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A HISTORY OF RECENT REAPPORTIONMENT IN HAWAII

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I. SYNOPSIS

Under presumably unique circumstances, the State of Hawaii was "reapportioned" three times in three years, twice by the State Reapportionment Commission and once by the United States District Court for the District of Hawaii. These reapportionments had several interesting and controversial aspects, which should cause the electorate and the legislature to consider amendments to the reapportionment process outlined in the state constitution and statutes. The final reapportionment, by virtue of its approval by the Department of Justice Voting Rights Act "preclearance", and the end of litigation in the federal district courts, has given Hawaii stability in its election districts until 1990. Following this final state reapportionment, the State also achieved "bailout" from the preclearance of all electoral changes by the Department of Justice and is no longer subject to this aspect of the Voting Rights Act.

In addition to providing an overview of the reapportionment process in Hawaii during 1983 and 1984, this article gives a background of geographical, political, and population factors in Hawaii which have caused the State, during the last 30 years, to approach the reapportionment issue from a different perspective than most other jurisdictions. The most notable difference in Hawaii had been the use of a registered voter population base for reapportionment as the best approximation of permanent state residents. This population base had been specifically approved by the United States Supreme Court in 1966 in *Burns v. Richardson*.¹

In the 1983-1984 reapportionment, the State of Hawaii Reapportionment Commission took a comprehensive approach to the process which included an evaluation of changes in legal standards, demographics, and technology relevant to reapportionment.

II. REAPPORTIONMENT IN HAWAII—A BRIEF BACKGROUND

Two factors have caused the reapportionment history of Hawaii to differ from that of other jurisdictions. These factors are the geography of the State—seven islands making up four counties, with dramatic geographical features on the islands forming natural boundaries—and the substantial transient population which does not participate in the political process. These factors, discussed in more detail below, led to decisions by Hawaii's political leaders which resulted in techniques of reapportionment to compensate for the unusual geography and the population components and distribution.

Although the current reapportionment plan has not been constrained by previous solutions to these factors, some historical background of reapportionment in Hawaii is necessary to under-

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¹ 384 U.S. 78 (1966).

stand which issues have been—and still may be—important in the State because of its unique attributes. The historical background demonstrates that issues which are traditionally important in other jurisdictions, such as the “gerrymandering” of communities or the submergence of ethnic minorities, have not been issues in Hawaii simply because its geography and population distribution alone create difficult problems of districting.

A. A Brief History of Reapportionment in Hawaii

Although Hawaii was not admitted to Statehood until 1959, the Organic Act which formed the basis for the Territorial Government called for the reapportionment of the Territorial Legislature after each decennial census.² However, as in other political jurisdictions in the United States, this provision of the Act was ignored by the conservative agricultural interests in the Territory who wished to continue the “rural” domination of legislature over the “urban” interests of Honolulu.

A gradual shift of economic and political power from the Caucasian business and agricultural interests to second-generation leaders of Asian origin was interrupted by World War II, when all political control was by the military government until 1945. Changes after the end of the war, however, were rapid, as returning veterans, primarily second-generation Japanese “*nisei*”, reorganized the Democratic party and presented the first serious challenge to Republican domination of politics since 1912. The growth of Democratic power was steady, winning a majority in the Territorial legislature in 1954, the governorship in 1962, and the mayoralty of Honolulu in 1968.

Reapportionment, however, did not become a serious issue in Hawaii until it received similar attention on the mainland United States.³ The State Constitutional Convention of 1950 anticipated statehood and made changes in the apportionment of the legislature approximately in line with contemporary political theory, but largely continued the disproportionate power of the rural “Neighbor” Islands over the principal, and most populated, Island of Oahu. The decision of the United States Supreme Court in *Reynolds v. Sims*,⁴ caused attention to reapportionment in Hawaii, substantially for the first time. Indeed, it is obvious from a perusal of the court’s opinion in the first federal court litigation brought in Hawaii following *Reynolds* that no one previously had really been concerned with malapportionment in the State of Hawaii.⁵

The then-governor of Hawaii, John Burns, moved decisively at the beginning of the special legislative session, called only five weeks after the *Reynolds* decision, to introduce and implement reapportionment reform legislation. Since this legislation essentially proposed to reduce radically the disproportionate strength of the Neighbor Islands in the Legislature, Neighbor Islands opposition produced a stalemate and the reapportionment issue soon was in litigation in both state and federal courts.⁶ In a second federal district court hearing, the court directed the Legislature to adopt an interim reapportionment plan, pending a state constitutional convention on the issue and final court approval.⁷

Although many issues were presented to the federal district court in Hawaii, the primary issues that remained for appeal to the United States Supreme Court were whether Hawaii’s use of registered voters (rather than total population) as an apportionment base was constitutionally valid and whether multi-member districts would similarly be acceptable.

Each of the federal courts recognized that the composition of Hawaii’s population was unique among all states because a substantial portion of the population could be identified as “transients” who were not true “residents” of the State. By far the largest component of this transient population was military personnel and their dependents, which the federal district court

² Hawaii Organic Act, 31 Stat. 152 (1900), 48 U.S.C. § 619.

³ See *Baker v. Carr*, 369 U.S. 186 (1961).

⁴ 377 U.S. 533 (1964).

⁵ *Holt v. Richardson*, 238 F. Supp. 468 (D. Haw. 1965).

⁶ *Guntert v. Richardson*, 47 Haw. 662, 394 P.2d 444 (1964); *Holt v. Richardson*, 238 F. Supp. 468 (D. Haw. 1965).

⁷ *Holt v. Richardson*, 238 F. Supp. 468 (D. Haw. 1965).

in Hawaii found had varied from 5% to 50% of the total state population in the previous twenty years (1944-1964).⁸ The United States Supreme Court, in *Burns v. Richardson*, agreed with the line of reasoning of the lower courts concerning the use of registered voters as a population base in Hawaii.⁹

B. *Burns v. Richardson*

In *Burns v. Richardson*, the United States Supreme Court specifically addressed the issue of what the "population bases", described in *Reynolds v. Sims*, could be construed as in different situations.¹⁰ The Court noted that it had tacitly approved "voter population" and "citizen population" as the equivalent to "total population" in other situations, and it finally approved the use of "registered voters" in Hawaii because the record showed that the distribution of registered voters approximated that of "state citizens" and the resulting distribution of legislators was not substantially different from that obtained by use of a more traditional population base.¹¹ The Court did note, however, that the use of registered voters as an apportionment base was not established "for all time or circumstances," and it was suggested that the State take measures to ensure the stability and accuracy of registered voter statistics.¹²

The Court also upheld the use of multi-member districts for either or both houses of the Legislature, absent a showing that a specific plan ". . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." The Court found no such problem with Hawaii's proposed multi-member districting plan.¹³

C. 1968 State Constitutional Convention

Since the federal courts had conditioned their approval of Hawaii's apportionment plan as "interim" pending a constitutional convention, such an assembly was formed in 1968 primarily for the purpose of establishing new apportionment standards. The standards that resulted have been hailed as models for other states:

1. Establishment of a legislatively appointed, bi-partisan reapportionment commission for future apportionments;
2. Districts to be compact and contiguous, following natural or easily recognized boundaries and census tract lines, where feasible;
3. Where practicable, submergence of different socio-economic area in larger districts to be avoided and representative districts wholly within senatorial districts;
4. Districts not to extend beyond "basic island unit" nor, if multimember, have more than four representatives; and
5. Registered voters as a reapportionment base.

The Convention additionally devised an apportionment plan to serve until 1973, making extensive use of data analysis and public input.¹⁴

Several features of the proposed state constitutional provisions were challenged in federal district court. In its 1970 opinion in *Burns v. Gill*,¹⁵ the Hawaii federal district court noted the extensive, good faith effort that the Convention had devoted to fashioning a fair plan and approved all of its features, except fractional voting. The approved plan had total deviation from the ideal district of 24%, a fact which the court approved after noting the strong justification made by the State for preserving the integrity of county (island) boundaries.¹⁶

⁸ *Id.* at 474-75.

⁹ *Burns v. Richardson*, 384 U.S. 73, 97 (1966).

¹⁰ *Id.* at 90-97.

¹¹ *Id.* at 94-95.

¹² *Id.* at 96-97.

¹³ *Id.* at 88.

¹⁴ Report of the 1968 Constitution Convention.

¹⁵ 316 F. Supp. 1285 (D. Haw. 1970).

¹⁶ *Id.* at 1299.

D. 1973 Apportionment by Commission

The work of the first Reapportionment Commission, established by the 1968 amendments to the State Constitution, closely followed the guidelines and work of the Convention. The commission drafted a plan that made minor adjustments, primarily based on new population statistics from the 1970 census. The Commission made one departure from the new state constitutional standards when they decided to assign three representatives to Kauai instead of the two that had been dictated by the mathematical "method of equal proportions," since the Commission determined that a "overage" of representatives would balance the "underage" caused by Kauai having only one state senator and thereby lower the overall deviations from ideal representation.¹⁷

A challenge was brought on this issue in the Hawaii Supreme Court. In *Blair v. Ariyoshi*,¹⁸ the Hawaii Supreme Court noted that the "method of equal proportions" would not always have given constitutionally sound deviation levels and since "fractional voting" had been disapproved by the federal district court in 1970, the Commission's solution was the best compromise, even though it violated a state constitutional provision.¹⁹

The district plan of the 1973 Commission was to be used in the 1974 elections and remained in effect for the elections in 1976, 1978, and 1980. The records show no adverse public reaction to this plan.²⁰

E. 1978 Constitutional Convention

Whereas the 1968 State Constitutional Convention was primarily called to bring Hawaii's districting in line with current Supreme Court decisions, the 1978 State Constitutional Convention was designed to analyze comprehensively the entire State Constitution. Delegates were provided with extensive research and history on many issues, including reapportionment. Although there was extensive debate on several reapportionment issues, most notably the use of multi-member districts, the Convention did not make any major changes to Hawaii's Constitution on this issue. The Convention did:

1. Assign Congressional redistricting to the Reapportionment Commission;²¹
2. Lengthen the Commission work-period from 120 to 150 days;²²
3. Change the reapportionment time from every eight to every ten years, to coincide with the U.S. Census;²³ and
4. Recommend to future Commissions that if multi-member districts were created, they be limited to less than four representatives.²⁴

All the recommended constitutional provisions of the Convention were approved by the electorate and 1981 was established as an apportionment years.

III. THE 1981 REAPPORTIONMENT COMMISSION

A. Authority from Constitution and Statutes

The authority of the 1981 Reapportionment Commission was derived from both the Constitution and statutes of the State of Hawaii.²⁵ As was basically established by the 1968 State Constitutional Convention, reapportionment in Hawaii is to be effected by a Commission of nine members, eight appointed by the majority and minority legislative leadership, the ninth to be selected by the Commission as the Chair.

¹⁷ Report of the 1973 Constitutional Convention.

¹⁸ 55 Haw. 85, 515 P.2d 1253 (1973) (per curiam), cert. denied, 416 U.S. 945 (1974).

¹⁹ *Id.*, at 88-89, 515 P.2d at 1256.

²⁰ Public Comment files, Office of the Lieutenant Governor.

²¹ Constitution of the State of Hawaii, Article IV, Section 2.

²² *Id.*

²³ *Id.*, Article IV, Section 1.

²⁴ *Id.*, Article IV, Section 6.

²⁵ *Id.*, Article IV, Section 2; HAW. REV. STAT. § 25-2.

The Commission is to meet on March 1 of the designated apportionment year. Within 50 days after all members are certified, it must prepare a plan which follows all the guidelines of the Hawaii Constitution and implementing state statutes.

State statutes also provide for advisory councils in each county (basic island group) who are empowered to hold hearings and otherwise advise the Commission.²⁶

After the Commission has drafted a plan, it must be described to the public in published notices. The commission must hold public hearings, take testimony, and correct or amend the plan as necessary before presenting an apportionment plan to the Chief Election Officer of the state, the Lieutenant Governor.²⁷

B. Role of the Lieutenant Governor

By statute, the Lieutenant Governor is designated as the Chief Election Officer of the State of Hawaii. Among other responsibilities assigned to the Lieutenant Governor in this capacity is the duty to "maintain data concerning registered voters, elections, apportionment, and districting." The Lieutenant Governor is required to "use this data to assist the reapportionment commission . . ."²⁸

The State Constitution also provides that the Lieutenant Governor:

. . . shall be the secretary of the commission without vote and, under the direction of the commission, shall furnish all necessary technical services.²⁹

C. Chronology of Reapportionment Process

The 1981 Reapportionment Commission became certified on May 1, 1981, after the Hawaii Supreme Court appointed and certified its chairman, the Commission failing to agree on a chairperson of its own. The Commission immediately began the process of reapportionment. It also made use of the reports of the 1973 Commission and an analysis of federal caselaw by its staff attorney and attorneys assigned by the State of Hawaii Office of the Attorney General.

One early part of the Commission's work was the conduct of public hearings, optional, but not mandated by state law. These hearings were held in June, 1981 on each island. The Advisory Council also held hearings and reported to the Commission.

With the assistance of the Lieutenant Governor's staff, the Commission developed alternative plans for apportionment. The Advisory Council and the public also provided plans to the Commission. A total of 65 plans were reviewed by the Commission before their selection of a proposed plan. This plan was announced to the public by legal notice. Hearings were held on all islands during August, 1981.

A final plan of apportionment was chosen by the Commission and presented to the then Lieutenant Governor, Jean King, on September 28, 1981. This plan closely followed the guidelines of the State Constitution and statutes in using registered voters as an apportionment base, in adopting a combination of single and multi-member districts, and in making an initial assignment of legislators wholly within basic island units.

Opposition to this plan, almost wholly political, decided that federal court was the forum for further amendment.

D. Court Challenge and Litigation History

On November 13, 1981, The Executive Director of the Republican Party of Hawaii, Craig Travis, filed suit in Hawaii federal district court, alleging that the deviations between the largest and smallest senate districts in Hawaii exceeded the standards of the equal protection clause of the fourteenth amendment to the federal Constitution, as this clause had been interpreted by

²⁶ HAW. REV. STAT. § 25-7.

²⁷ HAW. REV. STAT. § 25-2.

²⁸ HAW. REV. STAT. § 11-2(c).

²⁹ Constitution of the State of Hawaii, Article IV, Section 2.

various federal courts. The suit also alleged that the use of multi-member districts in the proposed reapportionment plan gave voters in multi-member districts an unfair advantage over those residing in single-member districts because multi-member district voters could "weight" their votes. It was asserted that the plan also unduly favored a particular political group, in contravention of the state constitution guidelines. The final major allegation was that the use of registered voters as an apportionment base was a violation of federal constitutional standards.³⁰

The Island of Hawaii Democratic Party and the League of Women Voters also joined the suit, repeating some of the original allegations and in addition expressing dissatisfaction with particular district boundaries.³¹

A three-judge court was convened and held several hearings on the charges. In an Order of March 25, 1982, the court ruled that the deviations of the Commission's plan were in excess of federal standards and that the Commission had not made a strong showing that the use of registered voters as an apportionment based was equivalent to a more traditional apportionment base.³²

The court was concerned about possible disruption to election administration in Hawaii if it allowed the Commission to re-draft the plan, so it decided to appoint Special Masters to prepare an interim districting plan for the state.

The Masters, with the assistance of the Lieutenant Governor's staff and other consultants, reported a plan to the court that used a different apportionment base and disregarded the county (island) boundaries to minimize deviations. The plan additionally created only single-member districts, since federal courts may not use multi-member districts in their creation of interim plans.³³

The apportionment base used by the Masters was "total population less non-resident military and dependents," which the Masters felt was the closest approximation to a "state citizen" base that they could determine, given their limitations on data analysis. However, to determine even this limited population based required making use of an estimate and data projection to both identify the non-voting military population and to locate that population in census tracts. As will be explained below, this estimate caused some probable inaccuracies in districting, which was reflected in uneven election participation.

The most controversial feature of the Masters' plan, however, was the use of "combined county" districts, which "straddled" election districts between two islands. The Masters created one senatorial district that included parts of both Hawaii and Maui and one house district that combined parts of both Oahu and Kauai. The rationale for this technique was that court-drafted plans were self-limited, by previous practice, to deviations in election districts that were much lower than legislative-drafted plans.³⁴ The Masters had received specific directions from the court to prepare alternative plans for the court's consideration, and the direction included a plan with single member districts and minimum deviations. This was the plan recommended by the Masters and accepted by the court.³⁵

Although the Master's plan was vigorously opposed by the State Reapportionment Commission, which continued to draft improved plans and submit them to the court, the court noted that any plan other than the one specifically drafted by the Masters for the court was required, under the Voting Rights Act, to be "pre-cleared" before implementation. The court then noted that since the Department of Justice was authorized 60 days for review and could take another 60 days for review if it felt the plan submission inadequate, it would not be practical or prudent for the court to give serious consideration to any plan other than its own without jeopardizing the timely conduct of the 1982 elections.³⁶

³⁰ *Travis v. King*, 552 F. Supp. 554 (D. Haw. 1982) (Civil Nos. 81-0433 & 81-0438).

³¹ *Id.*, Complaint Challenging Reapportionment Plan Adopted September 27, 1981.

³² *Id.*, Interlocutory Order, March 25, 1982.

³³ *Id.*, Final Report and Recommendation of the Special Masters Submitted Pursuant to Order of the Court, April 7, 1982.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*, Order, May 4, 1982.

The 1982 elections were held under the court-ordered plan, for the reasons given in a final opinion of the court issued October 13, 1982. The court had noted previously that it would continue to retain jurisdiction over the reapportionment issue, with the expectation that:

The Court shall retain jurisdiction over this matter until June 30, 1983, or until such other date as it may order, and during such period of time will consider any further data as to population distribution, or studies as to the effect of the multi-county districts on the 1982 elections, or any other pertinent matters that the parties may submit in support of motions to modify said reapportionment to meet constitutionally required standards.³⁷

IV. THE 1981 REAPPORTIONMENT COMMISSION REORGANIZED IN 1982

It is well-established in federal caselaw that apportionment and districting are state functions and federal courts are only to intervene when a state fails to apportion on a constitutionally valid basis.³⁸ Such intervention is therefore an interim solution to an apportionment problem.

Further, the Constitution of the State of Hawaii specifically states regarding the Reapportionment Commission:

Members of the commission shall hold office until each reapportionment plan becomes effective or until such time as may be provided by law.³⁹

Although elections had been held in 1982 under the court-ordered plan, it was recognized by the Hawaii Legislature and its newly-elected Chief Election Officer, Lieutenant Governor John Waihee, that the State had a continuing duty and responsibility to fashion a permanent plan of apportionment.

The Lieutenant Governor, soon after taking office, conferred with the Attorney General of the State of Hawaii and the leadership of the Legislature to determine a course of action for reapportionment. The Lieutenant Governor assumed this duty in the absence of the chairman of the 1981 Reapportionment Commission, Dr. Reuben Mallari, who had moved from the State without giving notice of his pending resignation from the Commission.

As a result, the Legislature appropriated support funds for both the Reapportionment Commission and the Officer of the Lieutenant Governor to begin population data analysis and conduct other studies in preparation for the formal re-constitution of the Commission.

A. Lieutenant Governor's Role in Analysis of Reapportionment Plan

The Lieutenant Governor, required by law to provide technical support to the Reapportionment Commission, initially began this support in two areas:

1. Analysis of the court-ordered Masters' plan; and
2. Analysis of population data deficiencies.

Since the federal district court had noted its interest in both of these issues,⁴⁰ development of data would not only provide necessary material to the Reapportionment Commission, but also justify to the federal court the planned work by the State on reapportionment.

As predicted by the federal court, the experience of the 1982 election revealed problems with the court-ordered plan. Initial sources of election problems were the county election clerks and the individual state legislators, since these groups were the ones most familiar with the composition of the individual districts and the technical administration of elections related to those districts (which were primarily concerned with the assignment of registered voters to precincts and districts).

In summary, the problems identified by the legislators and county election clerks were of several types:

1. Districts that were "technically gerrymandered" by sole reliance on Census Bureau pop-

³⁷ *Id.*

³⁸ *E.g., Gaffney v. Cummings*, 412 U. 735 (1973); *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

³⁹ Constitution of the State of Hawaii, Article IV, Section 2.

⁴⁰ *Travis v. King*, 552 F. Supp. 554, 568, 572 (D. Haw. 1982).

ulation components in tracts and blocks.⁴¹ As will be explained below, this created districts that were numerically accurate, but illogical and inconvenient to voters;

2. Districts that, as a result of errors in the transfer of district descriptions to elections maps, mis-assigned voters; and
3. Districts which were created by deliberate decision by the Masters' and ill-favored by the public and legislatures, i.e., the island "straddled" districts.

The staff of the Office of the Lieutenant Governor also performed an analysis of the 1982 elections plan and the methodology that was used to create this plan.⁴² The analysis determined that there were additional probable errors in the plan, caused by the inadequate population data that was available to the Masters. The analysis concluded:

1. The Masters had available to them incomplete, summary population data. This population data was from the STFI Bureau of Census file, which essentially gave only a total count of population for each census block, block group (or enumeration district), and tract. No census data was available for military occupation codes, other transients, or aliens.
2. Census tracts and blocks did not always follow "logical" or easily identifiable boundaries. In a few cases, blocks and block groups were wholly within a non-matching tract.
3. Data on military personnel, their dependents, and probable state of voting/residency was not available from either the military or other sources. The Masters relied on a projection to 1980 done from a sample survey in 1976. The accuracy of the survey and the judgments made in the projection were questionable and did not correlate with actual 1982 voting. (The 1982 election districts that included large sections of military housing had extremely low voter participation. If the Masters' assumptions had been correct, participation in all districts should have been roughly equal.)
4. The actual districting by the Masters was a list of census tracts and blocks and there was no court-drafted "reapportionment map." If the military data assumptions were correct, the apportionment *numbers* were correct, but election districts did not exist until the tract/block listing was transferred, by the Lieutenant Governor's staff, to election maps. A wholly accurate transfer was not possible because of a lack of good block/tract boundary descriptions.
5. The county clerks made assignment of registered voters to precinct and districts using an address coded, Census Bureau DIME file, which gave tract and block listings. This file was incomplete and reference to the election maps was necessary for some assignments. In a few cases, the file inadequacy was in the same areas where mapping transfer errors occurred and the assignment error was undetected until the election. The clerks making assignments, because of time limitations, did not keep a record of assignment methodology. Nor was a comprehensive record kept of errors on either elections maps or DIME files for purposes of correction.

In summary, the Lieutenant Governor was able to classify problems with the court-ordered plan as "data errors", "mapping errors", or convenience errors.

B. Reorganization of Commission and Chair

In addition to Article IV of the State Constitution which authorized the 1981 Reapportionment Commission to continue work, the Legislature in 1982 amended Section 25-1 of the Hawaii Revised Statutes to read:

Reapportionment commission. A reapportionment commission shall be constituted after the third Wednesday of January but before March 1 of each reapportionment year, and commencing with the 1981 reapportionment year, the members shall be appointed and certified to hold office until a general election is held under a reapportionment plan of the

⁴¹ A census tract has been the historic and nominally "stable" geographical area which the Bureau of Census uses to enumerate population and other data. It is normally established on the recommendation of local statistical personnel. A small subdivision, the census block, is used in urban areas to further subdivide a census tract.

⁴² Lieutenant Governor's Report to Reapportionment Commission, March 15, 1983.

commission or a new commission is constituted under Article IV, Section 2 of the State Constitution, whichever event shall occur first.⁴³

The legislative history of this amendment indicates that the intent of the legislature was to clarify that the Reapportionment Commission's duty does not end with the publication of a plan that may later be found to be invalid, but rather that it must draft a plan useful for an election.

The Lieutenant Governor received the resignation of the chairman of the 1981 Reapportionment Commission, Dr. Reuben Mallari, on February 17, 1983. The first task of the Commission, therefore, was the selection of a new chairperson.

The first meeting of the Commission was held on March 15, 1983. At this meeting the Special Deputy Attorney General, James Funaki, briefed the Commission on the legality of its authority and a probable hearing in federal court on an extension of the court's jurisdiction. A status report on the Lieutenant Governor's map and data analysis was also given to the Commission by the Lieutenant Governor, who also noted the need to select a new chairperson.⁴⁴

The approach for data analysis suggested by the Lieutenant Governor was to obtain more precise population component data to replace the estimate used by the Masters.

The Commission meeting of March 21, 1983 discussed candidates for the chair and at the meeting of March 28, 1983, attorney Yukio Naito was nominated and unanimously selected.⁴⁵

The other initial business of the Commission was obtaining an appropriation from the Legislature for Commission administration expenses and technical support. The Commission was briefed on May 14, 1983 on a scheduled hearing in federal district court on the jurisdiction issue and the work of the Lieutenant Governor in analyzing the Masters' plan for presentation to the court was outlined. The Lieutenant Governor had retained both a mapping and data consultant to provide technical assistance to his staff for prospective Commission work.⁴⁶

C. Approach to Studies and Data

In addition to the technical deficiencies of the Masters' plan, the Lieutenant Governor had outlined a plan to the Commission which was designed to cure long-standing population data problems for the State of Hawaii and also provided specific legal and socio-economic material to the Commission on issues noted in both the previous Commission report and by the federal court.⁴⁷

This approach was to catalog data sources relevant to reapportionment, to identify sources for areas where the data was deficient, and to prepare reports on four major issues unresolved from the federal court litigation:

1. Composition, legality, and selection of a population base for reapportionment;
2. The role of county integrity ("basic island units") in Hawaiian politics and the impacts of split counties;
3. An analysis of the law and impacts of using multi-member districts *vis-a-vis* single member districts; and
4. The rationale and impacts of using registered voters as an apportionment base.

The objective of the Lieutenant Governor's support to the Commission was to provide basic information and a set of options on issues where there was a probable conflict between federal standards and the State Constitution. Although not explicitly stated, the result would be a comprehensive overview of basic reapportionment issues unique to Hawaii.

In the data development area, population statistics would be assembled in a "data base", linked to each census block and tract, so the Commission could select any legally-reasonable population base for more detailed analysis and actual plan and map drafting.

Data development was greatly aided by the cooperation of several federal and state agencies:

⁴³ HAW. REV. STAT. § 25-1; Act 249, 1982 Hawaii Session Laws, Section 2.

⁴⁴ Minutes of Reapportionment Commission Meeting, March 15, 1983.

⁴⁵ Minutes of the Reapportionment Committee Meetings, March 21 and March 28, 1983.

⁴⁶ Minutes of the Reapportionment Committee Meetings, May 14, 1983 and June 9, 1983.

⁴⁷ *Id.*

1. Commander-in-Chief, Pacific Ocean—Admiral Robert Long and his successor, Admiral William J. Crowe, provided the full cooperation of their commands to produce statistics on active-duty military and their dependents in the State of Hawaii. This information was produced in two-phases: May, 1983 and September, 1983. The initial report by the military tabulated the reporting of DD Form 2058, in which each federal employee declares a state of residence for tax purposes, which was useful as an indication of probable participation in local politics. The later report included a comprehensive data on dependents and residency, which could be correlated with the census tract/block system.
2. Bureau of the Census—With the assistance of the State of Hawaii Department of Planning and Economic Development, a special tabulation of census data was contracted for to provide demographic data (including military occupation, citizenship, age, ethnicity, language ability) for tract/block system. This data is either not normally tabulated or would be reported several years after the actual census.
3. State Departments of Electronic Data Processing, Taxation, Health, and Education—These departments provided data analysis in specialized areas, primarily to validate Bureau of the Census material.
4. City and County of Honolulu—It primarily provided assistance with an analysis of registered voter data and the geo-coding of such data in a format compatible with Bureau of Census systems. Specialized assistance was also available in specific departmental areas.

With the cooperation of these agencies and with the contractual assistance of the Social Sciences Research Institute at the University of Hawaii, work was started on a data system to assist the Reapportionment Commission.

D. District Court Hearing and Decision

The litigation in *Travis v. King* was continued in a hearing in the District Court of Hawaii on June 20, 1983. The issue at this hearing, as presented by the plaintiff-intervenor, the League of Women Voters, was whether the court-ordered Masters' plan of 1982 should remain as a permanent districting plan for the State of Hawaii until the next reapportionment year, 1991.⁴⁸

Although the brief of the League of Women Voters argued for the permanence of the court plan and presented some analysis to the effect that the county split did not cause a serious impact on the candidates for those seats, there was general agreement that the "errors" of the plan should be corrected.⁴⁹

The Reapportionment Commission argued that it was well-established in federal case law that reapportionment was a function that belonged to state governments and that federal courts had always recognized that their plans were necessarily interim solutions to meet election schedules. The Commission also presented a rationale for abandoning the Masters' plan because of its deficiencies and a schedule of its proposed data and socio-economic analysis.⁵⁰

The court, in both oral and written opinions, concurred that the State had the right and duty to conduct reapportionment and extended its jurisdiction over the case, but restricted future intervention without the prior approval of the court. By recognizing that the Masters' plan was an interim solution to the 1982 elections, the court also effectively dismissed the possibility that the Masters' plan could be "revived" at a future date and rejected the need for continued corrections to the Masters' plan.⁵¹ The court later adopted the timetable for election plan completion presented by the Commission.⁵²

⁴⁸ *Travis v. King*, Civil Nos. 81-0433 & 81-0438, U.S. District Court, Hawaii.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

V. COMMISSION WORK IN 1983

The Commission had concurred with the Lieutenant Governor's suggested approach for data and socio-economic studies. Meetings during July and August of 1983 were primarily for the purpose of re-constituting the Advisory Councils, setting policy for the Councils, and reviewing data presented by the Commission members and the public. The first study was presented to the Commission on August 30, 1983.⁵³

A. Study of Individual Policy Issues

1. Permissible Population Base

Although the State Constitution established the use of registered voters as an apportionment base and the federal district court had not specifically ruled its use to be unconstitutional, the Commission had recognized in its previous work and report that registered voters had been adopted by the State of Hawaii as a compromise solution to the problem of insufficient data for a population base defined as "eligible voter" or "state citizen". Using as a premise the development of data for other population bases, the Commission examined a comprehensive analysis of the following alternate population formulas.

1. *Total Population* — Total population is the primary product of the federal decennial census and is the apportionment base used by most jurisdictions. While its use would probably be routinely approved by federal courts, all federal decisions concerning Hawaii's apportionment situation have noted the potential distortion that would be caused to the political process if such were used. While total population is an "exact" count, other statistics from the Bureau of the Census at the block/enumeration district level, necessary for apportionment, may be the result of "sample" data and subject to sampling errors.⁵⁴
2. *State Citizens* — Several jurisdictions have used "state citizens" for election purposes, usually defined as the "residents" of a state, with certain categories of persons excluded, most notably aliens and/or the legal residents of other states. Although the issue of excluding aliens from a representation base had not been squarely faced as yet by federal courts, the expansion of alien rights in other areas has led some commentators to suggest that aliens have a right to "equal representation."⁵⁵
3. *Eligible voters* — Although no jurisdiction currently uses "eligible voters" as an apportionment base and no federal court has specifically ruled on its legality, it has been suggested as a population base. This base has been commonly defined as the state citizen population, less minors not eligible to vote. Similar to the issue of aliens rights, the increased attention to the rights of minors has led to a suggestion that minors also deserve "equal representation."⁵⁶
4. *Registered Voters* — "Registered voters" remains the population based required by the Constitution of the State of Hawaii. However, as noted above, it has an historical basis as a compromise and both the Commission and federal courts have found problems with its continued use.⁵⁷

Development of statistics on the components of each population base began in April, 1983 and continued through October, 1983. The components of each population base were identified as: non-resident military (active duty and dependents), aliens, and minors. Statistics were assembled for all census geographical units for each component and the "data base" approach allowed the Commission to assemble all the permutations of these components to create all reasonable

⁵³ 1981 Reapportionment Commission Study, "Selection of a Constitutionally Permissible Population Base for Hawaii's Legislative Apportionment," Robert G. Schmitt (August 30, 1983).

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 7.

⁵⁶ *Id.* at 13. See also *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973).

⁵⁷ 1981 Reapportionment Committee Study, *supra* note 53, at 13.

definitions of "state citizen" or "eligible voter". Since the final statistics on these population bases were not received from the Bureau of the Census until October 15, 1983, the Commission did not decide on a specific base until that time. However, substantial data was available during September and preliminary data analysis, including legislative allocation, was possible at that time.

2. Basic Island Units

The second major issue of concern to the Commission was whether County integrity could and should be preserved, avoiding the "split-county" districts used by the 1982 plan. A report on this issue was presented to the Commission on September 16, 1983.⁵⁸

The report traced the political history of Hawaii from the independent kingdoms in pre-monarchy times to the current importance of county government and the strong identification of Hawaii's citizens with their counties.

The report also noted that, unlike every other state, Hawaii does not have a network of local governmental agencies such as townships, cities, school districts, and sewer districts through which local residents can exercise control over local issues. There are only the four counties which, relative to other states, have considerably less power over local matters. The Hawaii State Legislature, therefore, has substantial control over areas that are more commonly within the purview of local government in other states.

The report also noted that the fundamental problem with maintaining county integrity was a population distribution not easily divisible by the current number of legislators with a yield of a reasonable deviation range after such an allocation. As was to be later confirmed by the population statistics, no population base could follow the State Constitution and yield a deviation range of less than 21%. Further, this 21% could only be obtained by creating "perfect" districts of a specific size on each island and the likely result would then be a major disruption of traditional community lines within the islands.⁵⁹

Judging apportionment plans by relative percentages causes Hawaii to be severely hampered by its small size. When the same percentage deviation rule is applied to Hawaii and to a large state, the absolute harm done to voters is much less in Hawaii. This is because the same *percentage deviation* of differing populations means that population equality does not have the same significance in terms of the *numbers* of people affected. Hawaii's number of people per state representative—about 19,000, is one of the lowest among states. For comparison, California has about 296,000 residents per state house member. The "allowable" deviation of 16.4 percent applied to California would affect 48,500 people, while only about 3,100 residents would be affected in Hawaii.⁶⁰

Because of the state constitutional guidelines, the strong public reaction to the court-ordered 1982 plan and the arguments of this report, the Commission adopted an initial orientation towards maintaining county integrity in the drafting of reapportionment plans.⁶¹

3. Equality of Voter Registration

A third report was provided to the Commission on September 21, 1983 on the issue of equalizing voter registration. The topic of this report was chosen because of its direct relation to the rationale for the use of registered voters as an apportionment base in the State since 1950.⁶²

The report noted that the Constitution of the State of Hawaii requires, as a practical effect, that electoral districts be substantially equal in terms of numbers of registered voters. This could be viewed as a goal of greater equality of participation in the electoral process. This goal includes

⁵⁸ 1981 Reapportionment Commission Study, "Reapportionment and County Integrity," Jeffrey M. Smith (September 16, 1983).

⁵⁹ *Id.* "Perfect" districts are simple mathematical divisions that also must ignore geographical features, roads, military bases, etc.

⁶⁰ *Id.*

⁶¹ Minutes of Reapportionment Commission Meeting, September 16, 1983.

⁶² 1981 Reapportionment Commission Study, "Equality of Voter Registration as a State Goal and its Implications for Reapportionment," Jeffrey M. Smith (September 21, 1983).

the aspects of numerical equality of representation and of equality of participation in the election process. In the words of the report:

Although it is never directly stated, a reapportionment plan must answer the basic question—"what is to be made equal?" The drafters of a plan are constrained by practical considerations—lack of data, time, or resources—to emphasize per capita equality of representation, which is invariably expressed as minimizing the deviations of population when different election districts are compared. But other aspects of equality are found in reapportionment decisions of the Supreme Court.

Therefore, although an apportionment body will choose absolute numerical equality as a goal, it also must consider many other factors in a districting plan. These considerations may be maintenance of political subdivisions, establishing compact election districts, or preserving the voice of particular ethnic groups. Clearly, an apportionment body should also consider the practical aspects of equalizing voter participation as a factor in drafting its plans. One method of accomplishing this factor is to examine voter registration and/or participation statistics of the newly created election districts.

The traditional focus on numerical equality may be analyzed as "per capita equality" of representation, or what we shall term "passive representation." It focuses on protecting and equalizing the right to be represented in legislative bodies. It is most clearly stated in *Reynolds v. Sims*: ". . . the fundamental principle of representative government in this country is one of equal representation for equal numbers of people. . ." It refers to the constituency a legislator speaks for in conducting his business.

The aspect of equality related to voter participation is actually an equality of "active representation." It focuses on protecting and equalizing the right to participate in elections and choose.⁶³

The report concluded that the state constitutional guidelines requiring the use of registered voters as an apportionment base could be viewed as mandating the opportunity for equality of participation in the election process and would be satisfied, in substance, by selection of a population base which correlated well with registered voters or, in other words, was substantially "registerable".⁶⁴

4. Multi-Member Districts

A final legal and political study on the use of multi-member districts in an apportionment plan was delivered to the Commission on September 29, 1983.⁶⁵

The issue facing the Reapportionment Commission was whether, and to what extent, multi-member districts should be used in a new apportionment plan for the State legislature. The study concluded that single member districts should not be an apportionment scheme, nor the reverse. Each type of district should be judged in terms of how it contributes to goals that the State wants to achieve, goals involving both the fairness of representation and governance.⁶⁶

The report noted that the legal standards from Supreme Court litigation for determining the fairness of a districting plan focus on whether the plan, in the context of local political, economic and social conditions, has the discriminatory effect of submerging the minority vote.⁶⁷ These standards were developed in an attempt to frustrate the efforts of Southern states and municipalities to minimize the representation of the emerging black vote. The report explained:

Although multimember districts are not inherently unfair, when implemented in a geographical region where discrimination in all aspects of life has hindered minority progress and participation in the political process, the courts have questioned the Constitutional validity of these plans. It has been suggested that in the larger multimember district, the

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 1981 Reapportionment Commission Study, "Multimember Districts: A Legal and Policy Analysis," Jeffrey M. Smith, Amaza Reid & Robert G. Schmitt (September 29, 1983).

⁶⁶ *Id.* at 1.

⁶⁷ *Id.* at 19.

majority might be able to elect all the representatives from the district while the minority is outvoted. However, the federal courts have determined that each case will be decided on its own particular facts and circumstances, therefore any challenger of a plan must be prepared to make a strong showing of a history of discrimination having an adverse impact on a particular minority in the community.⁶⁸

The report extracted aspects of "fairness" for multi-member districts that should be relevant to Hawaii's population and geography:

- (a) The fairness standard does not compel avoidance of multimember districting in Hawaii. Special circumstances are required before the courts will take the unusual step of declaring that a particular racial minority has a "right" to elect members of its own group to office in rough proportion to its population share. These include a polarized racial situation and a dominant racial majority purposely practicing electoral discrimination against a racial minority. These do not pertain to Hawaii.
- (b) The main criterion to guide districting suggested by the fairness standard is the homogeneity or diversity of the election district. When applied to apportionment, the fairness standard prefers smaller districts (single member) to larger ones (multimember) because smaller ones are presumably more homogeneous. However, it does not provide any absolute standard to indicate what would be *too* small, and it does not tell how to balance the virtues of smallness with the benefits of bigness. Therefore, when considering the homogeneity or diversity of areas in making districting decisions, the Commission will have to develop its own standards for district diversity in light of the kind of representation it would like to see.
- (c) A districting system made up of small, homogenous districts and one made up of larger, more diverse districts have differing bases for deciding whether more diversity or more "sameness" in districting is desirable.

We can infer from studies of single member and multimember districts that smaller, more homogeneous districts have closer, more personal ties with their legislator, are oriented to "personality" rather than issues in election choice, are concerned with narrower and more parochial issues, and are "safer" for incumbents. Larger, more varied districts have legislators who are more issue oriented, rely more on mediating groups and organizations, concern themselves with broader issues more relevant to the general community, and face more competition at election time.

- (d) Consistent application of desirable standards such as the diversity of community interests to be incorporated in a district means that the emerging apportionment plan will probably not contain single members districts only or multimember districts only. Choice of a large (multimember) district or smaller (single member) districts as representation would depend on the specific characteristics—ethnic composition, employment patterns—of the communities involved, and would vary from area to area and island to island.⁶⁹

The Commission decided to examine both single-member district plans and plans making use of both single and multi-member districts. The Commission felt that the report had noted that "fairness" was the dominant theme of federal guidance on this issue and fairness could only be determined by viewing the impacts of both types of plans on communities and population groups in Hawaii.⁷⁰

B. Analysis of 1982 Election Districts

The development of population data, started in April, 1983, produced a first analysis for the Commission on September 27, 1983. This analysis concerned the 1982 election districts and included the "total" (census) population of those districts and the "state resident" population of those same districts. For the definition of state resident, the total/census population was used, less

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 38.

⁷⁰ Minutes of Reapportionment Commission Meeting, September 29, 1983.

the non-resident military personnel and their dependents.

The military statistics were obtained from the Commander-in-Chief, Pacific, as part of the previously described project with CINCPAC. A statistical consultant for the Commission correlated these military statistics with the Bureau of Census geographical system (tracts). It was noted that statistics obtained from the military, for both 1980 and 1982, produced a geographic distribution different than that used by the Masters, primarily in areas of new military housing construction after 1976. Since the Masters had relied on a 1976 survey projected to 1980, it did not account for heavy concentrations of the military in these new areas, such as the Aliamanu Family Housing Area (comprised of 2500 housing units). Further, the expected participation of military personnel and their dependents in elections in Hawaii, as determined from statements of declared state of residency, was significantly lower than the assumption used by the Masters.⁷¹ The apportionment base of "state residents", defined above, was calculated as 848,678. For the counties, this population was:

| | | |
|--------|---|----------------------|
| Oahu | - | 647,499 |
| Hawaii | - | 91,541 |
| Maui | - | 70,991 |
| Kauai | - | 38,647 ⁷² |

The Commission also examined 1982 election district statistics for registered voters. Each of the proposed new apportionment bases were tabulated in the existing 1982 districts. There was a significant variation between the census population, state resident, and registered voter population bases when these bases were compared in the 1982 election districts.

Also at this state of data development, the Commission examined population component statistics for different "population bases" which showed the population distribution of these bases in each of the counties and the resulting allocation of Senate and House seats under each population base. After this allocation, the best theoretical deviations under any of the population bases were known to the Commission.

The allocation of legislative seats is done, according to the Constitution of the State of Hawaii, under the "method of equal proportions." The method of equal proportions is a mathematical procedure which assigns legislative seats by comparing, seat-by-seat, the remaining population of each county to determine how the "next seat" will be assigned. It is a method to avoid arbitrary decisions about such assignments where "fractional seats" remain after a county population is divided by the number of the "ideal district" inhabitants. The Masters' plan for the 1982 election had assigned two "straddled county" seats.

The federal courts have assigned great importance to the numerical overall range of deviations under the "one-person, one-vote" principle. The "overall range of deviations" is the sum of deviations from the most populous district to the least populous district, ignoring the "+" and "-" signs. It is very important to note that even this "theoretical" deviation is possible only if the "ideal district" is strictly followed and that, in the actual practice of mapping a district, some consideration must be given to natural boundaries and community borders.

C. Commission Draft Plan Consideration and Direction

As the initial population data became available, the Commission directed the Lieutenant Governor to prepare a districting map that would follow, as closely as possible, the 1982 elections map, but use the updated and corrected statistics for a corresponding population base, that of "state residents" (census population less non-resident military and dependents). However, because the allocation of legislators was different (increase of representatives by one to County to Hawaii), it was evident that creation of a districting map would need more criteria from the

⁷¹ According to the compilation of residency statements, less than 5% of all active duty military and their dependents had declared Hawaii as a state of residency and therefore would be likely to register and vote in an election. See "Estimating in Hawaii," James E. Dannemiller, December, 1983.

⁷² Statistical Analysis, "Population Distribution in Counties," Office of Lieutenant Governor Special Report (September 20, 1983).

Commission.

At its meeting of October 6, 1983, the Commission requested the Lieutenant Governor to prepare several alternative districting plans. These plans were to use three different population bases: (1) census population, (2) "state resident" population (defined above), and (3) "eligible voters" population base (population over 18, less non-resident military and aliens). Additionally, the plans were to follow alternative criteria of both preserving the county integrity and "straddling," and the use of single-member districts only or the use of a combination of both single and multi-member districts.⁷³

The Commission also discussed the criteria of "allowable deviations" for districting plans and, on the advice of counsel, agreed that deviations in excess of the recognized federal court standards of 16.4% would have to be strongly justified. The conflict between these standards and the best possible deviations was noted by the Commission.

During several more meetings in October, 1983, the Commission examined alternative districting maps using the aforementioned criteria, except that the request for a plan based on "census population" was withdrawn, primarily because its lack of relevance to either legal or historical criteria in Hawaii. In addition to the maps, the Commission was also supplied with population statistical analysis of each plan examined. The primary focus of the Commission on the statistical analysis was the range of deviations that resulted under each criteria.

D. Commission Decision

The decision on an apportionment base was made by the Commission at its meeting of October 20, 1983. Several Commission members recommended the use of "eligible voters" as the base, primarily because of its strong relation to the historical use of registered voters in Hawaii and also because the statistical analysis showed that a slightly better range of deviations would be possible with this base if county integrity was to be preserved. Several other commissioners thought there should be some consideration given to "representational equality", the theme developed in the second Lieutenant Governor's study as relevant to the prior use of the registered voters apportionment base. By tie-breaking vote of Chairman Naito, the "state resident" apportionment base was chosen. Mr. Naito stated that he had made choice because of an important state policy to represent all residents of the state, including minors and aliens, who need representation in the state legislature.⁷⁴

A second major decision on the issue of county integrity was made in the Commission meeting of November 1, 1983. The initial discussion of this issue indicated that the Commission strongly favored the preservation of county integrity, but were very concerned that such preservation would result in a plan that would have deviations in excess of the maximum allowable under federal constitutional standards. To meet both of these objectives, the Commission discussed the possibility of directing that further districting plans should "preserve the basic island units to the greatest extent possible." Further discussion showed that this statement would be too subjective as a districting criteria. The Commission therefore voted unanimously to disregard county lines for the proposed districting plan, noting that this decision could be amended after the public hearings if there was strong public sentiment on this issue. The Commission also voted unanimously in favor of using only single-member districts in future districting plans.⁷⁵

With these basic decisions made, the Lieutenant Governor was able to prepare a further districting plan for the Commission. The experiences and comments of the Commission members were incorporated into a draft plan presented to the Commission in large-format maps, with accompanying statistical data, at a meeting on November 3, 1983.

The Commission carefully examined these maps in a district-by-district presentation by the Lieutenant Governor, which highlighted the geographic features of the maps. The maps had also been made available, in the technical support section of the Lieutenant Governor's office, for

⁷³ Minutes of Reapportionment Committee Meeting, October 6, 1983. See also "Population Deviations in Counties," Office of Lieutenant Governor Special Report (September 20, 1983) (Revised February 27, 1984).

⁷⁴ Minutes of Reapportionment Committee Meeting, October 20, 1983.

⁷⁵ Minutes of Reapportionment Committee Meeting, November 1, 1983.

detailed examination by the Commission members prior to the meeting. This plan was unanimously adopted by the Commission.⁷⁶

E. Advisory Council Coordination

As previously noted, the Commission decided on July 14, 1983 not to conduct preliminary public hearings on reapportionment, but rather to direct the county-oriented Advisory Councils to hold such meetings, since there had apparently been confusion created during 1981 by having both bodies conduct such hearings. The Commission also noted the additional costs of duplicative hearings. These Advisory Council meetings were held during October of 1983, and the Councils provided public comments and their own comments to the Commission for consideration in districting decisions.

E. Public Notice

As required by the State Constitution and statutes, the Commission made public notice and distribution of its draft plan and scheduled a series of public hearings in each of the counties.

The public notice appeared in newspapers in each county. Additionally, another 400 ethnic organizations were separately contacted to make them aware of the reapportionment process. Newspapers, radio and television stations broadcasting in Japanese and Tagalog were also notified, requesting their cooperation in broadcasting and printing public notices of the reapportionment process.

Distribution of the draft districting maps and supporting population data began on November 9, 1983. These maps were made available in the Lieutenant Governor's office, county clerk's offices and the regional libraries. The distribution was planned to provide ready access to the public for a set of maps in each section of the State and was only limited by the relatively high cost of each set of the "full size" maps. Distribution of each map was individually checked to ensure delivery in the required 10 days prior to the public hearings scheduled in a particular region.

F. Public Hearings

The Commission scheduled public hearings on the draft plan in each county and, where the size or population of the county required, additional hearings on Oahu and Hawaii. The reaction to the draft plan was primarily of two types: objection to the "straddling" of the counties and objection to individual district boundaries.

The objection to individual district lines was relatively minor compared to the "straddling" issue and was primarily in two areas where residents thought that their communities were being split. These two areas were Moanalua Gardens on Oahu and the Mountain View area near Hilo. Neither of these areas are political subdivisions and the splits were caused by creating lines necessary to minimize deviations.

Some objections to the draft plan were also raised by legislators, who feared that their electoral districts had been altered. These situations were also created by the over-riding policy criteria to minimize the deviation range, for it is not possible both to create "ideal" districts and to preserve each neighborhood community.

G. Analysis of Ethnic Impacts of Plan

The first report of the Reapportionment Commission and the opinion of the federal district court in *Travis v. King* had each expressed a strong interest in obtaining "socio-economic" information, including ethnic data, to aid future reapportionment decisions. This information had been available in the State of Hawaii through the Health Surveillance surveys of the Department of Health and from the Research and Statistics Office of the Department of Planning and Economic

⁷⁶ Minutes of Reapportionment Committee Meeting, November 3, 1983.

Development, but not in a format geographically useful for reapportionment.

Since Hawaii is a relatively small state, great disparities of population density, the traditional use of census tracts as the basic "building blocks" of elections districting does not produce uniform results, since the tracts in Hawaii do not follow either natural boundaries or community lines. A sub-group of the tract system, the census block, does provide the needed small geographical units of "population counting." However, the Bureau of Census does not routinely report all data at the census block level and, where the populations of a block are small, the Bureau routinely suppresses the data as part of its policy to prevent the identification of individuals.

A further limitation on some types of census data is that some statistics, such as total population, are the result of the "full count" of every individual on census day. Other data, including ethnic identification is the result of the "16% sample," where one in every six persons is asked more detailed questions. The Bureau of Census then expands this "sample" data to produce useful statistics comparable to the "full count", but notes that this data is subject to statistical sampling errors.

Because the Lieutenant Governor was aware of the need for ethnic, age, and language statistics for reapportionment, but also knew of its non-availability, he contracted with the Bureau of Census on June 30, 1983 to produce this information for the State, at the census block level. The Lieutenant Governor also met directly with Bureau of Census personnel in August, 1983 to further specify and obtain priority for this data. The Bureau of Census provided great cooperation and the Lieutenant Governor received this special tabulation on October 15, 1983.

Although ethnic data was provided to the Commission, no use was made of this data in the decision to adopt the draft plan, as the primary concern of the Commission was the range of deviations from the population base. It was feared that inclusion of ethnic considerations at this stage of the reapportionment process would potentially distract the focus from this constitutional standard. The Commission did direct the Lieutenant Governor to provide a comprehensive analysis of the ethnic implications of the draft plan, which was used to check the final version of the apportionment plan.⁷⁷

The Commission was very mindful of the mandates of the Voting Rights Act, as this statute had been discussed in the study report on multi-member districts. Although multi-member districts were not used in the final plan, the study had noted that some jurisdictions had used single-member jurisdictions to "racially gerrymand" districts and submerge certain ethnic minorities. For these reasons, the racial analysis was to provide a final check on the Commission plan.

Since the distribution of ethnic groups in Hawaii follows extremely complicated patterns, as compared to the patterns found on the Mainland, it was necessary to provide a historical context for the ethnic election district analysis. This context was the 1980 and 1982 election plans. The 1980 plan was drafted in 1973, using registered voters as an apportionment base. The 1982 plan was, of course, the court-ordered Masters' plan. Although an ethnic analysis had never been done on either of these plans, extensive research was unable to find a single complaint which could be construed as racially or ethnically oriented.

As a result of this analysis, it was concluded that the plan of the Reapportionment Commission in 1983 not only did not have any adverse impact on any racial or ethnic group in Hawaii, but actually enhanced the probable election participation of some ethnic groups.⁷⁸

H. Commission Final Plan Consideration and Decision

After examination of the transcripts and recordings of the public hearings and the analysis of ethnic data concerning the draft districting plan, the Commission made certain minor changes to the draft plan, primarily to adjust boundary lines erroneously transcribed from the working map and to restore some cohesiveness to particular communities. Further correction was necessary when population and map discrepancies were found in the Mililani area. The final plan was formally adopted by the Commission at its last meeting of 1983.

⁷⁷ "The 1984 Reapportionment Plan for the State of Hawaii: Analysis of its Impact on Ethnic/Racial Groups," Jeffrey M. Smith (January, 1984).

⁷⁸ *Id.* at 28.

I. Presentation of Plan to Lieutenant Governor

As required by statute, the final plan of reapportionment, with an accompanying report of the Commission, was presented to the Lieutenant Governor, in his capacity as the Chief Election Officer, on January 9, 1984.⁷⁹ After 10 days, the Lieutenant Governor would normally declare his acceptance of the plan and begin implementation of it in preparation for the 1984 elections. Implementation is required as early as February 1 of an election year, when the Lieutenant Governor must make nomination papers available to potential election candidates. However, because of the on-going jurisdiction of the federal district court in *Travis v. King* and the requirements of pre-clearance under the Voting Rights Act, two additional steps were necessary before the complete implementation of this plan.

J. Transmittal of the Plan to the Department of Justice

The plan was transmitted to the Department of Justice on February 27, 1984. Expedited processing of this plan was requested for two reasons:

1. The federal district court had scheduled a February, 1984 hearing on its jurisdiction in *Travis v. King*. Although the role of the Department of Justice *vis-a-vis* the federal district court could not be predicted, it was probable that the court would defer judgment until the final pre-clearance decision.

2. As stated above, the process of implementing an election in Hawaii begins with the statutorily required availability of nomination papers. For potential candidates, this is an extremely important date, since decisions regarding residence in a particular district, its composition, and the incumbent representative will have very great personal consequences. The experience of 1982, where the election district lines shifted several times (during a time when state statutes assumed stability), caused great disruption in several state races.

The Department of Justice approved the Reapportionment Plan on April 6, 1984, thus effectively "pre-clearing" it under the Voting Rights Act provisions.

The submission had detailed the racial neutrality of the election districts and the effective equality of representation afforded to Hawaii's citizens. The approval of the Department of Justice was conditioned on having no challenges to the election process for five years, based on any "test or device" used to impede voting.

K. Conclusion of Federal District Court Litigation

The reapportionment plan was submitted to federal district court on January 17, 1984. The Reapportionment Commission, the State of Hawaii, and the Lieutenant Governor requested that the court accept the final plan of apportionment drafted by the Commission, because the low deviations meant that it met the constitutional standard of "one-person, one-vote", and because the plan was well-founded on a comprehensive analysis of population data that went far beyond any previous use of statistics. The statistical data, socio-economic studies, and subsequent analysis of impacts of the plan on ethnic groups in Hawaii closely followed the suggestions of the court in its 1982 opinion. On April 9, 1984, the court agreed with this reasoning but extended its jurisdiction in the case to April 9, 1986.

Except for minor corrections to some districts for technical adjustments, the 1984 elections were successfully implemented under this plan. The court refused to grant intervention into the case by some residents of Kauai, who alleged dilution of their representation because of the "cause" districts which combined areas of Kauai and Oahu (Waianae). In spite of affidavits from the representatives from these districts, the court did not grant the intervention sought.

L. Voting Rights Act "Bailout"

The City and County of Honolulu was the last remaining Hawaii jurisdiction required to

⁷⁹ Report and Final Reapportionment Plan Adopted by the 1981 Reapportionment Commission, January 9, 1984.

"pre-clear" any election changes to the Department of Justice, under the provisions of the Voting Rights Act.

Lieutenant Governor Waihee had directed, early in his term, a thorough review of election records during the previous 10 years to determine whether a showing could be made, in the United States District Court for the District of Columbia, that Hawaii had complied with the Voting Rights Act and was entitled therefore to "bail-out".

The results of this review led to the suit authorized by the Voting Rights Act, filed by Lieutenant Governor Waihee against the United States Government on June 1, 1984.⁸⁰

The court agreed with the State of Hawaii and on July 31, 1984, issued an order relieving Hawaii from compliance with Voting Rights Act preclearance. The court did retain jurisdiction for five years, but would only re-open the matter on specific United States Attorney General complaints of Voting Rights Act violations.

VI. CONCLUSIONS AND RECOMMENDATIONS

The experiences of reapportionment in Hawaii during the period between 1981 and 1984 demonstrate the need for changes to both the technical and legal processes that have been heretofore followed. Fortunately, there is adequate time to analyze the process thoroughly and plan for the next reapportionment. Although many aspects of the reapportionment process are either "political" or "public policy" and will be decided by the Legislature or Constitutional Convention, it is apparent that the following aspects of the process must be altered:

A. Reapportionment Year

Although it was the intent of the 1978 Constitutional Convention to set reapportionment at a time when the decennial census data would be available to the Commission, the 1981 Commission only had "total population" available and the estimation process for other population components, such as non-resident military, caused errors in the creation of districts. This data did not become available until 1983 and only then by special request of the Lieutenant Governor to the Bureau of the Census. Similarly, ethnic data was not available to the Commission on a routine basis. Even though the Census Bureau plans to alter some of the techniques of census taking in 1990, Hawaii must make specific plans to identify and acquire certain data from the 1990 census for the next reapportionment. This responsibility should be assigned to a particular state agency, most appropriately either the Department of Planning and Economic Development or the Office of the Lieutenant Governor.

B. Reapportionment Techniques

The actual technical process of reapportionment changed significantly from the 1981 approach to the 1983 method. The Office of the Lieutenant Governor's use of microcomputers made a "database" approach feasible, given the constraints of time and cost. This, in turn, allowed the Commission to consider different aspects of "population base" in the decision making process and consider more variations of a districting plan.

However, the microcomputer use was applied to the population data alone and mapping was done by conventional and labor-intensive drafting, which inevitably restricts the number of alternative plans that can be created in a restricted time period. Current microcomputer technology allows "digital mapping", which is the creating or analysis of maps and data from a "mapping database" of a particular area. Although the creation of this mapping database is initially labor intensive, all uses of this technology thereafter are very fast, accurate, and inexpensive when compared to conventional drafting. This technology is now available. Further, the Bureau of the Census has initiated "Operation Tiger", which is a project to digitize many aspects of the 1990 Census. Although the impact of this national project on Hawaii is difficult to predict, it is clear that the State should aggressively pursue coordination with the Census Bureau and insure

⁸⁰ *Waihee v. United States*, Civil No. 84-1694, U.S. District Court, District of Hawaii.

compatibility of all state-initiated digital mapping projects with relevant federal specifications to lower state costs and maximize the use of the federal data products. A digitally-mapped population system additionally has a wide variety of uses, both governmental and commercial.

C. Reapportionment Base

The State Constitution requires that "registered voters" be used as the apportionment base. The current reapportionment uses "state residents" as the base and therefore violates the Constitution. Since there has never been a *per se* federal prohibition against the use of registered voters as an apportionment base, either the state legislature or other appropriate forum must consider this issue and provide a workable legal environment for the next reapportionment commission.

D. Districting Techniques

The Reapportionment Commission's decisions to use only single-member districts and to create "multi-county" districts continues to be controversial. While both issues involve very different aspects of reapportionment, they are similar in that the federal courts have allowed the states a wide range of choices in these areas, while focusing on "minimal deviations" among districts overall. Each reapportionment commission has faced a dilemma on these issues, attributable primarily to the population distribution among the counties and islands. On one hand, the Commission would like to follow state policy and traditions (to say nothing of following the State Constitution), "keep the counties intact" and "provide election opportunity" through the use of multimember districts. On the other hand, adherence to county integrity causes high district deviations and the use of multimember districts further attracts federal judicial scrutiny. While there are no facile answers to this dilemma, again these are issues for the Legislature to thoughtfully consider and, if nothing else, create legislative and committee history over the next few years that will aid future reapportionment commissions in these choices.

The confusion and delays encountered in the recent reapportionment emphasizes that the time available before the next reapportionment must not be wasted. Early attention must be devoted by the Legislature to the lingering problems. Otherwise, the lamentable experience of the 1980's will be repeated in the 1990's.