based budgeting has focused on a long-term payment plan (CS HJR 39) for developing the CBB reserve fund. There are essentially three sources of funding the CBB reserve for deferred implementation of cash-based budgeting: the General Fund, Permanent Fund earnings, and new or higher taxes. Over a period of years, contributions to the CBB reserve would come from one or a combination of these sources (CS HJR 39 targets general fund unrestricted revenues). A significant feature of CS HJR 39 (and the computer model used in this report) is the automatic start-up of cash-based budgeting once the reserve fund exceeds the total expenditures in the preceding 18 months.

---

[2] A Constitutional amendment is the generally preferred means of creating the reserve fund and defining its use for budgetary purposes. The Constitution would serve to insulate the cash-based budgeting reserve fund from the political process much as is the case with the Permanent Fund.

The General Fund. In this report, General Fund unrestricted revenues identified as potentially available for contribution to a CBB reserve fund are those revenues "in excess" of the projected operating costs of government. For this purpose, no real growth in the Operating Budget above the FY 84 level ($2.057 billion) is assumed.

Three mechanisms for obtaining contributions to the CBB reserve fund are considered in this report:

- A percentage of unrestricted revenues deposited into the CBB reserve fund monthly;
- A "grubstake" contribution to the CBB reserve fund appropriated in the 1984 legislative session to become effective contingent on voter approval of the CBB program during the 1984 general election.
- A percentage of the balance of unobligated (unappropriated) revenues remaining in the General Fund at the end of each year.

Assuming that actual revenues match the 30th percentile revenue forecast, annual contributions of 11.6 percent of total unrestricted revenues would enable the CBB reserve fund to attain the 18-month reserve requirement of $5.173 billion by FY 94. An FY 94 cash-based budgeting start-up could also be achieved with an annual General Fund contribution of 10 percent if a front-end (grubstake) contribution of $325 million were made during the current session. Under these options, annual contributions to the CBB reserve fund would range between $325 million and $472 million. General Fund "excess revenues" would be sufficient to meet CBB contribution requirements in every year except FY 92 and FY 93.

Permanent Fund Earnings. Permanent Fund earnings are another potential source of funds for a CBB reserve account. This report assumes the Permanent Fund is restructured to allow annual contributions to the CBB reserve fund. In addition, the Undistributed Income Account balance of the Permanent Fund (estimated at $535.6 million for FY 85) is assumed to be deposited into the CBB reserve fund as a grubstake contribution.

Under this set of assumptions, Permanent Fund earnings contributed to the CBB reserve fund are projected to increase from $208 million in FY 86 to $457 million in FY 93. Given the earnings potential of the CBB reserve fund, cash-based budgeting could be started in FY 95 with Permanent Fund earnings as a source of contributions.

New or Higher Taxes. A third alternative for funding cash-based budgeting is through new or higher taxes. However, this approach is less promising than the General Fund or Permanent Fund earnings options for the following reasons:

- The political feasibility of raising petroleum taxes is a matter of considerable conjecture, especially in light of the Congressional debate over the need to limit the ability of petroleum producing states to increase oil production taxes.

- Given the January, 1984 estimate of all nonpetroleum tax revenue of $131 million, tax rates would have to be three to four times higher than existing rates in order to meet CBB reserve contribution requirements of between $300 to $450 million per year.

- A reinstituted Alaska individual income tax could potentially raise revenues of around $225 million per year. This potential source of funds for cash-based budgeting is of a sufficient magnitude to fund a CBB reserve by the late 1990s, but may also be useful as a supplementary source of funds under other implementation options.

Near-Term Implementation of Cash-Based Budgeting

Two methods by which cash-based budgeting could conceivably be implemented soon after voter approval in 1984 are by a loan from the Permanent Fund and by bonding. Both options would require adoption of a constitutional amendment allowing the State to incur debt for purposes other than for capital construction projects. Assuming cash-based budgeting could begin in FY 86, both the permanent fund loan and bonding methods would involve a lump sum deposit into the CBB reserve fund of $4.836 billion.

Permanent Fund Loan. The plan for repayment of the Permanent Fund loan depends on the interest rate and repayment period assumed. Given a 7-year repayment period and an annual interest rate of ten percent, $479 million per year (in addition to interest earnings on the balance) would be diverted from the General Fund to repay the loan.

The Permanent Fund loan approach to funding the CBB reserve presents difficulties for the following reasons:

- The loan repayment plan stated above assumes perfect liquidity of Permanent Fund investments. In actuality, some Permanent Fund investments are not readily retrievable for contribution into the CBB reserve fund. Consequently, the start-up date for cash-based budgeting may be delayed from 2 to 3 years, and the annual repayment amounts would be increased since the CBB reserve fund target grows in proportion to revenue projections through FY 90.

- A serious drawback of the Permanent Fund loan concept is the precedent that such a use of the permanent fund principal would set.

- A Permanent Fund loan would likely be viewed by the bond market as no different than any other general obligation debt of the State. Consequently, this very large outstanding debt might cause the State's AA bond rating to drop to A or A-, making further bond sales for any State agency more expensive while the loan was being repaid. Furthermore, a debt of the magnitude of $4.8 billion would eliminate any further debt capacity for the State until this loan is repaid.

Bonding. An alternative near-term cash-based budgeting funding source is bonded debt. If $4.836 billion in bonds could be sold by the State, cash-based budgeting could be started in the near term with a repayment schedule much like that which would occur under the Permanent Fund loan option. The following potential problems are associated with the bonding alternative:

- According to a recent report of State debt capacity, an additional $1.2 billion in debt could potentially be incurred by the State through FY 90 only by doubling its current debt service to revenue ratio. This report recommends against such an increase in the debt service/revenue ratio since the State's AA bond rating would be in jeopardy.[3]

- The Internal Revenue Service (IRS) forbids financial arbritrage with regard to revenues raised by sale of tax exempt bonds. This means the State would be prohibited from investing revenues raised by bond sales at interest rates higher than those pertaining to the sale of the bonds. This factor would effectively raise the overall cost of the bonding alternative for funding cash-based budgeting by the amount of foregone interest earnings of CBB reserve fund investments.

The Fiscal Benefits and Limitations of Cash-Based Budgeting

The intent of legislation proposing cash-based budgeting is to create a budgeting system which will allow legislators to know precisely how much money can be appropriated in the budgets that they will prepare. However, cash-based budgeting is more than simply a mechanism for making revenues more certain.

---

[3] A Review of Debt Capacity and Debt Management for the State of Alaska; August 1983, prepared by Government Finance Research Center-Municipal Finance Officers Association, Washington D.C.

Fiscal Restraint. The implementation of cash-based budgeting would provide for a constitutional prohibition against deficit spending by requiring that appropriations for a given fiscal year may not exceed total revenues already in hand from the prior calendar year. In addition, about $400 million per year would be diverted from the revenue stream to the CBB reserve fund during the period of reserve fund growth. In those years, less revenues would be available for appropriation for other purposes.

Bringing Certainty To The Budgeting Process. Knowing exactly how much money is available for appropriation each year is different from the task of allocating available funds. Even though the size of the pie will be known under cash-based budgeting, the problems of dividing up the pie will still require difficult political decisions. For local governments and school districts, who rely on State appropriations to finalize their budgets, uncertainty over revenues would remain until the legislative allocation process is complete. This source of revenue uncertainty will become an increasing problem for local jurisdictions during a period of declining revenues as a consequence of increasingly intense competition among contenders for a piece of the budget pie.

In addition, cash-based budgeting resolves the "revenue uncertainty" problem for budgeting purposes on a year-to-year basis, it does not eliminate the considerable uncertainty concerning how the State will budget "within its means" during a period of projected declining revenues.

Revenue Stability - Smoothing. With the start of cash-based budgeting, an element of revenue stability would be introduced to the extent that revenues needed to cover future appropriations will be "in the bank." However, cash-based budgeting would do nothing to smoooth out an eratic revenue stream (including both sharp increases and dramatic drops) since revenues would presumably be appropriated at the same level at which they were received 18-months earlier.

Cash-Based Budgeting As An Expenditure Limitation. As a limit on expenditures, cash-based budgeting differs from conventional expenditure limitations which are tied to growth in demand for governmental services (population growth) and changes in the costs of goods and services. Instead, cash-based budgeting is simply bound to increases or declines in total State revenues which are predominately determined by changes in the price and production level of petroleum.

Flow Charts Showing the Implementation of Cash-Based Budgeting

Figures 1 and 2 illustrate the transition to cash-based budgeting under the deferred implementation option. Figure 1 shows the timing of the flow of funds and Figure 2 shows the anticipated impact of CBB on State expenditures. Information provided by the graphs is summarized below.

Figure 1 shows that:

- the current practice of preparing the annual budget during the preceding fiscal year is retained under CBB;
- the current practice of spending revenues during the period in which they are collected continues during the transition period (1986 through 1993);
- a portion of annual revenues is diverted to the CBB Reserve Fund during the transition period;
- the CBB Reserve Fund is transferred to the General Fund in 1994 and is the source of money spent during FY 94;
- revenues collected during the first half of FY 94 are held for expenditure in FY 95;
- the CBB Reserve Fund is the source of the remainder of the money spent during FY 95; and
- beginning in 1996, expenditures during the fiscal year are limited to the amount of revenue collected in the preceding calendar year.

Figure 2 shows that:

- contributions to the CBB Reserve Fund begin in 1986 and continue through 1993;
- annual contributions to the CBB Reserve Fund reduce the level of expenditure because they divert revenue which would otherwise go to the General Fund;[4]

---

[4]This conclusion is based on the assumption that expenditures will equal revenues in each year. If the amount budgeted without cash-based budgeting is less than revenues, the reduction in spending under cash-based budgeting would be less than shown in the graph.

- the CBB Reserve Fund grows to over $5 billion in 8 years, including $1.8 billion in interest earnings;

- contributions stop when the balance of the CBB Reserve Fund exceeds total revenues for the preceding 18 months;

- when the balance of the CBB Reserve Fund is transferred to the General Fund in 1994, expenditures can exceed the level of expenditure that could have occurred without CBB;

- future interest earnings from the large General Fund balance permit higher annual levels of expenditures than could occur without those interest earnings;

- although CBB permits a higher level of future expenditures, the level of expenditures follows the same trend as expenditures without CBB; and

- CBB does not reduce annual fluctuations in the permissible level of expenditures.

Figure 1

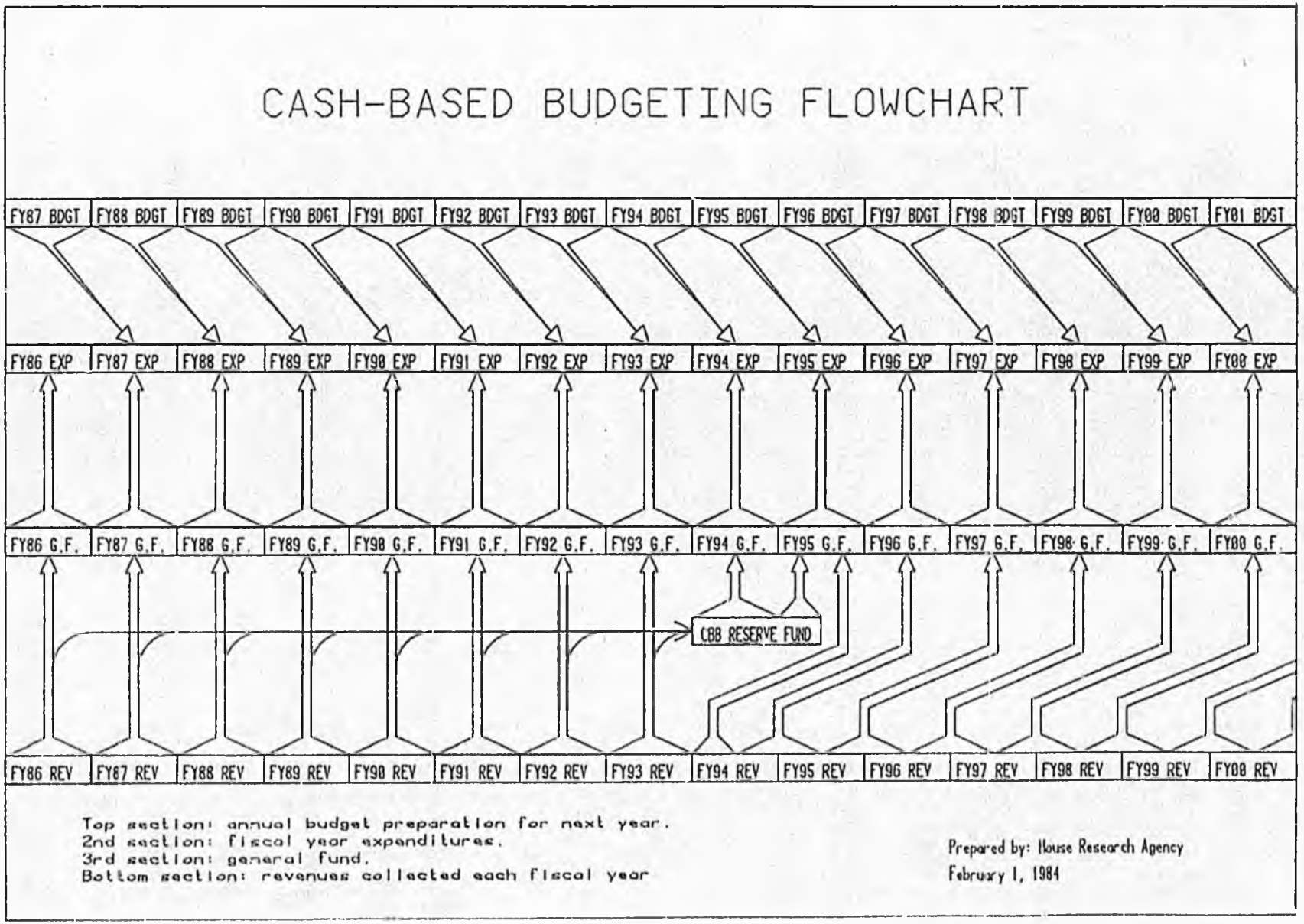
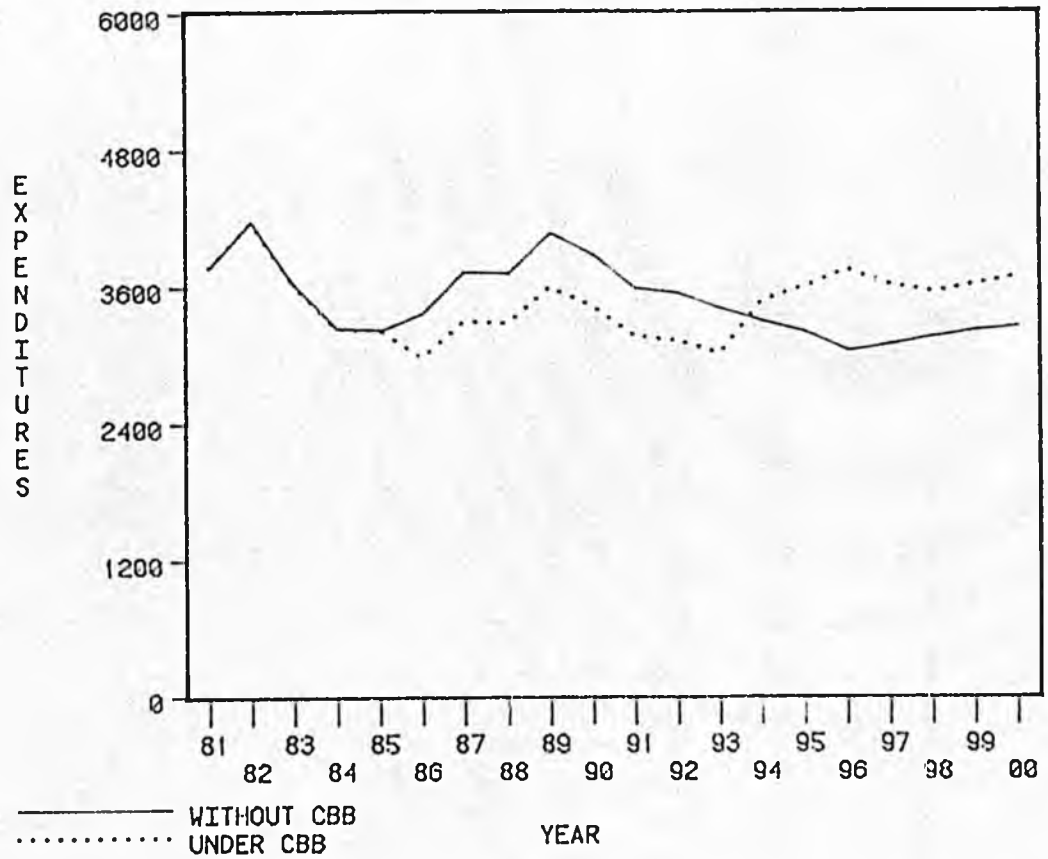
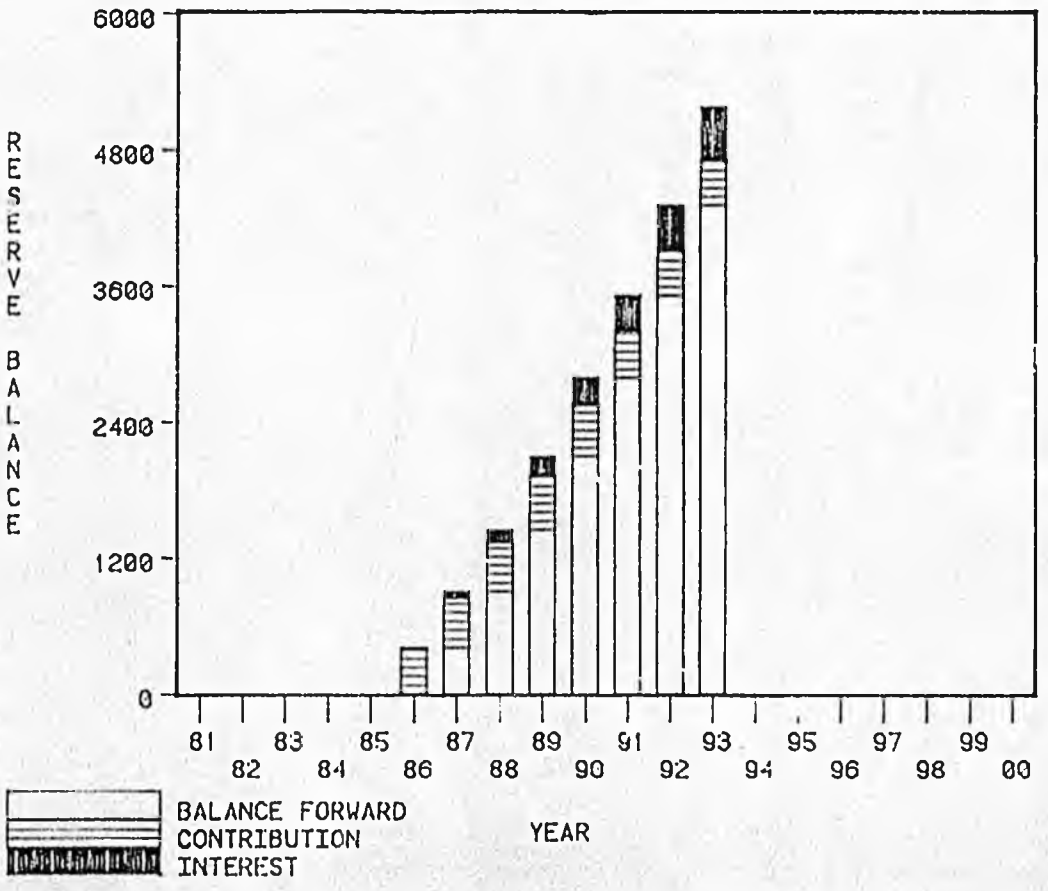

CASH-BASED BUDGETING FLOWCHART
FY87 BDGT
FY88 BDGT
FY89 BDGT
FY90 BDGT
FY91 BDGT
FY92 BDGT
FY93 BDGT
FY94 BDGT
FY95 BDGT
FY96 BDGT
FY97 BDGT
FY98 BDGT
FY99 BDGT
FY00 BDGT
FY01 BDGT
FY86 EXP
FY87 EXP
FY88 EXP
FY89 EXP
FY90 EXP
FY91 EXP
FY92 EXP
FY93 EXP
FY94 EXP
FY95 EXP
FY96 EXP
FY97 EXP
FY98 EXP
FY99 EXP
FY00 EXP
FY86 G.F.
FY87 G.F.
FY88 G.F.
FY89 G.F.
FY90 G.F.
FY91 G.F.
FY92 G.F.
FY93 G.F.
FY94 G.F.
FY95 G.F.
FY96 G.F.
FY97 G.F.
FY98 G.F.
FY99 G.F.
FY00 G.F.
CBB RESERVE FUND
FY86 REV
FY87 REV
FY88 REV
FY89 REV
FY90 REV
FY91 REV
FY92 REV
FY93 REV
FY94 REV
FY95 REV
FY96 REV
FY97 REV
FY98 REV
FY99 REV
FY00 REV
Top section: annual budget preparation for next year.
2nd section: fiscal year expenditures.
3rd section: general fund.
Bottom section: revenues collected each fiscal year
Prepared by: House Research Agency
February 1, 1984

Figure 2

EXPENDITURES AND RESERVES UNDER CASH BASED BUDGETING
(IN MILLIONS OF $)





NOTE REGARDING THE FOLLOWING FRAME(S) ON MICROFILM:
COMPLETE DOCUMENT IS AVAILABLE IN ORIGINAL FILES.
TITLE PAGE ONLY HAS BEEN FILMED.

State Budget Policy Under Uncertain Revenue Forecasts

Options for Legislative Action

House Research Agency
Alaska State Legislature
January 1983

House Research Agency Report 82-B

THE PURPOSE OF THIS LEGISLATION, ORIGINALLY INTRODUCED IN A SLIGHTLY DIFFERENT FORM IN APRIL OF 1979 WITH A BI-PARTISAN LIST OF 24 SPONSORS, IS TO STABILIZE BUDGETING IN ALASKA. AT THE PRESENT ALASKA, LIKE EVERY OTHER STATE, BUDGETS MONEY "ON THE COME", THAT IS, WE MAKE OUR VERY BEST EFFORTS TO CALCULATE PROBABLE INCOME FOR THE NEXT FISCAL YEAR, AND THEN ATTEMPT TO BUDGET UP TO THAT FIGURE, HOPING THAT WE HAVE NEITHER OVERSPENT AND CAUSED LEGAL PROBLEMS, OR LEFT TOO MUCH ON THE TABLE AND CONSEQUENTLY DISAPPOINTED LARGE NUMBERS OF VOTERS.

BY THE SIMPLE EXPEDIENT OF SETTING ASIDE, IN A CONSTITUTIONALLY-PROTECTED ACCOUNT, 15 PERCENT OF AN AVERAGE YEAR'S INCOME FOR A PERIOD OF SEVEN YEARS, WE WILL HAVE A TOTAL OF 105 PERCENT OF AN AVERAGE YEAR'S INCOME IN THE ACCOUNT. BEGINNING IN THE EIGHTH YEAR, ALL BUDGETING WOULD BE DONE FROM THAT FUND OF KNOWN CASH RESERVES, AND ALL INCOME FROM THAT TIME ON WOULD GO INTO THE RESERVE FUND.

A POTENTIAL EXISTS OF LEGAL CHALLENGE AS TO WHETHER APPROPRIATIONS TO THE FUND WOULD RUN AFOUL OF THE SPENDING LIMITATION WHICH WAS APPROVED BY THE VOTERS LAST FALL. A TOP-OF-THE HEAD OPINION FROM THE LEGAL DIVISION IS THAT IT WOULD NOT, BUT WE ARE HAVING IT RESEARCHED IN MORE DEPTH, AND MIGHT HAVE TO INTRODUCE AMENDMENTS ACCORDINGLY.

THE MAIN THRUST OF THE AMENDMENT IS THAT IT WOULD:

1. PLACE THE ENTIRE BUDGETING PROCESS ON THE BASIS OF KNOWN FISCAL RESERVES.
2. SHORTEN LEGISLATIVE SESSIONS BY ELIMINATING THE NECESSITY OF JUGGLING INCOME PROJECTIONS.
3. ENABLE INTERIM BODIES AND INDIVIDUALS TO WORK ON THE BUDGETARY PROCESS THROUGHOUT THE YEAR.
4. ELIMINATE THE DANGEROUS PROBABILITY OF OVER-BUDGETING.
5. SIMPLIFY ANSWERING CONSTITUENT DEMANDS FOR FUNDING OF MANY PROJECTS AND PROGRAMS.
6. ENSURE FULL FUNDING OF PROJECTS AND PROGRAMS APPROVED BY THE LEGISLATURE.

OBJECTIONS WILL BE THAT WE CANNOT AFFORD THE SETASIDE AND THAT WE WOULD BE IDLING LARGE AMOUNTS OF MONEY FOR AN ENTIRE YEAR. TO THE FIRST OF THOSE WE ANSWER THAT WE PROBABLY CANNOT AFFORD, GIVEN THE RADICAL CHANGES IN INCOME WHICH WE EXPERIENCE, NOT TO INSTALL SOME SORT OF STABILIZING DEVICE. TO THE SECOND THAT THE MONEY WILL BE AT WORK, EARNING INCOME, FOR THE ENTIRE PERIOD DURING WHICH IT IS IN THE LIMBO OF THE RESERVE ACCOUNT AND EVEN AFTER IT IS BUDGETED WILL CONTINUE TO BE AT WORK UNTIL ACTUALLY EXPENDED.

HJR

42

Summary of U.S.State Dept. 1982 report to Senate & House Foreign Relations Committees on Human Rights Practices in Taiwan

Political history since 1949 - the political power and most positions of power in the government remain with the Nationalist Party, the Kuomintang, who were elected on mainland China before 1945. Native Taiwanese - about 85% of population - do not have significant power, and are structurally prevented from gaining it.

What is referred to in the report as the "taiwanese independence movement" is a loose movement to return control of the government to elected Taiwanese. This movement is considered sedition.

Martial Law - Martial law was imposed in 1949 and operated ever since. It is the means by which the Nationalist Party retains control and is the crucial fact for human rights in Taiwan. Martial law means that political crimes and other major crimes can and are tried in military, rather than civilian, courts. Cases in these categories are then reviewable only by the Ministry of Defense.

These are the observations on human rights conditions as listed in the State Dept. report:

Political murders - murders of a mother and twin daughters of an opposition figure and of a U.S. born Taiwanese professor in 1980 and 1981 "are believed to have beer politically motivated".

Torture - Just last May, five policemen were tried and convicted for illegal arrest and causing bodily harm to a taxi driver beaten and then drowned while under arrest. "Physical violence...(is) a practice many believe police resort to frequently."

Arrest and warrants - Arrest is without warrant in many cases. Individuals may be held up to seven months and possibly more at prosecutor's request. Recently, attorneys were allowed to be present for interrogation of their clients, but that may only mean sitting behind a soundproof window - watching, but not hearing. There is no protection against self-incrimination.

For many minor crimes police not only arrest, but also prosecute and punish. Police are now trying to get the power to put certain of those detained in military prisons for "educational punishment" for crimes against "social peace" - all without trial.

"Monitoring of telephone calls(is)widely believed to exist", and in a recent case there was evidence of monitoring of international calls.

Political prisoners - There are, by government admission and the count of international organizations, approximately 100 political prisoners in Taiwan. 20 of them have been imprisoned over 30 years.

Sedition, which is defined as any opposition to basic government policy, especially the contention that the present government represents all of mainland China, is punishable in military courts under martial law. Native Taiwanese who say that their island should be self-governing are committing sedition and are commonly and frequently tried as such. Political candidates are known to be routinely monitored for such sentiments.

International security surveillance- Although authorities deny it, it is widely accepted that activities of students in the U.S. and other countries' universities who are Taiwanese are followed by the security service.

Censorship - Police may legally seize, ban and/or suspend publication licenses of publishers of printed material they think "confuses public opinion and affects the morale of the public and armed forces." This practice is very common. Major U.S. magazines such as Newsweek have been banned in recent past. Foreign correspondents' credentials have been revoked for reporting the wrong things.

Public assembly - Public assembly for political purposes is banned, except in recent years 15 day election periods have been created in which rallies are allowed but closely monitored.

Religious freedom - Churches have been warned against involvement in opposition political groups or groups which discuss Taiwanese independence. Authorities have made it clear that they intend to take control of religious educational institutions. In 1980 a confrontation with the Presbyterian church came to a head with the conviction of the church's general secretary and others in the church for their harboring a sedition defendant who sought help.

Travel freedom - Permission to leave the country for a trip or to study may be delayed or witheld for security reasons or because the person has criticized the political establishment. 20,000 people (about 2% of applicants) were denied travel permits in 1980 - over 300 for security reasons alone.

TAIWAN

More than thirty years of dynamic economic development contrasts sharply with the pace of political development in Taiwan, where the ruling authorities have emphasized stability rather than change. Nonetheless, the authorities have created an array of democratic institutions from village to province level, with candidates inside and outside the dominant Nationalist Party. Actual power, however, remains in the hands of the small leadership group elected in mainland China before 1945, which came to Taiwan after World War II and controls the Nationalist Party (Kuomintang), the military, and the executive bureaucracy. A high degree of political control is exercised through the security apparatus, which operates under martial law provisions enacted in 1949 and which the authorities justify by the threat of military action or subversion from mainland China.

The enhancement of human rights is publicly endorsed by the authorities but remains incompletely realized in Taiwan. Although individuals may run for elective office, coordinated opposition activity is greatly restricted. The publication of opposition political views is closely controlled and the activities of outspoken oppositionists are monitored, both at home and, apparently, abroad. Native Taiwanese, descendants of Chinese who migrated from the mainland mostly in the eighteenth century and who now constitute 85 percent of the population, dominate the economy but are under-represented within the ruling elite. Recent evidence suggests that torture and other forms of physical intimidation are still occasionally used by police, but probably are not officially condoned.

Nineteen eighty-two saw the continuation of a slow trend toward improvement in the human rights situation in Taiwan. Publication and public expression of oppositionist sentiment have become gradually freer, although there are still strict limits to what is acceptable. The authorities continue to recruit qualified Taiwanese to fill important economic and political, military, and security posts, a process which will contribute to an increased share of political power by the Taiwanese. With the rise of a prosperous middle class, popular concern about human rights is increasing. Despite Taiwan's diplomatic isolation and concern about the island's future after the passing of the current President, Chiang Ching-kuo, the outlook for continued improvement in human rights appears favorable.

1. Respect for the Integrity of the Person, Including Freedom from:

   a. Killing

No killings for political reasons have been substantiated in Taiwan in 1982, or indeed in recent years. However, the murder in February 1980 of the mother and twin daughters of jailed oppositionist Lin Yi-hsiung and the suspected murder in July 1981 of a Taiwan-born US resident, Professor Chen Wen-cheng, are widely believed to have been politically motivated.

   b. Disappearance

In recent years, there have been no credible reports of persons being abducted or secretly arrested by the security services. There are no known terrorist organizations operating on the island.

Code 382

Country Reports on Human Rights Practices for 1982 for Senate & House For. Rels. Committees by State Department

c. Torture

Taiwan law specifically prohibits the use of torture. The Code of Criminal Procedure states that an accused shall be "frankly" examined, but that no violence, threat, inducement, fraud, or other improper means shall be used. This language is repeated in the Military Trial Law.

The death in police custody of a Taipei taxi driver, Wang Ying-hsien, in May 1982 focused public attention on the use of physical violence by police in interrogating criminal suspects, a practice many believe police resort to frequently. Wang was picked up on suspicion of robbing a bank and died while in police custody. The actual robber was captured a few hours later and Wang's daughter challenged the police account of Wang's death. The autopsy report, released on August 20, confirmed that Wang was beaten but ruled that his death was caused by drowning in the Hsintien River. Although his death was officially declared a suicide, five policemen were tried and convicted for illegally arresting Wang and causing him bodily harm.

d. Cruel, Inhuman, or Degrading Treatment or Punishment

Imprisonment is the usual form of punishment for both political and nonpolitical offenders. According to the authorities, nine executions were carried out in 1981, seven of convicted murderers, and two of persons convicted of robbery.

Taiwan's civilian prisons are severely overcrowded. In April 1982 the press reported that civilian prisons, built to accommodate 11,261 prisoners, were then holding 17,162 or 5,901 over capacity. Prisoners are forced to share cramped living quarters and have fewer opportunities for work, exercise, and family visits. Overcrowding was partially responsible for severe rioting which broke out in the juvenile section of Hsinchu Prison in March 1982.

Conditions in the military prisons administered by the security police, where political prisoners are confined, are reportedly less crowded. Prisoners receive the same food as soldiers and have work and recreation opportunities. Although conditions for the Kaohsiung-incident prisoners have reportedly improved since their arrest in 1980, six non-Nationalist Party legislators charged in July 1982 that these prisoners continue to be denied access to regular work programs and recreational activities, are prohibited certain amenities accorded other prisoners, and are subject to special rules which keep them separate from one another. A few of the Kaohsiung-incident prisoners are alleged to still suffer from the effects of pretrial mistreatment.

There is no known discrimination in the treatment of prisoners because of class, race, sex, or religion.

e. Arbitrary Arrest and Imprisonment

Taiwan's law of habeas corpus requires that, following an individual's arrest, the arresting authorities notify in writing the individual and his designated relative or friend within 24 hours of the reason for his arrest or detention. The Code of Criminal Procedure specifies that the authorities may detain an accused for up to two months during investigation prior to the filing of the formal indictment, and for up to three months during trial. During the investigation phase,