

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH MOON, C.J., JOINS

I respectfully dissent from the majority's holding that the reapportionment plan for the County of Hawai'i (County), as crafted by the 2001 County of Hawai'i Reapportionment Commission (Commission), presents no equal protection violation.

As the majority notes, a reapportionment plan that exhibits a total population deviation of more than ten percent presumptively violates the right to equal representation secured under the fourteenth amendment to the United States Constitution. Brown v. Thomson, 462 U.S. 835, 842-843 (1983) (citing Swann v. Adams, 385 U.S. 440, 444 (1967)). That presumption of illegality may only be dispelled by showing that rational public policies outweigh the ill effects of an apportionment scheme that materially enhances the representational power of some at the expense of others. Mahan v. Howell, 410 U.S. 315, 326 (1973).

The Commission's reapportionment plan in this case is presumptively unconstitutional under Brown v. Thomson because it reflects a total population deviation of 10.89 percent. The excessive deviation was caused by the Commission's error in counting non-resident students and military personnel when calculating the ideal mean population for each of the voter districts.

I part company with the majority because the heightened deviation flowing from that error cannot, as Mahan v. Howell requires, be rationalized under any public policy the Commission was authorized to pursue. Section 3-17(f) of the Hawai'i County Charter (Charter) -- which enumerates the only public policies the Commission may validly consider in fashioning district boundaries -- states:

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- (1) No district shall be drawn to unduly favor or penalize a person or political faction;
- (2) Insofar as possible, districts should be contiguous and compact;
- (3) District lines shall, where possible, follow permanent and easily recognizable features;
- (4) Districts shall have approximately equal resident populations as required by applicable constitutional provisions.

Charter of the County of Hawai'i § 3-17(f) (1990). Inasmuch as subsection (4), under our interpretation today, forbids the inclusion of non-resident students and military personnel in the "resident population" count, the Charter's stated policy is to exclude these groups from the Commission's redistricting calculus. To allow the Commission to surreptitiously establish the district boundaries based on where these excluded groups reside -- in short, to employ, de facto, a "total population" count such as that used in this case -- undermines subsection (4)'s fundamental purpose of equalizing the populations among the districts without regard to non-resident students and military personnel.

Because no authorized public policy justifies the erosion of equal representation that the current plan engenders, the plan fails the constitutional test set forth in Brown v. Thomson and Mahan v. Howell. Accordingly, I must dissent.¹


Julia C. Traylor

¹ The County notes that the reapportionment plan's total deviation figure could be brought below ten percent by shifting "less than 200 persons" to other districts. That remedy would seem the better course than the majority's proposal to hold in place a reapportionment plan that is based on an inaccurate population count.