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minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.26

As must be apparent the degree of racial bloc voting that is cognizable as an element of a 2 vote dilution claim will [478 U.S. 30, 58] vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under 2.

3

Standard Utilized by the District Court

The District Court clearly did not employ the simplistic standard identified by North Carolina - legally significant bloc voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate. Brief for Appellants 36. And, although the District Court did utilize the measure of "substantive significance" that the United States ascribes to it - "'the results of the individual election would have been different depending on whether it had been held among only the white voters or only the black voters,'" Brief for United States as Amicus Curiae 29 (quoting 590 F. Supp., at 368) - the court did not reach its ultimate conclusion that the degree of racial bloc voting present in each district is legally significant through mechanical reliance on this standard.27 While the court did not phrase the standard for legally significant racial bloc voting exactly as we do, a fair reading of the court's opinion reveals that the court's analysis conforms to our view of the proper legal standard.

The District Court's findings concerning black support for black candidates in the five multimember districts at issue [478 U.S. 30, 59] here clearly establish the political cohesiveness of black voters. As is apparent from the District Court's tabulated findings, reproduced in Appendix A to opinion, post, p. 80, black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%.

In sharp contrast to its findings of strong black support for black candidates, the District Court found that a substantial majority of white voters would rarely, if ever, vote for a black candidate. In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%. See ibid. The court also determined that, on average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multicandidate field, except in heavily Democratic areas where white voters consistently ranked black candidates last among the Democrats, if not last or next to last among all candidates. The court further observed that approximately two-thirds of white voters did not vote for black candidates in general elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one.28 [478 U.S. 30, 60]

While the District Court did not state expressly that the percentage of whites who refused to vote for black candidates in the contested districts would, in the usual course of events, result in the defeat of the minority's candidates, that conclusion is apparent both from the court's factual findings and from the rest of its analysis. First, with the exception of House District 23, see infra, at 77, the trial court's findings clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice. See Appendix B to opinion, post, p. 82. Second, where black candidates won elections, the court closely examined the circumstances of those elections before concluding that the success of these

blacks did not negate other evidence, derived from all of the elections studied in each district, that legally significant racially polarized voting exists in each district. For example, the court took account of the benefits incumbency and running essentially unopposed conferred on some of the successful black candidates,29 as well as of the [478 U.S. 30, 61] very different order of preference blacks and whites assigned black candidates,30 in reaching its conclusion that legally significant racial polarization exists in each district.

We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

C

EVIDENCE OF RACIALLY POLARIZED VOTING

1

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the principal cause is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a correlation between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income[,] incumbency, education, campaign expenditures," Brief for [478 U.S. 30, 62] Appellants 42, "media use measured by cost, . . . name, identification, or distance that a candidate lived from a particular precinct," Brief for United States as Amicus Curiae 30, n. 57, can prove that race was the primary determinant of voter behavior.31

Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice is unclear; indeed, their catalogs of relevant variables suggest both.32 Age, religion, income, and education seem most relevant to the voter; incumbency, campaign expenditures, name identification, and media use are pertinent to the candidate; and party affiliation could refer both to the voter and the candidate. In either case, we disagree: For purposes of 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. Grofman, Migalski, & Noviello 203. As we demonstrate infra, appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended 2 and would prevent courts from performing the "functional" analysis of the political process, S. Rep., at 30, n. 119, and the "searching practical evaluation of the `past [478 U.S. 30, 63] and present reality,'" id., at 30 (footnote omitted), mandated by the Senate Report.

2

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers to voting patterns that are in some way caused by race, rather than to voting patterns that are merely correlated with the race of the voter, is that the reasons black and white voters vote differently have no relevance to the central inquiry of 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.

Both 2 itself and the Senate Report make clear that the critical question in a 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See, e. g., S. Rep., at 2, 27, 28, 29, n. 118, 36. As we explained, supra, at 47-48, multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the difference between the choices made by blacks and whites - not the reasons for that difference - that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants' theory of racially polarized voting. However, their theory contains other equally serious flaws [478 U.S. 30, 64] that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under 2 and the Senate Report.

3

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of "racially polarized voting" refers not to voting patterns that are merely correlated with the voter's race, but to voting patterns that are determined primarily by the voter's race, rather than by the voter's other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, e. g., Butler 902 (Minority group "members' shared concerns, including political ones, are . . . a function of group status, and as such are largely involuntary. . . . As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group"); S. Verba & N. Nie, Participation in America 151-152 (1972) ("Socioeconomic status . . . is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes"). Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which [478 U.S. 30, 65] holds that black bloc voting does not exist when black voters' choice of certain candidates is most strongly influenced by the fact that the voters have low incomes and menial jobs - when the reason most of those voters have menial jobs and low incomes is attributable to past or present

racial discrimination - runs counter to the Senate Report's instruction to conduct a searching and practical evaluation of past and present reality, S. Rep., at 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities. Id., at 5, 40.

Furthermore, under appellants' theory of racially polarized voting, even uncontrovertible evidence that candidates strongly preferred by black voters are always defeated by a bloc voting white majority would be dismissed for failure to prove racial polarization whenever the black and white populations could be described in terms of other socioeconomic characteristics.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is $10,465, and 47.8% of the black community lives in poverty. More than half - 51.5% - of black adults over the age of 25 have only an eighth-grade education or less. Just over half of black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of $19,042. White residents are better educated than blacks - only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. 1 App., Ex-44. As is the case in Senate District 2, blacks in this [478 U.S. 30, 66] hypothetical urban district have never been able to elect a representative of their choice.

According to appellants' theory of racially polarized voting, proof that black and white voters in this hypothetical district regularly choose different candidates and that the blacks' preferred candidates regularly lose could be rejected as not probative of racial bloc voting. The basis for the rejection would be that blacks chose a certain candidate, not principally because of their race, but principally because this candidate best represented the interests of residents who, because of their low incomes, are particularly interested in government-subsidized health and welfare services; who are generally poorly educated, and thus share an interest in job training programs; who are, to a greater extent than the white community, concerned with rent control issues; and who favor major public transportation expenditures. Similarly, whites would be found to have voted for a different candidate, not principally because of their race, but primarily because that candidate best represented the interests of residents who, due to their education and income levels, and to their property and vehicle ownership, favor gentrification, low residential property taxes, and extensive expenditures for street and highway improvements.

Congress could not have intended that courts employ this definition of racial bloc voting. First, this definition leads to results that are inconsistent with the effects test adopted by Congress when it amended 2 and with the Senate Report's admonition that courts take a "functional" view of the political process, S. Rep. 30, n. 119, and conduct a searching and practical evaluation of reality. Id., at 30. A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution. And, contrary to Congress' intent in adopting the "results test," appellants' proposed definition could result in the inability of minority voters to establish a critical [478 U.S. 30, 67] element of a vote dilution claim, even though both races engage in "monolithic" bloc voting, id., at 33, and generations of black voters have been unable to elect a representative of their choice.

Second, appellants' interpretation of "racially polarized voting" creates an irreconcilable tension between their proposed treatment of socioeconomic characteristics in the bloc voting context and the Senate Report's statement that "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health" may be relevant to a 2 claim. Id., at 29. We can find no support in either logic or the legislative history for the anomalous conclusion to which

appellants' position leads - that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

4

Race of Candidate as Primary Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates principally on the basis of the candidate's race is also misplaced.

First, both the language of 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate per se is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to . . . elect representatives of their choice." [478 U.S. 30, 68] (Emphasis added.) Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Cf. Letter to the Editor from Chandler Davidson, 17 New Perspectives 38 (Fall 1985). Indeed, the facts of this case illustrate that tendency - blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a 2 inquiry. Under 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.

An understanding of how vote dilution through submergence in a white majority works leads to the same conclusion. The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure with a white majority that votes as a significant bloc for different candidates. Thus, as we explained in Part III, supra, the existence of racial bloc voting is relevant to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis. See, e. g., Blacksher & Menefee 59-60; Grofman, Should Representatives be Typical?, in Representation and Redistricting Issues 98; Note, Geometry and Geography 207. [478 U.S. 30, 69]

Second, appellants' suggestion that racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spent more on their campaigns, utilized more media coverage, and thus enjoyed greater name recognition than the black candidates, fails for another, independent reason. This argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S. Rep., at 5, 40; H. R. Rep. No. 97-227, p.

31 (1981). Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, e. g., White v. Regester, 412 U.S., at 768-769; Kirksey v. Board of Supervisors of Hinds County, Miss., 554 F.2d 139, 145-146 (CA5) (en banc), cert. denied, 434 U.S. 968 (1977). See also S. Verba & N. Nie, Participation in America 152 (1972). The Senate Report acknowledges this tendency and instructs that "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," S. Rep., at 29 (footnote omitted), is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives. Courts and commentators have recognized further that candidates generally must spend more money in order to win [478 U.S. 30, 70] election in a multimember district than in a single-member district. See, e. g., Graves v. Barnes, 343 F. Supp. 704, 720-721 (WD Tex. 1972), aff'd in part and rev'd in part sub nom. White v. Regester, supra. Berry & Dye 88; Davidson & Fraga, Nonpartisan Slating Groups in an At-Large Setting, in Minority Vote Dilution 122-123; Derfner 554, n. 126; Jewell 131; Karnig, Black Representation on City Councils, 12 Urb. Aff. Q. 223, 230 (1976). If, because of inferior education and poor employment opportunities, blacks earn less than whites, they will not be able to provide the candidates of their choice with the same level of financial support that whites can provide theirs. Thus, electoral losses by candidates preferred by the black community may well be attributable in part to the fact that their white opponents outspent them. But, the fact is that, in this instance, the economic effects of prior discrimination have combined with the multimember electoral structure to afford blacks less opportunity than whites to participate in the political process and to elect representatives of their choice. It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination which hinder blacks' ability to participate in the political process tend to prove a 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim. Accord, Escambia County, 748 F.2d, at 1043 ("'[T]he failure of the blacks to solicit white votes may be caused by the effects of past discrimination'") (quoting United States v. Dallas County Comm'n, 739 F.2d 1529, 1536 (CA11 1984)); United States v. Marengo County Comm'n, 731 F.2d, at 1567.

5

Racial Animosity as Primary Determinant of Voter Behavior

Finally, we reject the suggestion that racially polarized voting refers only to white bloc voting which is caused by [478 U.S. 30, 71] white voters' racial hostility toward black candidates.33 To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of Mobile v. Bolden, 446 U.S. 55 (1980), and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending 2, Congress rejected the requirement announced by this Court in Bolden, supra, that 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism.34 Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies. See Engstrom, The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases, 28 How. L. J. 495 (1985).

The Senate Report states that one reason the Senate Committee abandoned the intent test was that "the Committee . . . heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S. Rep., at 36. The Committee

found the testimony of Dr. Arthur S. [478 U.S. 30, 72] Flemming, Chairman of the United States Commission on Civil Rights, particularly persuasive. He testified:

> "'[Under an intent test] [l]itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.'" Ibid. (footnote omitted).

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on 2 plaintiffs. Ibid. The new intent test would be equally, if not more, burdensome. In order to prove that a specific factor - racial hostility - determined white voters' ballots, it would be necessary to demonstrate that other potentially relevant causal factors, such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior. As one commentator has explained: [478 U.S. 30, 73]

> "Many of the[se] independent variables . . . would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not. To conduct such an extensive statistical analysis as this implies, moreover, can become prohibitively expensive.
>
> "Compared to this sort of effort, proving discriminatory intent in the adoption of an at-large election system is both simple and inexpensive." McCrary, Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L. J. 463, 492 (1985) (footnote omitted).

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." S. Rep., at 36. Amended 2 asks instead "whether minorities have equal access to the process of electing their representatives." Ibid.

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under 2 and under a functional theory of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail, supra, requiring proof that racial considerations actually caused voter behavior will result - contrary to congressional intent - in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a 2 violation. The Senate Report's remark concerning the old intent test thus is pertinent to the new test: The requirement that a "court . . . make a separate . . . finding of intent, after accepting the proof of the factors involved in the White [v. Regester, 412 U.S. 755] analysis . . . [would] seriously clou[d] the prospects of eradicating the remaining instances of racial discrimination in American elections." Id., at 37. We therefore decline to adopt such a requirement. [478 U.S. 30, 74]

Summary

In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A

North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election.35 They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly proportional representation.36 This electoral [478 U.S. 30, 75] success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U.S.C. 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep., at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not `necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [ 2] by manipulating the election of a `safe' minority candidate." Id., at 29, n. 115, quoting Zimmer v. McKeithen, 485 F.2d 1297, 1307 (CA5 1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (per curiam). The Senate Committee decided, instead, to "`require an independent consideration of the record.'" S. Rep., at 29, n. 115. The Senate Report also emphasizes that the question whether "the political processes are `equally open' depends upon a searching practical evaluation of the `past and present reality.'" Id., at 30 (footnote omitted). Thus, the language of 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a 2 claim.

Moreover, in conducting its "independent consideration of the record" and its "searching practical evaluation of the `past [478 U.S. 30, 76] and present reality,'" the District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular, as the Senate Report makes clear, id., at 29, n. 115, the court could properly notice the fact that black electoral success increased markedly in the 1982 election - an election that occurred after the instant lawsuit had been filed - and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting."37 590 F. Supp., at 367, n. 27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black

candidates' success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' 2 claim. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters. [478 U.S. 30, 77]

B

The District Court did err, however, in ignoring the significance of the sustained success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives,38 but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections. Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court's ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

As an initial matter, both North Carolina and the United States contend that the District Court's ultimate conclusion that the challenged multimember districts operate to dilute [478 U.S. 30, 78] black citizens' votes is a mixed question of law and fact subject to de novo review on appeal. In support of their proposed standard of review, they rely primarily on Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), a case in which we reconfirmed that, as a matter of constitutional law, there must be independent appellate review of evidence of "actual malice" in defamation cases. Appellants and the United States argue that because a finding of vote dilution under amended 2 requires the application of a rule of law to a particular set of facts it constitutes a legal, rather than factual, determination. Reply Brief for Appellants 7; Brief for United States as Amicus Curiae 18-19. Neither appellants nor the United States cite our several precedents in which we have treated the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a). See, e. g., Rogers v. Lodge, 458 U.S., at 622-627; City of Rome v. United States, 446 U.S. 156, 183 (1980); White v. Regester, 412 U.S., at 765-770. Cf. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

In Regester, supra, we noted that the District Court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that

> "we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . multimember district in the light of past and present reality, political and otherwise." Id., at 769-770.

Quoting this passage from Regester with approval, we expressly held in Rogers v. Lodge, supra, that the question whether an at-large election system was maintained for discriminatory purposes and subsidiary issues, which include whether that system had the effect of diluting the minority vote, were questions of fact, reviewable under Rule 52(a)'s [478 U.S. 30, 79] clearly-erroneous standard. 458 U.S., at 622-623. Similarly, in City of Rome v. United States, we declared that the question whether certain electoral structures had a "discriminatory effect," in the sense of diluting the minority vote, was a question of fact subject to clearly-erroneous review. 446 U.S., at 183.

We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the `past and present reality,'" S. Rep., at 30 (footnote omitted), whether the political process is equally open to minority voters. "`This determination is peculiarly dependent upon the facts of each case,'" Rogers, supra, at 621, quoting Nevett v. Sides, 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S., at 622. The fact that amended 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether 2 has been violated does not alter the standard of review. As we explained in Bose, Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U.S., at 501, citing Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855, n. 15 (1982). Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law. [478 U.S. 30, 80]

B

The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, see supra, at 77, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

APPENDIX A TO OPINION OF BRENNAN, J.

Percentages of Votes Cast by Black and White Voters for Black Candidates in the Five Contested Districts

Senate District 22

Primary General

White Black White Black

1978 (Alexander) 47 87 41 94 1980 (Alexander) 23 78 n/a n/a 1982 (Pol[illegible] 32 83 33 94 [478 U.S. 30, 81]

House District 21

Primary General

White Black White Black

1978 (Blue) 21 76 n/a n/a 1980 (Blue) 31 81 44 90 1982 (Blue) 39 82 45 91

House District 23

Primary General

White Black White Black

1978 Senate Barns (Repub.) n/a n/a 17 5 1978 House Clement 10 89 n/a n/a Spaulding 16 92 37 89 1980 House Spaulding n/a n/a 49 90 1982 House Clement 26 32 n/a n/a Spaulding 37 90 43 89

House District 36

Primary General

White Black White Black

1980 (Maxwell) 22 71 28 92 1982 (Berry) 50 79 42 92 1982 (Richardson) 39 71 29 88

House District 39

Primary General

White Black White Black

1978 House Kennedy, H. 28 76 32 93 Norman 8 29 n/a n/a Ross 17 53 n/a n/a Sumter (Repub.) n/a n/a 33 25 [478 U.S. 30, 82]

House District 39

Primary General

White Black White Black

1980 House Kennedy, A. 40 86 32 96 Norman 18 36 n/a n/a 1980 Senate Small 12 61 n/a n/a 1982 House Hauser 25 80 42 87 Kennedy, A. 36 87 46 94

590 F. Supp., at 369-371.

APPENDIX B TO OPINION OF BRENNAN, J.

Black Candidates Elected From 7 Originally Contested Districts

District Prior to

(No. Seats) 1972 1972 1974 1976 1978 1980 1982 House 8 (4) 0 0 0 0 0 0 0 House 21 (6) 0 0 0 0 0 1 1 House 23 (3) 0 1 1 1 1 1 1 House 36 (8) 0 0 0 0 0 0 1 House 39 (5) 0 0 1 1 0 0 2 Senate 2 (2) 0 0 0 0 0 0 0 Senate 22 (4) 0 0 1 1 1 0 0

See Brief for Appellees, table printed between pages 8 and 9; App. 93-94.

Footnotes

[Footnote 1] Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

[Footnote 2] Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties - four members), House No. 36 (Mecklenburg County - eight members), House No. 39 (part of Forsyth County - five members), House No. 23 (Durham County - three members), House No. 21 (Wake County - six members), and House No. 8 (Wilson, Nash, and Edgecombe Counties - four members).

[Footnote 3] Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting. The history of this action is recounted in greater detail in the District Court's opinion in this case, Gingles v. Edmisten, 590 F. Supp. 345, 350-358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and that the plan at issue in this case is the 1982 plan.

[Footnote 4] These factors were derived from the analytical framework of White v. Regester, 412 U.S. 755 (1973), as refined and developed by the lower courts, in particular by the Fifth Circuit in Zimmer v. McKeithen, 485 F.2d 1297 (1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (per curiam). S. Rep., at 28, n. 113.

[Footnote 5] Bullet (single-shot) voting has been described as follows: "'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if [478 U.S. 30, 39] the vote of the majority is divided among a number of candidates.'" City of Rome v. United States, 446 U.S. 156, 184, n. 19 (1980), quoting United States Commission on Civil

Rights, The Voting Rights Act: Ten Years After, pp. 206-207 (1975).

[Footnote 6] Designated (or numbered) seat schemes require a candidate for election in multimember districts to run for specific seats, and can, under certain circumstances, frustrate bullet voting. See, e. g., City of Rome, supra, at 185, n. 21.

[Footnote 7] The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as Amicus Curiae 8, n. 12, 24, n. 49. We are not persuaded that the legislative history of amended 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill. See, e. g., Garcia v. United States, 469 U.S. 70, 76, and n. 3 (1984); Zuber v. Allen, 396 U.S. 168, 186 (1969).

[Footnote 8] The Senate Report states that amended 2 was designed to restore the "results test" - the legal standard that governed voting discrimination cases prior to our decision in Mobile v. Bolden, 446 U.S. 55 (1980). S. Rep., at 15-16. The Report notes that in pre-Bolden cases such as White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S. Rep., at 16.

[Footnote 9] The Senate Committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." Id., at 40 (footnote omitted). As the Senate Report notes, the purpose of the Voting Rights Act was "'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.'" Id., at 5 (quoting 111 Cong. Rec. 8295 (1965) (remarks of Sen. Javits)).

[Footnote 10] Section 2 prohibits all forms of voting discrimination, not just vote dilution. S. Rep., at 30.

[Footnote 11] Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. Engstrom & Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis. Stud. Q. 465, 465-466 (1977) (hereinafter Engstrom & Wildgen). See also Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553 (1973) (hereinafter Derfner); F. Parker, Racial Gerrymandering and Legislative Reapportionment (hereinafter Parker), in Minority Vote Dilution 86-100 (Davidson ed., 1984) (hereinafter Minority Vote Dilution).

[Footnote 12] The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability to elect the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in [478 U.S. 30, 47] a single-member district, alleging that the use of a multimember district impairs its ability to influence elections. We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member

districts resulted in the dilution of the minority vote.

[Footnote 13] Commentators are in widespread agreement with this conclusion. See, e. g., Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla. St. U. L. Rev. 85 (1979) (hereinafter Berry & Dye); Blacksher & Menefee, From Reynolds v. Sims to City of Mobile v. Bolden, 34 Hastings L. J. 1 (1982) (hereinafter Blacksher & Menefee); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga. L. Rev. 353 (1976) (hereinafter Bonapfel); Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La. L. Rev. 851 (1982) (hereinafter Butler); Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666 (1972) (hereinafter Carpeneti); Davidson & Korbel, At-Large Elections and Minority Group Representation, in Minority Vote Dilution 65; Derfner; B. Grofman, Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues (hereinafter Grofman, Alternatives), in Representation and Redistricting Issues 107 (B. Grofman, R. Lijphart, H. McKay, & H. Scarrow eds., 1982) (hereinafter Representation and Redistricting Issues); Hartman, Racial Vote Dilution and Separation of Powers, 50 Geo. Wash. L. Rev. 689 (1982); Jewell, The Consequences of Single- and Multimember Districting, in Representation and Redistricting Issues 129 (1982) (hereinafter Jewell); Jones, The Impact of Local Election Systems on Political Representation, 11 Urb. Aff. Q. 345 (1976); Karnig, [478 U.S. 30, 48] Black Resources and City Council Representation, 41 J. Pol. 134 (1979); Karnig, Black Representation on City Councils, 12 Urb. Aff. Q. 223 (1976); Parker 87-88.

[Footnote 14] Not only does "[v]oting along racial lines" deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences," Rogers v. Lodge, 458 U.S., at 623, leaving the minority effectively unrepresented. See, e. g., Grofman, Should Representatives Be Typical of Their Constituents?, in Representation and Redistricting Issues 97; Parker 108.

[Footnote 15] Under a "functional" view of the political process mandated by 2, S. Rep., at 30, n. 120, the most important Senate Report factors bearing on 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political [478 U.S. 30, 49] subdivision is racially polarized." Id., 28-29. If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists - for example antibullet voting laws and majority vote requirements, are supportive of, but not essential to, a minority voter's claim. In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." 2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. See, e. g., McMillan v. Escambia County, Fla., 748 F.2d 1037, 1043 (CA5 1984); United States v. Marengo County Comm'n, 731 F.2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U.S. 976 (1984); Nevett v. Sides, 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951 (1980); Johnson v. Halifax County, 594 F. Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen 469; Parker 107. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that 2 plaintiffs prove their

claim before they may be awarded relief.

[Footnote 16] In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

[Footnote 17] The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained: "To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically [478 U.S. 30, 51] cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates . . . . [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; it would not assure racial minorities proportional representation." Blacksher & Menefee 55-56 (footnotes omitted; emphasis added).

[Footnote 18] The terms "racially polarized voting" and "racial bloc voting" are used interchangeably throughout this opinion.

[Footnote 19] The 1982 reapportionment plan left essentially undisturbed the 1971 plan for five of the original six contested multimember districts. House District 39 alone was slightly modified. Brief for Appellees 8.

[Footnote 20] The District Court found both methods standard in the literature for the analysis of racially polarized voting. 590 F. Supp., at 367, n. 28, 368, n. 32. See also Engstrom & McDonald, Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting, 17 Urb. Law. 369 (Summer 1985); Grofman, Migalski, & Noviello, The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective, 7 Law & Policy 199 (Apr. 1985) (hereinafter Grofman, Migalski, & Noviello).

[Footnote 21] The court used the term "racial polarization" to describe this correlation. It adopted Dr. Grofman's definition - "racial polarization" exists where there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," Tr. 160, or to put it differently, where "black voters and white voters vote differently." Id., at 203. We, too, adopt this definition of "racial bloc" or "racially polarized" voting. See infra, at 55-58.

[Footnote 22] The court found that the data reflected positive relationships and that the correlations did not happen by chance. 590 F. Supp., at 368, and n. 30. See also D. Barnes & J. Conley, Statistical

Evidence in Litigation 32-34 (1986); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 716-720 (1980); Grofman, Migalski, & Noviello 206.

[Footnote 23] The two exceptions were the 1982 State House elections in Districts 21 and 23. 590 F. Supp., at 368, n. 31.

[Footnote 24] This list of factors is illustrative, not comprehensive.

[Footnote 25] The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

[Footnote 26] This list of special circumstances is illustrative, not exclusive.

[Footnote 27] The trial court did not actually employ the term "legally significant." At times it seems to have used "substantive significance" as Dr. Grofman did, to describe polarization severe enough to result in the selection of different candidates in racially separate electorates. At other times, however, the court used the term "substantively significant" to refer to its ultimate determination that racially polarized voting in these districts is sufficiently severe to be relevant to a 2 claim.

[Footnote 28] In stating that 81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white voters did not vote for black candidates in general elections, the District Court aggregated data from all six challenged multimember districts, apparently for ease of reporting. The inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific. When considering several separate vote dilution claims in a single case, courts must not rely on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district. In the instant case, however, it is clear from the trial court's tabulated findings and from the exhibits that were before it, 1 App., Exs. 2-10, that the court relied on [478 U.S. 30, 60] data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting.

[Footnote 29] For example, the court found that incumbency aided a successful black candidate in the 1978 primary in Senate District 22. The court also noted that in House District 23, a black candidate who gained election in 1978, 1980, and 1982, ran uncontested in the 1978 general election and in both the primary and general elections in 1980. In 1982 there was no Republican opposition, a fact the trial court interpreted to mean that the general election was for all practical purposes unopposed. Moreover, in the 1982 primary, there were only two white candidates for three seats, so that one black candidate had to succeed. Even under this condition, the court remarked, 63% of white voters still refused to vote for the black incumbent - who was the choice of 90% of the blacks. In House District 21, where a black won election to the six-member delegation in 1980 and 1982, the court found that in the relevant primaries approximately 60% to 70% of white voters did not vote for the black candidate, whereas approximately 80% of blacks did. The court additionally observed that although winning the Democratic primary in this district is historically tantamount to election, 55% of whites declined to vote for the Democratic black candidate in the general election.

[Footnote 30] The court noted that in the 1982 primary held in House District 36, out of a field of eight, the successful black candidate was ranked first by black voters, but seventh by whites. Similarly, the court

found that the two blacks who won seats in the five-member delegation from House District 39 were ranked first and second by black voters, but seventh and eighth by white voters.

[Footnote 31] Appellants argue that plaintiffs must establish that race was the primary determinant of voter behavior as part of their prima facie showing of polarized voting; the United States suggests that plaintiffs make out a prima facie case merely by showing a correlation between race and the selection of certain candidates, but that defendants should be able to rebut by showing that factors other than race were the principal causes of voters' choices. We reject both arguments.

[Footnote 32] The Fifth Circuit cases on which North Carolina and the United States rely for their position are equally ambiguous. See Lee County Branch of NAACP v. Opelika, 748 F.2d 1473, 1482 (1984); Jones v. Lubbock, 730 F.2d 233, 234 (1984) (Higginbotham, J., concurring).

[Footnote 33] It is true, as we have recognized previously, that racial hostility may often fuel racial bloc voting. United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977); Rogers v. Lodge, 458 U.S., at 623. But, as we explain in this decision, the actual motivation of the voter has no relevance to a vote dilution claim. This is not to suggest that racial bloc voting is race neutral; because voter behavior correlates with race, obviously it is not. It should be remembered, though, as one commentator has observed, that "[t]he absence of racial animus is but one element of race neutrality." Note, Geometry and Geography 208.

[Footnote 34] The Senate Report rejected the argument that the words "on account of race," contained in 2(a), create any requirement of purposeful discrimination. "[I]t is patently [clear] that Congress has used the words `on account of race or color' in the Act to mean `with respect to' race or color, and not to connote any required purpose of racial discrimination." S. Rep., at 27-28, n. 109.

[Footnote 35] The relevant results of the 1982 General Assembly election are as follows. House District 21, in which blacks make up 21.8% of the population, elected one black to the six-person House delegation. House District 23, in which blacks constitute 36.3% of the population, elected one black to the three-person House delegation. In House District 36, where blacks constitute 26.5% of the population, one black was elected to the eight-member delegation. In House District 39, where 25.1% of the population is black, two blacks were elected to the five-member delegation. In Senate District 22, where blacks constitute 24.3% of the population, no black was elected to the Senate in 1982.

[Footnote 36] The United States points out that, under a substantially identical predecessor to the challenged plan, see n. 15, supra, House District 21 elected a black to its six-member delegation in 1980, House District 39 [478 U.S. 30, 75] elected a black to its five-member delegation in 1974 and 1976, and Senate District 22 had a black Senator between 1975 and 1980.

[Footnote 37] See also Zimmer v. McKeithen, 485 F.2d, at 1307 ("[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations - namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district").

[Footnote 38] We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives.

JUSTICE WHITE, concurring.

I join Parts I, II, III-A, III-B, IV-A, and V of the Court's opinion and agree with JUSTICE BRENNAN'S opinion as to Part IV-B. I disagree with Part III-C of JUSTICE BRENNAN'S opinion. [478 U.S. 30, 83]

JUSTICE BRENNAN states in Part III-C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under JUSTICE BRENNAN'S test, there would be polarized voting and a likely 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending 2 as it did, and it seems quite at odds with the discussion in Whitcomb v. Chavis, 403 U.S. 124, 149-160 (1971). Furthermore, on the facts of this case, there is no need to draw the voter/candidate distinction. The District Court did not and reached the correct result except, in my view, with respect to District 23.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended 2 is intended to codify the "results" test employed in Whitcomb v. Chavis, 403 U.S. 124 (1971), and White v. Regester, 412 U.S. 755 (1973), and to reject the "intent" test propounded in the plurality opinion in Mobile v. Bolden, [478 U.S. 30, 84] 446 U.S. 55 (1980). S. Rep. No. 97-417, pp. 27-28 (1982) (hereinafter S. Rep.). Whereas Bolden required members of a racial minority who alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S. Rep., at 28. At the same time, however, 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See id., at 193-194 (additional views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. See id., at 32. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when 2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the

structure of vote dilution litigation. Second, the Court adopts a test, based on the [478 U.S. 30, 85] level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending 2 and has failed to apply the results test as described by this Court in Whitcomb and White.

I

In order to explain my disagreement with the Court's interpretation of 2, it is useful to illustrate the impact that alternative districting plans or types of districts typically have on the likelihood that a minority group will be able to elect candidates it prefers, and then to set out the critical elements of a vote dilution claim as they emerge in the Court's opinion.

Consider a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black, and in which the black voters are concentrated in one section of the city and tend to vote as a bloc. It would be possible to draw four single-member districts, in one of which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice, while any remaining black voters in the other districts would be submerged in large white majorities. This option would give the minority group roughly proportional representation.

Alternatively, it would usually be possible to draw four single-member districts in two of which black voters constituted much narrower majorities of about 60%. The black [478 U.S. 30, 86] voters in these districts would often be able to elect the representative of their choice in each of these two districts, but if even 20% of the black voters supported the candidate favored by the white minority in those districts the candidates preferred by the majority of black voters might lose. This option would, depending on the circumstances of a particular election, sometimes give the minority group more than proportional representation, but would increase the risk that the group would not achieve even roughly proportional representation.

It would also usually be possible to draw four single-member districts in each of which black voters constituted a minority. In the extreme case, black voters would constitute 30% of the voters in each district. Unless approximately 30% of the white voters in this extreme case backed the minority candidate, black voters in such a district would be unable to elect the candidate of their choice in an election between only two candidates even if they unanimously supported him. This option would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but impossible without such support.

Finally, it would be possible to elect all four representatives in a single at-large election in which each voter could vote for four candidates. Under this scheme, white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate. To illustrate, if only four white candidates ran, and each received approximately equal support from white voters, each would receive about 700 votes, whereas black voters could cast no more than 300 votes for any one candidate. If, on the other hand, eight white candidates ran, and white votes were distributed less evenly, so that the five least favored white candidates received fewer than 300 votes while three others received 400 or more, it would be feasible for blacks to elect one representative with 300 votes even without substantial white support. If even 25% of the white voters [478 U.S. 30, 87] backed a particular minority candidate, and black voters voted only for that candidate, the candidate would receive a total of 475 votes,

which would ensure victory unless white voters also concentrated their votes on four of the eight remaining candidates, so that each received the support of almost 70% of white voters. As these variations show, the at-large or multimember district has an inherent tendency to submerge the votes of the minority. The minority group's prospects for electoral success under such a district heavily depend on a variety of factors such as voter turnout, how many candidates run, how evenly white support is spread, how much white support is given to a candidate or candidates preferred by the minority group, and the extent to which minority voters engage in "bullet voting" (which occurs when voters refrain from casting all their votes to avoid the risk that by voting for their lower ranked choices they may give those candidates enough votes to defeat their higher ranked choices, see ante, at 38-39, n. 5).

There is no difference in principle between the varying effects of the alternatives outlined above and the varying effects of alternative single-district plans and multimember districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Although 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." White, 412 U.S., at 765. See also Fortson v. Dorsey, 379 U.S. 433, 439 (1965). This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely [478 U.S. 30, 88] with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers. Ante, at 48-49, n. 15. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength. "[T]he phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002, 1012 (1984) (REHNQUIST, J., dissenting from summary affirmance). Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% [478 U.S. 30, 89] of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are, as we have seen, a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting

to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is the scenario described above, in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Ante, at 50. If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired.1 Second, "the minority group must be able [478 U.S. 30, 90] to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. Ante, at 51. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it - in the absence of special circumstances . . . - usually to defeat the minority's preferred candidate." Ibid. If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." Ibid. That is to say, the minority group has proved vote dilution in violation of 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a [478 U.S. 30, 91] majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: how much of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will usually be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to usual, roughly proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates 2.

To appreciate the implications of this approach, it is useful to return to the illustration of a town with four council representatives given above. Under the Court's approach, if the [478 U.S. 30, 92] black voters who constitute 30% of the town's voting population do not usually succeed in electing one representative of

their choice, then regardless of whether the town employs at-large elections or is divided into four single-member districts, its electoral system violates 2. Moreover, if the town had a black voting population of 40%, on the Court's reasoning the black minority, so long as it was geographically and politically cohesive, would be entitled usually to elect two of the four representatives, since it would normally be possible to create two districts in which black voters constituted safe majorities of approximately 80%.

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority's preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court's requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white `crossover' votes rises to the level of legally significant white bloc voting." Ante, at 56. But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority's electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "Zimmer factors" that were developed by the Fifth Circuit to implement White's results test and which were highlighted in the Senate Report. S. Rep., at 28-29; see Zimmer v. McKeithen, [478 U.S. 30, 93] 485 F.2d 1297 (1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (per curiam). If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," ante, at 44, or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," ante, at 45, or "the exclusion of members of the minority group from candidate slating processes," ibid., or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," ibid., or "the use of overt or subtle racial appeals in political campaigns," ibid., or that "elected officials are unresponsive to the particularized needs of the members of the minority group." Ibid. Of course, these other factors may be supportive of such a claim, because they may strengthen a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts. [478 U.S. 30, 94]

II

In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in 2. It is not necessary or appropriate to decide in this case whether 2 requires a uniform measure of undiluted minority voting strength in every case, nor have appellants challenged the standard employed by the District Court for assessing undiluted minority voting strength.

In this case, the District Court seems to have taken an approach quite similar to the Court's in making its preliminary assessment of undiluted minority voting strength:

> "At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration." Gingles v. Edmisten, 590 F. Supp. 345, 358-359 (EDNC 1984).

The Court goes well beyond simply sustaining the District Court's decision to employ this measure of undiluted minority voting strength as a reasonable one that is consistent with 2. In my view, we should refrain from deciding in this case whether a court must invariably posit as its measure of "undiluted" minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable [478 U.S. 30, 95] standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under 2, and leave open the broader question whether 2 requires this approach.

What appellants do contest is the propriety of the District Court's standard for vote dilution. Appellants claim that the District Court held that "[a]lthough blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats that numbers alone would presumptively give them (i. e., in proportion to their presence in the population)," standing alone, constituted a violation of 2. Brief for Appellants 20 (emphasis in original). This holding, appellants argue, clearly contravenes 2's proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973.

I believe appellants' characterization of the District Court's holding is incorrect. In my view, the District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. See 590 F. Supp., at 372.2 The District Court attached great weight [478 U.S. 30, 96] to this circumstance as one part of its ultimate finding that "the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." Id., at 374. But the District Court's extensive opinion clearly relies as well on a variety of the other Zimmer factors, as the Court's thorough summary of the District Court's findings indicates. See ante, at 38-41.

If the District Court had held that the challenged multimember districts violated 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with 2's disclaimer of a right to proportional representation. Surely Congress did not intend to say, on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict

proportional representation, but it comes so close to such a right as to be inconsistent with 2's disclaimer and with the results test that is codified in 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to 2:

> "The language of the subsection explicitly rejects, as did White and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, [478 U.S. 30, 97] and is not dispositive." S. Rep., at 194 (additional views of Sen. Dole).

On the same reasoning, I would reject the Court's test for vote dilution. The Court measures undiluted minority voting strength by reference to the possibility of creating single-member districts in which the minority group would constitute a majority, rather than by looking to raw proportionality alone. The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multimember district as it could elect under the most favorable single-member district scheme, it follows that the Court is requiring a form of proportional representation. This approach is inconsistent with the results test and with 2's disclaimer of a right to proportional representation.

In enacting 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in White and Whitcomb. The factors developed by the Fifth Circuit and relied on by the Senate Report simply fill in the contours of the "results" test as described in those decisions, and do not purport to redefine or alter the ultimate showing of discriminatory effect required by Whitcomb and White. In my view, therefore, it is to Whitcomb and White that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of 2. [478 U.S. 30, 98]

The "results" test as reflected in Whitcomb and White requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See White, 412 U.S., at 766. While electoral success is a central part of the vote dilution inquiry, White held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," id., at 765-766, and Whitcomb flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district." 403 U.S., at 156. To the contrary, the results test as described in White requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S., at 766. BY showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in White met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." Davis v. Bandemer, post, at 131 (plurality opinion).

When Congress amended 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by Bolden. The vote dilution analysis adopted by the Court

today clearly bears little resemblance to the "results" test that emerged in Whitcomb and White. The Court's test for vote dilution, combined with its standard for evaluating "voting potential," White, supra, at 766, means that any racial minority with distinctive interests must usually "be represented in legislative halls if [478 U.S. 30, 99] it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute" a voting majority in "a single member district." Whitcomb, 403 U.S., at 156. Nothing in Whitcomb, White, or the language and legislative history of 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts.

I would adhere to the approach outlined in Whitcomb and White and followed, with some elaboration, in Zimmer and other cases in the Courts of Appeals prior to Bolden. Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973 (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." Davis v. Bandemer, post, at 132. Of course, the relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Cf. Davis v. Bandemer, post, at 169-170 (POWELL, J., concurring in part and dissenting in part). Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent [478 U.S. 30, 100] under the challenged plan before it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou[p]." White, supra, at 765.

III

Only three Justices of the Court join Part III-C of JUSTICE BRENNAN's opinion, which addresses the validity of the statistical evidence on which the District Court relied in finding racially polarized voting in each of the challenged districts. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups

diverge. Indeed, the [478 U.S. 30, 101] Senate Report clearly stated that one factor that could have probative value in 2 cases was "whether there is significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep., at 29. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics . . . dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a 2 violation. Id., at 33-34. Similarly, I agree with JUSTICE WHITE that JUSTICE BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with Whitcomb and is not necessary to the disposition of this case. Ante, at 83 (concurring).

In this case, as the Court grudgingly acknowledges, the District Court clearly erred in aggregating data from all of the challenged districts, and then relying on the fact that on average, 81.7% of white voters did not vote for any black candidate in the primary elections selected for study. Ante, at 59-60, n. 28. Although Senate District 22 encompasses House District 36, with that exception the districts at issue in this case are distributed throughout the State of North Carolina. White calls for "an intensely local appraisal of the design and impact of the . . . multimember district," 412 U.S., at 769-770, and racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district. In view of the specific evidence from each district that the District Court also considered, however, I cannot say that its conclusion that there was severe racial bloc voting was clearly erroneous with regard to any of the challenged districts. Except in House District 23, where racial bloc voting did not prevent sustained and virtually [478 U.S. 30, 102] proportional minority electoral success, I would accordingly leave undisturbed the District Court's decision to give great weight to racial bloc voting in each of the challenged districts.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a 2 claim. But JUSTICE BRENNAN, joined by JUSTICE WHITE, concludes that "persistent proportional representation" will foreclose a 2 claim unless the plaintiffs prove that this "sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." Ante, at 77. I agree with JUSTICE BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a 2 violation. Moreover, I agree that this case presents no occasion for determining what would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.

In my view, the District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23, where the Court acknowledges error. As the evidence summarized by the Court in table form shows, ante, at 82, Appendix B, the degree of black electoral success differed widely in the seven originally contested districts. In House District 8 and Senate District 2, neither of which is contested in this Court, no black candidate had ever been elected to the offices in question. In House District 21 and House District 36, the only instances of black electoral success came in the two most recent elections, one of which took place during the pendency of this litigation. By contrast, in House District 39 and Senate District 22, black successes, although intermittent, dated back to 1974, and a black candidate had been elected in each [478 U.S. 30, 103] of these districts in three of the last five elections. Finally, in House District 23 a black candidate had been elected in each of the last six elections.

The District Court, drawing no distinctions among these districts for purposes of its findings, concluded that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population." 590 F. Supp., at 367. The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since, as the Court states, "[t]he inquiry into the existence of vote dilution . . . is district-specific." Ante, at 59, n. 28. The Court asserts that the District Court was free to regard the results of the 1982 elections with suspicion and to decide "on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections," ante, at 76, but the Court does not explain how this technique would apply in Senate District 22, where a black candidate was elected in three consecutive elections from 1974 to 1978, but no black candidate was elected in 1982, or in House District 39, where black candidates were elected in 1974 and 1976 as well as in 1982. Contrary to what the District Court thought, see 590 F. Supp., at 367, these pre-1982 successes, which were proportional or nearly proportional to black population in these three multimember districts, certainly lend some support for a finding that black voters in these districts enjoy an equal opportunity to participate in the political process and to elect representatives of their choice.

Despite this error, I agree with the Court's conclusion that, except in House District 23, minority electoral success was not sufficiently frequent to compel a finding of equal opportunity to participate and elect. The District Court found that "in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and . . . in each district it presently operates to [478 U.S. 30, 104] minimize the voting strength of black voters." Id., at 372. I cannot say that this finding was clearly erroneous with respect to House District 39 or Senate District 22, particularly when taken together with the District Court's findings concerning the other Zimmer factors, and hence that court's ultimate conclusion of vote dilution in these districts is adequately supported.

This finding, however, is clearly erroneous with respect to House District 23. Blacks constitute 36.3% of the population in that district and 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black. There is no finding, or any reason even to suspect, that the successful black candidates in District 23 did not in fact represent the interests of black voters, and the District Court did not find that black success in previous elections was aberrant.

Zimmer's caveat against necessarily foreclosing a vote dilution claim on the basis of isolated black successes, 485 F.2d, at 1307; see S. Rep., at 29, n. 115, cannot be pressed this far. Indeed, the 23 Court of Appeals decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in District 23. See, e. g., Turner v. McKeithen, 490 F.2d 191 (CA5 1973) (no black candidates elected); Wallace v. House, 515 F.2d 619 (CA5 1975) (one black candidate elected), vacated on other grounds, 425 U.S. 947 (1976).

I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a 2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice. With respect to House District 23, the District Court's failure to accord black electoral success such [478 U.S. 30, 105] weight was clearly erroneous, and the District Court identified no reason for not giving this degree of success preclusive effect. Accordingly, I agree with JUSTICE BRENNAN that appellees failed to establish a violation of 2 in District 23.

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize" their voting strength. White, 412 U.S., at 765.

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under 2. For that reason, I join the Court's judgment but not its opinion.

[Footnote 1] I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice. Because the plaintiffs in this case would meet that requirement, if indeed it exists, I need not decide whether [478 U.S. 30, 90] it is imposed by 2. I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability to elect the representatives of [its] choice" has been impaired and claims that "its ability to influence elections" has been impaired. Ante, at 46-47, n. 12. It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support, and that a minority that could not constitute such a majority ordinarily does not. But the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has elected those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

[Footnote 2] At times, the District Court seems to have looked to simple proportionality rather than to hypothetical single-member districts in which black voters would constitute a majority. See, e. g., 590 F. Supp., at 367. No-where in its opinion, however, did the District Court state that 2 requires that minority groups consistently attain the level of electoral success that would correspond with their proportion of the total or voting population. [478 U.S. 30, 106]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, ante, at 37-41, 52-54, and n. 23, 59-61, and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, ante, at 75-76, is not, however, supported by the language of the statute or by its legislative history.1 I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District 23 is merely one part of an extremely large record which the District Court carefully considered before making its ultimate findings of fact, all of which should be upheld under a normal application of the "clearly erroneous" standard that the Court traditionally applies.2

The Court identifies the reason why the success of one black candidate in the elections in 1978, 1980, and 1982 is not [478 U.S. 30, 107] inconsistent with the District Court's ultimate finding concerning House District 23.3 The fact that one black candidate was also elected in the 1972, 1974, and 1976 elections, ante, at 82, Appendix B, is not sufficient, in my opinion, to overcome the additional findings that apply to House District 23, as well as to other districts in the State for each of those years. The Court accurately summarizes those findings:

> "The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion." Ante, at 80.

To paraphrase the Court's conclusion about the other districts, ibid., I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in House District 23 to have less opportunity than white voters to elect representatives of their choice.4 Accordingly, I concur [478 U.S. 30, 108] in the Court's opinion except Part IV-B and except insofar as it explains why it reverses the judgment respecting House District 23.

[Footnote 1] See ante, at 75 ("Section 2(b) provides that `[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.' 42 U.S.C. 1973(b) . . . However, the Senate Report expressly states that `the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote,"' noting that if it did, `the possibility exists that the majority citizens might evade [ 2] by manipulating the election of a "safe" minority candidate.'. . . The Senate Committee decided, instead, to `"require an independent consideration of the record"'") (internal citations omitted).

[Footnote 2] See ante, at 79 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

[Footnote 3] See ante, at 52-54, and n. 23, 60, n. 29, 75-76.

[Footnote 4] Even under the Court's analysis, the decision simply to reverse - without a remand - is mystifying. It is also extremely unfair. First, the Court does not give appellees an opportunity to address the new legal standard that the Court finds decisive. Second, the Court does not even bother to explain the contours of that standard, and why it was not satisfied in this case. Cf. ante, at 77, n. 38 ("We have no occasion in this case [478 U.S. 30, 108] to decide what types of special circumstances could satisfactorily

demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives"). Finally, though couched as a conclusion about a "matter of law," ante, at 77, the Court's abrupt entry of judgment for appellants on District 23 reflects an unwillingness to give the District Court the respect it is due, particularly when, as in this case, the District Court has a demonstrated knowledge and expertise of the entire context that Congress directed it to consider. [478 U.S. 30, 109]

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TO: House Judiciary Committee

FROM: Kay Brown, executive director
Alaska Conservation Voice

DATE: Feb. 6, 1998

SUBJECT: HJR 44

The Alaska Conservation Voice opposes HJR 44, which proposes amendments to the Constitution of the State of Alaska relating to redistricting of the Legislature.

The Alaska Conservation Voice believes that the proposals in HJR 44 would negatively impact the ability of our state to achieve a fair redistricting plan.

We are particularly concerned about the proposed changes to Article VI, sec. 8, of the Alaska Constitution (Sec. 6 of the resolution), which would shift responsibility for redrawing legislative districts from the Governor to a board controlled by the Legislature. HJR 44 would establish a redistricting board with four of its five members beholden to a legislative caucus. It is not wise to allow members of the Legislature, whose jobs aredirectly affected by the work of the board, to become directly involved in the redistricting process. Inserting the Legislature into the redistricting process would open the door for individual legislators to attempt to pressure the board or improperly influence its decisions, and could increase partisan influence over the board.

We also object to the changes proposed to Article VI, sec. 10, of the Alaska Constitution (Sec. 8 of the resolution). The courts should have the responsibility and authority to determine the final redistricting plan, without limitation. The courts should not be limited to adopting one of the board's plans, without change, as proposed in HJR 44.

HJR 44 has other potential problems, such as eliminating the option of multi-member districts, that should be carefully reviewed to assess the impacts on minority voting rights.

The Alaska Conservation Voice supports a fair public process to achieve new legislative districts, and we believe the current system is far preferable to the process proposed in HJR 44.

Thank you for the opportunity to comment.

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

v.

KALMBACH, INC., Appellee.

No. 1604.

Supreme Court of Alaska.

Nov. 10, 1972.

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

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

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

OPINION

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

PER CURIAM.

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

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

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

Affirmed.

EVANS, J., not participating.

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

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

v.

Jay S. HAMMOND et al., Respondents.

No. 1711.

Supreme Court of Alaska.

July 21, 1972.

Opinion Sept. 29, 1972.

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

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

Objections overruled.

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

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

1. States ⇐27

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

2. States ⇐27

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

3. States ⇐27

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

Opinion of Sept. 29, 1972

4. Constitutional Law ⇐225(1)

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

5. States ⇐27

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

6. States ⇐27

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

7. States ⇐27

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

8. States ⇐27

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

9. Elections ⇐18
States ⇐27

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

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

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

11. States ⇐27

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

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

12. States ⇐27

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

13. States ⇐27

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

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

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

15. Constitutional Law ⇐49

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

16. Action ⇐6

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

17. States ⇐27

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

18. States ⇐27

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

19. States ⇐27

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

20. States ⇐27

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

21. States ⇐27

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

22. States ⇐27

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

23. States ⇐27

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

24. States ⇐27

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

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

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

OPINION IN RE OBJECTIONS TO INTERIM REAPPORTIONMENT PLAN

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

RABINOWITZ, Justice.

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

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

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

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

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

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

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

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

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

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

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

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

Petitioners contended that the effect of the inclusion of all enumerated military personnel was to give greater political power to those communities which adjoin major military installations. In arguing for preservation of the civilian population concept,[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 inhabitant of his usual place of residence, which is generally construed to mean the place where he lives and sleeps most of the time. This place is not necessarily the same as his legal residence, voting residence or domicile.[9]

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

OPINION SEPT. 29, 1972

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

BOOCHEVER, Justice.

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

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

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

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

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

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

6. Alaska Const. art. VI, § 3. Since both the court's interim plan of reapportionment and the 1971 plan utilized census figures, I do not here reach the question of whether some other basis for determining population for reapportionment purposes may now be used in view of the unconstitutionality of a portion of the provision. I do not necessarily agree with the court's apparent conclusion that the elimination of the "civilian" requirement may be severed from the requirement of using the census as a basis for population. It may well be that the two provisions are not separable. Champlin Ref. Co. v. Corporation Comm'n, 268 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.

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.

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

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

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

6. The date of filing for candidacies was May 31, 1972. It was extended by this court in accordance with its powers over reapportionment matters first to June 15, 1972 and then to June 30, 1972. Connor v. Johnson, 402 U.S. 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. 889–891.

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

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

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

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

In the earlier reapportionment cases, the United States Supreme Court refused to articulate a strict test for what was required by the equal protection clause. In Reynolds v. Sims [18] the Court noted that "[w]hat is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." Hence the present guidelines for reapportionment evolved on a case-by-case basis. In Swann v. Adams,[19] percentage variances in

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, 536 (1964).

16. The procedure followed by Hawaii in reapportioning its legislature in 1968 is illustrative of such "honest and good faith effort". A committee of three Senators and eight Representatives held 30 hearings before submitting its recommendations to the entire Constitutional Convention. After 15 hours of debating over a three-day period the apportionment provisions were adopted. The committee heard testimony from over 53 witnesses —political scientists, statisticians, attorneys and others—reviewed judicial decisions, analyzed apportionment and districting provisions of other state constitutions and reviewed numerous publications on the subject. Then, utilizing all those resources, the Committee formulated and adopted districting criteria. The Committee engaged an independent team of computer programmers, a statistician, and appropriate staff members, and turned over to that team the primary work of formulating and analyzing districting plans. That team, using a computer upon data gleaned from the 1960 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 39 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 challenged the validity of this constitutional provision, contending that the elimination of military personnel as a class violated the equal protection clauses of the United States and Alaska Constitutions.

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 −11.04 percent held unconstitutional); Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967) (variations from +15.09 to −10.56 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 countenancing variations which might not otherwise be acceptable. *E. g.*, Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S.Ct. 820, 17 L.Ed.2d 771, 774 (1967). *See also* Burns v. Gill, 316 F.Supp. 1285, 1288 (D. Hawaii 1970) saying, "[N]o one particular area of deviation or variance from the ideal of absolute equality of voting power, per se, invalidates an apportionment plan."

27. Alaska Const. art. VI, § 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33. *But see* dissenting opinion of Justice Boochever in Egan v. Hammond, 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 1287 fn. 21, 16 L.Ed.2d at 391, n. 21.

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. 1058.

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

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

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

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

V. DESIGNATION OF SEATS WITHIN MULTI-MEMBER DISTRICTS

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

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

VI. TERMINATING LEGISLATORS' TERMS

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

45. Alaska Const. art. VI, § 6.

46. Hovet v. Myers, 489 P.2d 684, 689 (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 684, 689 (Or.1971).

49. 320 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).

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

VII. GOVERNOR'S AUTHORITY TO REAPPORTION

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

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

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

APPENDIX I

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

DECISION AND ORDER

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

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

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

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

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

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

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

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

George F. Boney
Chief Justice

Jay A. Rabinowitz
Associate Justice

Roger G. Connor
Associate Justice

Robert C. Erwin
Associate Justice

Robert Boochever
Associate Justice

50. Mann v. Davis, 238 F.Supp. 458 (E.D. Va.1964), aff'd, 370 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, 370 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).

Clifford J. GROH et al., Appellants,

v.

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

No. 2233.

Supreme Court of Alaska.

Sept. 13, 1974.

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

Affirmed in part and reversed in part.

Erwin, J., dissented and filed opinion.

1. States ⇐27(3)

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

2. States ⇐27(2)

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

3. States ⇐27(10)

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

4. Administrative Law and Procedure ⇐760

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

5. States ⇐27(10)

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

6. States ⇐27(3)

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

7. States ⇐27(10)

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

8. States ⇐27(5)

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

9. States ⇐27(5)

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

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

10. States ⇐27(5)

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

11. States ⇐27(5)

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

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

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

13. States ⇐27(5)

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

14. States ⇐27(7)

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

15. States ⇐27(7)

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

16. States ⇐27(7)

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

17. States ⇐27(7)

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

18. States ⇐27(3)

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

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

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

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

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

OPINION

BOOCHEVER, Justice.

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

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

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

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

1. *See* Egan v. Hammond, 502 P.2d 856 (Alaska 1972) and Wade v. Nolan, 414 P.2d 980 (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 856, 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* Klugery v. Chapple, 504 P.2d 831, 834–835 (Alaska 1972); Kelly v. Zamarello, 480 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 . . . and allow the supreme court of Alaska to be the appellate court . . . ?
>
> Hellenthal: Of course their review would be confined to review of legal matters and not facts. Perhaps it was though that the supreme court was a bit more detached than a superior court.
>
> Taylor: But if the district courts abuse their discretion, you can always raise that in the appellate court.
>
> Hellenthal: But as you know and I know as lawyers, to raise the question of abusive [sic] discretion you have got to be awfully right.
>
> Taylor: Could you not in your proposal put it that the superior court should have original jurisdiction and that the supreme court would be the appellate court and also could find as to the facts? (Minutes, pp. 1859–60).

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

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

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

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

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

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

11. 502 P.2d at 870–871.

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

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

14. 502 P.2d at 870.

III

MILITARY PERSONNEL

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

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

15. The masters we appointed collected the following data regarding participation of military personnel in the 1970 general election: Elmendorf and Fort Richardson, 102 voters of 9,445 population over age 18; Eielson and Fort Wainwright, 172 voters of 10,276 population over age 18; Shemya Station, no voters among 1,085 population over age 18; Kodiak Station, 78 voters of 1,717 population over age 18. In these six enumeration districts populated by military personnel and their dependents, there were thus only 352 voters from an adult population of 22,523 or less than 1.6 percent. Approximately 52 percent of non-military adults voted in the same election. Egan v. Hammond, 502 P.2d at 900, *see* 502 P.2d at 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 100 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 36, 64 (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 § 9020, *implementing* 20 C.F.R. § 602.6, *implementing* 29 U.S.C. § 301 *et seq.* We harbor no reluctance to take notice of such authoritative sources documenting a well known aspect of the Alaska economy. Civil Rule 43(a)(2)[c] and 43(a)(2)[d].

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

22. *Id.*

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

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

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

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

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

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

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

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

26. *Id.*

27. *Id.* at vi.

28. *Id.* The rules followed by census enumerators to decide residence questions further support the understanding that civilian transients 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-520.) Thus, the census included as Alaska residents only those transients who spent a majority of the year in Alaska. For the Board to seek to determine who among them actually considered themselves to be state citizens would be a Herculean task, if it could be accomplished at all. Persons who were in Alaska as seasonal laborers when their families were enumerated in other states would also have been referred back as residents of the locale of the family household. *Id.* [Rule 1] at 75. Only homeless migrants could have been included as Alaska residents, had such persons been present in the state. The relevant rule assigns "Persons in places which have shifting populations composed mainly of persons with no fixed residence, such as convict camps, highway and other construction camps, and camps for migratory agricultural workers," a residence in the camp where they are found. *Id.* [Rule 10] 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 09.55.100 rendered nugatory the portion of *Wilson* which held that a serviceman may not sue for divorce within the state of assignment. *See* Lauterbach v. Lauterbach, 392 P.2d 24 (Alaska 1964).

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

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, 300 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. Van Dort, 502 P.2d 453 (Alaska 1972). We deal here not with a durational requirement, but with the question of whether an individual may be considered a resident for purposes of apportionment.

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

35. 50 U.S.C.A. App. § 574 provides:

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

. . .

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

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

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

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

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 protection clauses of the United States and Alaska constitutions.

34 L.Ed.2d 68 (1972). *See also* In re Opinion of Justices, 111 N.H. 140, 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 881.

40. The Juneau senate district is underrepresented by 14 percent, and the Bethel district overrepresented by 8.4 percent.

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 330, 93 S.Ct. at 991, 35 L.Ed.2d at 337.

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

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

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

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

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

The Supreme Court concluded:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. *Id.* at 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 1836.
62. *Id.* at 1873.
63. 502 P.2d at 801.
64. Many Alaska Natives have been elected to the legislature, and two have been elevated to the position of President of the Senate. Appellants point out that a black was elected to the House from a district with an insignificant minority population. [Hedland Dep. 34]

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

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

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

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

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

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

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

V

DISTRICTING OF THE GREATER ANCHORAGE AREA

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

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

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

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

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

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

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

VI

THE TERMINATION OF SENATORIAL TERMS

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

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

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

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

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

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

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

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

Affirmed in part and reversed in part.

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

ORDER

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 6th day of June, 1974.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I also cannot accept the majority's assumption that voter registration can be taken as an indication of a person's state citizenship in Alaska. In the Hawaii reapportionment plan litigated in Burns v. Richardson,[12] the state's registered voters were accepted as a permissible population base only because this base purportedly produced a distribution of legislators not unlike hat 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, 1289 (D.Hawaii 1970), *quoted in* Egan v. Hammond, 502 P.2d 850, 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 (1974).

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

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

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

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

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

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

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

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

OPINION

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

BOOCHEVER, Justice.

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

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

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

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

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

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

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

ERWIN, J., dissents.

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

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

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

ERWIN, Justice (dissenting).

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

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

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

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

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

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

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

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

In my view, major readjustments on a statewide basis are required if the plan is to meet 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

1. Alaska Const. art. VI, § 6.

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

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

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

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

1. Supra, p. 5.

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

Supreme Court of Alaska.
Sept. 30, 1974.

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

Affirmed in part and reversed in part.

1. Constitutional Law ⇐83(1), 211
Elections ⇐21
Residency requirements for state legislative candidacy of three years in state and one year in election district serve compelling state interests, and thus neither violated potential candidate's rights to equal protection or to freedom of interstate travel, nor did they violate voters' rights to participate in elections. Const. art. 1, § 1; art. 2, § 2; AS 15.25.030; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐209
Where statute challenged as violative of equal protection burdens fundamental or basic right, it can be sustained only upon showing that it promotes compelling governmental interest. U.S.C.A.Const. Amend. 14.

3. Elections ⇐7
Constitutional residency requirements for legislative candidates should be viewed with strict judicial scrutiny, i. e., whether they serve compelling state interest. Const. art. 2, § 2.

4. Costs ⇐172
Award of attorney's fees to state against potential candidate for legislature who in good faith raised issue of constitutionality of residency requirements was abuse of discretion. Rules of Civil Procedure, rule 82.

5. Costs ⇐172
It is not purpose of award of attorney's fees to penalize party for litigating good-faith claim but rather partially to compensate prevailing party where such compensation is justified. Rules of Civil Procedure, rule 82.

6. Costs ⇐172
It is abuse of discretion to award attorney fees against losing party who has in good faith raised question of genuine public interest before courts. Rules of Civil Procedure, rule 82.

John W. Wood, Anchorage, for appellant.

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

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

OPINION

ERWIN, Justice.

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

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

0-LS0528\C.1
Glover
2/5/98

A M E N D M E N T

OFFERED IN THE HOUSE BY REPRESENTATIVE PORTER

TO: HJR 44, Draft version "C"

Page 2, lines 24 - 26

Delete "[EACH SHALL CONTAIN A POPULATION AT LEAST EQUAL TO THE QUOTIENT OBTAINED BY DIVIDING THE TOTAL CIVILIAN POPULATION BY FORTY]"

Insert "Each shall contain a population **as near as practicable** [AT LEAST EQUAL] to the quotient obtained by dividing the [TOTAL CIVILIAN] population **of the state** by forty"

0-LS0528\C.3
Glover
2/6/98

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE PORTER

TO: CSHJR 44( ), Draft version "C"

Page 3, line 30, through page 4, line 1:

Delete "**the presiding officer of the house of representatives, the house of representatives minority appointing officer, and**"

Page 4, line 1:

Delete "**, by a majority vote,**"

0-LS0528\C.4
Glover
2/6/98

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE PORTER

TO: CSHJR 44( ), Draft version "C"

Page 5, lines 23 - 26:

Delete "**The presiding officer of the house of representatives and the house of representatives minority appointing officer shall each appoint one superior court judge to the panel, and the chief justice of the supreme court shall appoint one superior court judge to the panel.**"

Insert "**The three-judge panel shall be randomly selected from a group consisting of the presiding judges of the superior court of each judicial district. The legislature shall provide by law the procedure for making the random selection.**"

Page 6, line 14:

Delete "**appointed**"

Insert "**selected**"

Page 6, line 24:

Delete "**established**"

Insert "**selected**"

Sectional Analysis for HJR 44 0-LS0528\C
2/4/98

Section Number of HJR 44.	Changes Made to Existing Section of Constitution Article VI	Reasons for Changes and Intent
Section 1 and Section 2.	Language is added to Section 1 and Section 2 of Article VI that boundaries of house election districts and senate districts are to be established after decennial censuses, as provided in the framework spelled out in the changes to Article VI.	The proposed language changes clarify that boundaries of house and senate districts are to be redrawn after every decennial census of the United States. This amendment requires that senate districts, as well as house districts, be subject to reapportionment to achieve equal representation. This change brings the constitution into line with the Alaska Supreme Court's decision over 30 years ago in Wade v. Nolan (1966), 414 P. 2d 689, at 700-701.
	Old language is deleted which referred to Article XIV. Article XIV is no longer necessary, and is repealed in Section 11 of HJR 44.	Article XIV is a lengthy description of existing house and senate districts, which changes every 10 years. The intent in eliminating Article XIV is to eliminate the need for unnecessary amendment of the constitution every ten years.
Section 3.	The power to reapportion in Section 3 of Article VI is changed from the Governor to a Reapportionment Board.	Alaska and Maryland are the only two states we are aware of where the Governor has reapportionment authority. This change is intended to remove reapportionment and redistricting as far as possible from the political arena by creating a bipartisan Reapportionment Board.
	Language is added to make clear that both house districts and senate districts are reapportioned, and not just the house districts.	At the time the Alaska Constitution was drafted, The U.S. Supreme Court had not yet ruled that the one-man one-vote equal protection requirement applied to senate districts as well as to house districts in state legislatures. This change is intended to respond to the express request of the Alaska Supreme Court almost 26 years ago to amend the constitution to provide for reapportionment of senate districts. Egan v. Hammond (1972), 502 P. 2d 856, at 874.
	Language is added to make clear that reapportionment is based on the entire state's population base, including	Citing controlling U.S. Supreme Court case law, the Alaska Supreme Court has held that eliminating military personnel as a class from the reapportionment

	military population, and not just the civilian population.	population base is unconstitutional. Almost 26 years ago the Alaska Supreme Court expressly asked the legislature to amend this provision in Egan v. Hammond, 502 P. 2d 856 (1972), at 871. This change is somewhat overdue. There has been much discussion about changing "reapportionment" to redistricting" in many places in Article VI. The Alaska Supreme Court has stated by way of dicta that there is little difference between the two words, and that reapportionment is inseparable from redistricting. Egan v. Hammond (1972), 502 P. 2d 856, at 873. For that reason and because "redistricting" has not yet received acceptance in legal treatises and dictionaries, "reapportionment" has been retained.
Section 4.	Language is added to Section 4 of Article VI to create forty single-member house election districts, which contain "as nearly as practicable" one-fortieth of the reapportionment population base. Language is added to create twenty single-member senate districts, which consist of two contiguous house districts. Language is deleted about civilian population and creating forty equal election districts.	The intent is to confirm single-member house districts. Since Alaska Supreme Court and U.S. Supreme Court decisions make clear that minor deviations from an ideal one-fortieth reapportionment per district are permissible, the "as nearly as practicable" language is added. The intent is to confirm single-member senate districts, each coinciding with the boundaries of two contiguous house districts. This language is specifically intended to overrule the supreme court's decision in Kenai Peninsula Borough v. State (1987), 743 P.2d 1352, at 1364-1365, in so far as the inapplicability of Article VI, section 6 factors to reapportionment of senate districts, with the result that here shall never again be another "Donut" district. The deleted language refers to "civilian" population, which has been struck down by the Alaska Supreme Court on constitutional grounds. The concept of forty equal election districts is retained in restated form in this section.
Section 5.	Language is added to Section 6	Self-explanatory. See discussion in

	of Article VI to clarify that the Reapportionment Board, and not the Governor, will do the reapportionment.	Section 3.
	Language is deleted which previously required that each election district to be equal to one fortieth of the state's population base.	Self-explanatory. See discussion in Section 4.
Section 6.	(a) Language is added to Section 8 of Article VI to clarify that the Reapportionment Board shall consist of five members, all of whom shall be residents of the state and none of whom may be public employees or officials at the time of appointment.	This language is intended to establish that the Reapportionment Board will have five members who must be Alaska residents, in addition to the existing limitation against having public employees or officials serving on the board
	Language is added to clarify that compensation to be paid to board members is "as provided by law".	It is intended that the board members be compensated for per diem and travel expenses. If the constitutional amendment is approved by the voters, a bill will be drafted to provide for compensation.
	Language is deleted which previously required board members to be from certain geographic areas of the state, and which required that appointments be made without regard to political affiliation.	It would be unnecessarily restrictive to allocate one board member to be from a certain geographic area of the state, considering how the board members are appointed.The intent of deleting the language referring to appointments "without regard to political affiliation" is to be consistent with the method by which the first four board members are appointed. Two are appointed by the majority party, and two by the minority party.
	(b) New language is added which requires board members to be appointed after, but not later than 15 days after, the election of the Speaker of the House and of the President of the Senate in the year following the decennial census.	It is the intent of this language to have at least the first four board members appointed within 15 days after the Speaker of the House and the President of the Senate have been elected. The minority caucuses will organize and appoint two of the four board members within the same period of time.
	New language is added	It is the intent of this language to require

	to require the board members to serve until a final reapportionment plan and proclamation has been adopted, including all legal challenges and remands by Alaska Supreme Court.	board members to serve until a plan and proclamation have been adopted, and to continue to serve through any remands following supreme court decisions.
	(c) New language is added which requires the Speaker of the House, the House Minority Leader, the President of the Senate, and the Senate Minority Leader to each select one board member. The appointments are to be made after the election of the Speaker of the House and the President of the Senate at the beginning of the legislative session following the decennial census.	This language is intended to simply set out that the presiding officers and minority leaders of both bodies each appoint one board member. The rather obfuscatory and convoluted language is the result of drafting rules which do not allow the use of words not found and defined elsewhere in the constitution, such as "caucus" and "minority". The intent is to ensure that a fair balance is achieved by allowing the majority and minority two seats each on the board.
	The fifth board member is appointed by a majority vote of the other four members. If there is a deadlock, the Speaker of the House, the House Minority Leader, and the Chief Justice of the Alaska Supreme Court appoint the fifth member by a majority vote. The fifth member shall automatically become the chair.	If the four board members cannot agree on the fifth member, a procedure is in place to avoid deadlock.
	The fifth member may not have held an elected state office or an elected office of a political party in Alaska in the five years preceding the appointment.	This provision is taken almost verbatim from New Jersey, and is intended to make the fifth member as politically neutral as possible. It cannot be overemphasized that the intent behind the fifth board member's appointment is to find a person as politically neutral as possible, for only such a person could lead the other four members to a fair and well thought out reapportionment plan.
	(d) New language is added which requires the legislature to pass a law determining the order in which each of the appointing legislators makes	The intent of this language is to allow for a random process for appointing the first four board members. A bill should be introduced to take care of this detail, upon approval of HJR 44 by the voters

	his or her appointment.	of the state. The bill should also provide for compensation of board members, as mentioned in Section 6(a).
	(e) New language is added which allows for removal of any of the first four board members, with or without cause. However, removal may only be made the appointing legislator or that person's successor. All vacancies created by the removal, resignation, death or incapacity of any of the first four board members are filled by the appointing legislator or that person's successor.	The appointing legislators or their successors will control the discharge and appointment of the first four appointees.
	The fifth board member may be removed only for good cause shown, as determined by a majority vote of a group consisting of the other four board members and the Chief Justice of the Alaska supreme Court. The vacancy due to removal, resignation, death, or incapacity of the fifth board member is filled by the appointing procedure set forth in (c) of this section.	As to the fifth member, who is the chair, removal must be for good cause shown. The requirement of showing cause for removal applies only to the fifth member because the chair is intended to be as neutral as possible. It is the intent that "good cause shown" is to be determined by case law. Vacancies for any reason are filled first by a majority vote of the other four members, or, in the event of deadlock, by a majority vote of the Speaker of the House, the House Minority Leader, and the Chief Justice.
	(f) New language is added that precludes board members from seeking elected legislative office in the general election following adoption of the final reapportionment plan.	This provision is intended to avoid the appearance of impropriety on the part of a board member who might otherwise be accused of reapportioning a district for self serving reasons. The over-all goal of the changes to Article VI is to have as far as possible, a reapportionment plan that is fair, rational, objective, and free from undue political influence.
Section 7.	Language is deleted from Section 9 of Article VI by which the board previously elected its own chairman.	This is intended as a consistency deletion.
	Language is added by which "actions of the board" require a majority vote, but ambiguous language is deleted about "a ruling or determination" and	The original language created ambiguities about the legal effect of a majority of only three board members meeting somewhere and taking unspecified "rulings or determinations".

	"or otherwise act for the board". New language is added which requires the board to "employ or contract for services of independent legal counsel".	Two members in this scenario should not be able to bind a five member board. The board will need independent legal counsel, and should not be tempted to utilize legal services from any of the three branches of state, local or federal government.
Section 8.	New language is added to Section 10 of Article VI which requires the board to agree on one or more proposed plans within 30 days of release of the decennial census population data. The board then has 60 more days to hold hearings and agree on a final reapportionment plan and to issue a proclamation of reapportionment. If the census data is released before the board is duly appointed, language has been added to clarify that the clock starts to run on the times for coming up with a plan after the board is duly appointed. Language is deleted about the board reporting to the Governor, and the Governor submitting the final plan and proclamation. New language is added by which the final plan is to set out boundaries of house election districts and senate districts. New language is added to clarify that an existing reapportionment plan will remain effective until a new plan has been fully adjudicated in time for the next primary or general election. Existing language in Section 10 of	The assumed time line concludes that the board has been appointed and is fully organized by the end of January 2001. The decennial census data likely will be available two months later. The board then will have 30 days to agree on one proposed plan, if it can. If it cannot, it will have hearings on multiple proposed plans instead of just one, over the next 60 days. By the end of the 90 day period following the release of the decennial census data, the board is to adopt a final single plan and proclamation. In the remote event the census data is released before the board is duly appointed, it is the intent of this language that the board has 30 days after it is appointed to come up with one or more proposed plans, and a total of 90 days after it is appointed to come up with the final plan. This deletion is for consistency reasons. It is the Reapportionment Board which develops and adopts the proposed and final plans of reapportionment. This provision is intended to clarify that the final plan sets out the boundaries of senate districts as well as of house election districts. This language is intended to deal with the possible scenario where, because of protracted litigation, a general election cannot be held on time. Under the language found in existing Section 10 of Article VI, the presently existing reapportionment plan expires the minute the year 2000 decennial census is

	Article VI states that reapportionment plans expire "after the official reporting of the next decennial census". The new language makes the old plan fully effective until the new plan has been litigated to a final decision, and 60 days remain for election officials to prepare materials after the final adjudication before the next election.	officially reported, which likely will be about April 1 of 2001. If a new reapportionment plan were not fully litigated in time for the 2002 elections, there would be no legal house and senate districts in which to hold an election: the old reapportionment plan would have expired, and the new plan would be snarled in litigation. The new language allows the old reapportionment plan to be used for primary and general election purposes until the new plan is litigated through a final judicial decision, plus 60 days to allow election authorities to prepare materials for the election.
	(b) New language is added to clarify that adoption of a final plan of reapportionment requires at least three votes of the board.	This language is self-explanatory.
	(c) New language is added to create a three-judge panel if the board is unable to agree on a final plan and proclamation within the three month period in (a) of this section. The Speaker of the House, the House Minority Leader, and the Chief Justice of the Alaska Supreme Court each select one Superior Court Judge. The three-judge panel receives all proposed plans from the board within 10 days after the panel has been appointed. The panel then has 45 days after than to select one of the plans without change as a final plan. The panel then issues the proclamation of reapportionment.	This language is intended to provide a mechanism if the board cannot agree on a final plan. It forces the board to work toward agreement if it wants to take credit for the final plan, and to avoid the blame for failing to come up with a final plan. The three-judge panel mechanism is specifically intended to have no authority other than to choose one of several proposed plans, without engaging in any reapportioning activities of its own. It's only purpose is to pick and choose among competing plans. The three judge panel has no review standard because it has no reviewing authority.
Section 9.	The enforcement provisions of Article VI, Section 11, now provide that any qualified voter can compel performance of duties or to correct any error in redistricting or reapportionment. A lawsuit to compel performance of a duty	The mechanics of the enforcement procedure are self-explanatory.

	must be filed not later than 30 days after the duty was to be performed. A lawsuit to correct any error in redistricting or reapportionment must be filed within 30 days of adoption of the final plan by the board or by the three-judge panel.	
	Except for appeals from the three-judge panel, the superior court has original jurisdiction on all challenges to a plan adopted by the board. See the discussion on the immediate right of the appellate procedures involving suits alleging errors in redistricting or reapportionment.	If the board adopts a final plan which is challenged by a qualified voter on the ground that there were errors in redistricting or reapportionment, the superior court has original jurisdiction, but the scope of its review is limited to whether the board acted arbitrarily or capriciously in adopting the plan. The superior court may not reopen evidentiary matters, may not appoint a special master, and may not substitute its judgment for that of the board. If an appeal is taken from the superior court decision to the supreme court in the above context, the scope of review by the supreme court is limited to whether the superior court abused its discretion in determining if the board acted arbitrarily or capriciously in adopting the plan. The supreme court may not reopen evidentiary matters, may not appoint a special master, or substitute its judgment for that of the superior court or the Reapportionment Board.
	In appeals from the three-judge panel, the supreme court has original jurisdiction, but with very limited review authority.	In instances where the three-judge panel adopts the final plan, the scope of review by the supreme court is limited to whether the three-judge panel acted arbitrarily or capriciously in adopting the plan. The supreme court may not reopen evidentiary matters, may not appoint a special master, or substitute its judgment for that of the three-judge panel. The intent in limiting the scope of judicial review throughout this section is to place the scope of review where it was in Kenai Peninsula Borough v. State (1987), 743 P. 2d 1352, at 1357-1358: where the court's narrow review

		is as though it were applying the arbitrary and capricious standard of review to an act of an administrative agency, without substituting its judgment for that of the board. However, this language is intended to further limit the scope of review beyond that stated in Kenai Peninsula Borough v. State, so that the supreme court only decides whether the trial court abused its discretion, and does not engage in a de novo review of the superior court record.
	If any reapportionment remands are ordered by the supreme court, the matter shall be remanded directly to the board, and not to the superior court.	In Hickel v. Southeast Conference (1992), 846 P.2d 38, at 63, our supreme court appears to have substituted its judgment for that of the board, and then remanded the matter to the superior court and a special master. Two dissenting justices of our supreme court openly admitted that failing to remand to the board was "an abuse of our judicial power".
Section 10.	The effective date of these amendments to the constitution is January 1, 2001. Language is added to ensure that the reapportionment plan in effect on December 31, 2000, will be the fall back reapportionment plan in the event the reapportionment process which will follow the 2000 decennial census is not fully completed in time for the 2002 primary and general elections.	Self-explanatory. This applicability of amendments language is intended to protect against the scenario spelled out on the bottom of page 6 and the top of page 7 of this sectional analysis.
Section 11.	Article VI, sections 5 and 7, and Article XIV of the constitution are repealed.	These sections of Article VI and Article XIV are repealed because they are no longer necessary in light the changes made in HJR 44.

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2/3/98

CS FOR HOUSE JOINT RESOLUTION NO. 44( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PORTER AND MULDER, Dyson, Green

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to redistricting and reapportionment of the legislature; and providing for an effective date.

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

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

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

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

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

ARTICLE XIV, SUBJECT TO CHANGES AUTHORIZED IN THIS ARTICLE].

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

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

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

Section 4. Method of Reapportionment. The Reapportionment Board shall establish forty election districts, with each election district to elect one member of the house of representatives. Each election district shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. The board shall establish twenty senate districts each composed of two contiguous election districts, with each senate district to elect one senator [REAPPORTIONMENT SHALL BE BY THE METHOD OF EQUAL PROPORTIONS, EXCEPT THAT EACH ELECTION DISTRICT HAVING THE MAJOR FRACTION OF THE QUOTIENT OBTAINED BY DIVIDING TOTAL CIVILIAN POPULATION BY FORTY SHALL HAVE ONE REPRESENTATIVE].

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

Section 6. Method of Redistricting. The **Reapportionment Board shall establish** [GOVERNOR MAY FURTHER REDISTRICT BY CHANGING] the size and area of election districts, subject to the limitations of this article. Each [NEW] district [SO CREATED] shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. [EACH SHALL CONTAIN A POPULATION AT LEAST EQUAL TO THE QUOTIENT OBTAINED BY DIVIDING THE TOTAL CIVILIAN POPULATION BY FORTY.] Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

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

Section 8. Reapportionment Board. (a) The Reapportionment Board [THE GOVERNOR SHALL APPOINT A REAPPORTIONMENT BOARD TO ACT

IN AN ADVISORY CAPACITY TO HIM. IT] shall consist of five members, **all of whom shall be residents of the state and** none of whom may be public employees or officials **at the time of appointment. Board members shall be appointed as provided in (b) and (c) of this section** [. AT LEAST ONE MEMBER EACH SHALL BE APPOINTED FROM THE SOUTHEASTERN, SOUTHCENTRAL, CENTRAL, AND NORTHWESTERN SENATE DISTRICTS. APPOINTMENTS SHALL BE MADE WITHOUT REGARD TO POLITICAL AFFILIATION]. Board members shall be compensated **as provided by law**.

(b) Except as provided in (c) of this section, members of the Reapportionment Board shall be appointed after, but not later than fifteen days after, the election of the permanent presiding officers of the house of representatives and senate following the first regular session of a legislature that convenes the year following a decennial census. Except as provided in (e) of this section, board members serve until a final plan for reapportionment and proclamation of reapportionment has been adopted and all challenges to it brought under Section 11 of this article have been resolved upon final remand or affirmation.

(c) Following election of the permanent presiding officers of the house of representatives and senate, the members of the house of representatives who are not members of the majority shall elect by majority vote a house of representatives minority appointing officer, and the members of the senate who are not members of the majority shall elect by majority vote a senate minority appointing officer. One member of the Reapportionment Board shall be appointed by the presiding officer of the house of representatives, one by the house of representatives minority appointing officer, one by the presiding officer of the senate, and one by the senate minority appointing officer. The four board members appointed by the legislators shall appoint by majority vote a fifth member of the board who shall be chair. If the fifth member has not been appointed by the end of the day that is five days after the last day required for appointment of the board members under (b) of this section, the presiding officer of the house of representatives, the house of representatives minority appointing

officer, and the chief justice of the supreme court shall, by a majority vote, appoint the fifth member who shall be chair. The chair of the board may not have held an elected state office or an elected office of a political party in this state in the five-year period preceding appointment.

(d) The legislature shall provide by law the procedure for determining the order for making an appointment to the Reapportionment Board by each of the legislators authorized to make appointments under this section.

(e) Any of the four members of the Reapportionment Board appointed by a legislator may be removed with or without cause. Removal will be effected by the person who originally made the appointment or by that person's successor. A vacancy due to removal, resignation, death, incapacity, or otherwise shall be filled by the person who originally made that appointment or by that person's successor. The chair of the board may be removed only for good cause shown by a majority vote of the group consisting of the other members of the board and the chief justice of the supreme court. The vacancy of the chair, due to removal, resignation, death, incapacity, or otherwise, shall be filled as provided for in (c) of this section.

(f) A person who was a member of the Reapportionment Board at any time during the process leading to final adoption of a reapportionment plan under Section 10 of this article may not be a candidate for the legislature in the general election following the adoption of the final reapportionment plan.

* **Sec. 7.** Article VI, sec. 9, Constitution of the State of Alaska, is amended to read:

Section 9. Board Actions **[ORGANIZATION].** [THE BOARD SHALL ELECT ONE OF ITS MEMBERS CHAIRMAN AND MAY EMPLOY TEMPORARY ASSISTANTS.] Concurrence of three members of the Reapportionment Board is required for actions of the board [A RULING OR DETERMINATION], but a lesser number may conduct hearings [OR OTHERWISE ACT FOR THE BOARD]. The board shall employ or contract for services of independent legal counsel.

* **Sec. 8.** Article VI, sec. 10, Constitution of the State of Alaska, is amended to read:

Section 10. Reapportionment Plan and Proclamation. (a) Within thirty days after the release of the decennial census population data or thirty days after

being duly appointed, whichever occurs last, the board shall adopt one or more proposed reapportionment plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the release of the decennial census population data or thirty days after being duly appointed, whichever occurs last, the board shall adopt a final reapportionment plan and [WITHIN NINETY DAYS FOLLOWING THE OFFICIAL REPORTING OF EACH DECENNIAL CENSUS, THE BOARD SHALL SUBMIT TO THE GOVERNOR A PLAN FOR REAPPORTIONMENT AND REDISTRICTING AS PROVIDED IN THIS ARTICLE. WITHIN NINETY DAYS AFTER RECEIPT OF THE PLAN, THE GOVERNOR SHALL] issue a proclamation of reapportionment [AND REDISTRICTING. AN ACCOMPANYING STATEMENT SHALL EXPLAIN ANY CHANGE FROM THE PLAN OF THE BOARD]. The final plan shall set out boundaries of election and senate districts and [REAPPORTIONMENT AND REDISTRICTING] shall be effective for the election of members of the legislature until sixty days after adoption and final adjudication of the succeeding reapportionment plan and proclamation of reapportionment.

(b) Except as provided in (c) of this section, adoption of a final reapportionment plan shall require the affirmative votes of three members of the Reapportionment Board.

(c) If the Reapportionment Board is unable to adopt a final plan and proclamation by the date specified in (a) of this section, there shall be convened a three-judge panel. The presiding officer of the house of representatives and the house of representatives minority appointing officer shall each appoint one superior court judge to the panel, and the chief justice of the supreme court shall appoint one superior court judge to the panel. The board shall, within ten days after the panel's appointment, transmit to the panel all proposed reapportionment plans under consideration by the board. Within forty-five days after the transmittal, the panel shall adopt one of the proposed plans without change as a final plan and shall issue a proclamation of reapportionment. The supreme court shall adopt rules for proceedings before the three-judge panel under this

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subsection [UNTIL AFTER THE OFFICIAL REPORTING OF THE NEXT DECENNIAL CENSUS].

* **Sec. 9.** Article VI, sec. 11, Constitution of the State of Alaska, is amended to read:

Section 11. Enforcement. Any qualified voter may apply to the superior court to compel the performance of [GOVERNOR, BY MANDAMUS OR OTHERWISE, TO PERFORM HIS REAPPORTIONMENT] duties under this article or to correct any error in redistricting or reapportionment. Application to compel performance of a duty [THE GOVERNOR TO PERFORM HIS REAPPORTIONMENT DUTIES] must be filed not later than [WITHIN] thirty days following [OF] the date that the duty is required to be done under [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 adoption of the final plan and proclamation by the Reapportionment Board or by the three-judge panel appointed under Section 10 of this article. Except for appeals of decisions of the three-judge panel, original [PROCLAMATION. ORIGINAL] jurisdiction in these matters is [HEREBY] vested in the superior court. The original jurisdiction of the superior court in matters involving correction of errors in redistricting or reapportionment shall be limited to determining whether the board acted arbitrarily or capriciously in adopting the plan. On appeal from the superior court, the cause shall be reviewed by the supreme court and the review limited to whether the superior court abused its discretion in determining if the board acted arbitrarily or capriciously in adopting the plan. The supreme court shall have original jurisdiction for appeals of decisions of the three-judge panel established under Section 10 of this article. The review by the supreme court shall be limited to whether the three-judge panel acted arbitrarily or capriciously in adopting the plan. Notwithstanding Section 15 of Article IV, all dispositions by the superior court and the supreme court under this section shall be expedited and shall have priority over all other matters pending before the respective court. Upon a decision by the supreme court that a plan is invalid, the case shall be returned to the board for development of a new plan [UPON THE LAW AND THE FACTS].

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

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

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

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

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