

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston**

JEFFERSON COUNTY COMMISSION, et. al.
Plaintiffs,

and

THORNTON COOPER,
Intervening Plaintiff,

v.

**Civil Action No. 2:11-CV-00989
(Honorable King, Bailey, Berger)**

**NATALIE TENNANT, in her capacity as
The Secretary of State, et al.,**
Defendants.

**JOINT RESPONSE OF DEFENDANTS JEFFREY KESSLER AND RICHARD
THOMPSON IN OPPOSITION TO PLAINTIFFS JEFFERSON COUNTY
COMMISSION, PATRICA NOLAND, AND DALE MANUAL'S
COMBINED MOTION TO STRIKE**

Jeffrey Kessler and Richard Thompson, by counsel, respond in opposition to Plaintiff's Combined Motion to Strike the Transcript of the Senate Redistricting Committee's August 4, 2011 meeting during which the Committee considered congressional redistricting plans and ultimately adopted the plan that passed both Houses of the Legislature as S.B. 1008 and was signed into law by the Governor.

Plaintiffs contend that "[e]xhibit O is an unauthenticated document which is not a part of the legislative record and is inadmissible under the Federal Rules of Evidence and FRCP 44(a)." (Pl's Mot. to Strike, Document 49, at 1-2) Plaintiffs further contend that there is no official record of the Senate consideration of S.B. 1008 other than the materials Plaintiffs offered in their Notice of Intent to Offer Exhibits. (Id. at 3)

On August 5, 2011, the Senate Majority Leader asked unanimous consent that the transcript of the August 4, 2011 Select Redistricting Committee meeting be printed in the Appendix to the Senate Journal. (See Journal of the Senate, Aug. 5, 2011 at 54, attached as Ex. M to Joint Opening Br., Document 42, also attached as Ex. A to this filing) The Senate gave unanimous consent and the Transcript was made a part of the official Senate record.

President Kessler and Speaker Thompson offered as Exhibit AA to their Opening Brief a certification from Darrell E. Holmes, the Clerk of the West Virginia Senate. The certification states that the Select Committee on Redistricting Meeting Transcript from August 4, 2011, among other records, is a true and accurate copy of the records of the Senate. The certification was signed under oath by the Clerk, and was notarized. (See Ex. AA to Joint Opening Br., Document 42, also attached as Ex. B to this filing) Plaintiffs' Combined Motion to Strike offers no evidence to contradict the Clerk's certification that the Transcript is a part of the Senate Record of the consideration of S.B. 1008.

Under West Virginia law, the Clerk of the Senate is the official with legal custody of the records of the West Virginia Senate. W. VA. CODE § 4-1-12 ("The journals, papers and documents of each house shall be in the custody of its clerk, and copies thereof may be certified by him") A proper means of proving an official record under the Federal Rules of Civil Procedure is to present "a copy attested by the officer with legal custody of the record . . . accompanied by a certificate that the officer has custody." Fed. R. Civ. P. 44(a). Here, the Clerk has attested that the transcript is a part of the record, and a West Virginia statute makes clear that the Clerk is the legal custodian of the record. Because the Clerk is the proper custodian, his certification also complies with the self authentication requirement of Federal Rule of Evidence 902.

The transcript shows that at the August 4, 2011 Select Redistricting Committee meeting, Senators gave consideration to alternate redistricting proposals, discussed their policy objectives, and most importantly, were fully informed as to the requirements of the federal and state constitutional requirements with respect to congressional redistricting. It is therefore unsurprising that Plaintiffs would ask the Court not to look at the transcript, and in effect, pretend that the Senate's detailed consideration of S.B. 1008 never took place. While Plaintiffs would have the Court exclude important evidence, President Kessler and Speaker Thompson believe that the Court should give due consideration to the legislative record in determining whether the minor population variance in S.B. 1008 has been adequately justified. Accordingly, the Plaintiffs' Combined Motion to Strike should be denied.

**JEFFREY KESSLER, in his capacity
as President of the West Virginia Senate**

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**RICHARD THOMPSON, in his capacity as
Speaker of the West Virginia House of Delegates**

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(Judges King, Bailey, and Berger)**

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Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2011, I electronically filed the foregoing “**Joint Response Defendants Jeffrey Kessler and Richard Thompson to Plaintiffs Jefferson County Commission, Patricia Noland, and Dale Manual’s Combined Motion to Strike**” with the Clerk of the Court using the CM/ECF system which will provide notice to counsel of record as follows:

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/s/ Adam B. Tomlinson
Adam B. Tomlinson (W. Va. Bar No. 11311)

WEST VIRGINIA LEGISLATURE
SENATE JOURNAL
EIGHTIETH LEGISLATURE



FIRST EXTRAORDINARY SESSION, 2011

AUGUST 1-5, 2011

passage of Engrossed Senate Bill No. 1008, which vote explanation will be printed in the Appendix to the Journal.

At the request of Senator Browning, and by unanimous consent, the remarks by Senator Unger regarding the passage of Engrossed Senate Bill No. 1008 were ordered printed in the Appendix to the Journal.

At the request of Senator Unger, unanimous consent being granted, it was ordered that the following be printed in the Appendix to the Journal: A transcript of the August 4, 2011, meeting of the Select Committee on Redistricting; Population Summary Report, Plan Components Report and Measures of Compactness of the various congressional plans considered by the Select Committee; and an article by Kenneth C. Martis, Ph.D., Professor of Geography, West Virginia University, entitled "West Virginia Congressional Redistricting, Mason County Flop Plan".

On motion of Senator Unger, the Senate recessed until 7 p.m. tonight.

Night Session

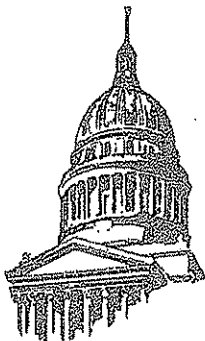
Upon expiration of the recess, the Senate reconvened and, without objection, returned to the third order of business.

A message from The Clerk of the House of Delegates announced the passage by that body, to take effect from passage, and requested the concurrence of the Senate in the passage of

Eng. House Bill No. 106—A Bill to amend and reenact §1-2-2 and §1-2-2b of the Code of West Virginia, 1931, as amended, all relating to the apportionment of membership of the House of Delegates.

At the request of Senator Unger, and by unanimous consent, reference of the bill to a committee was dispensed with, and it was taken up for immediate consideration, read a first time and ordered to second reading.

On motion of Senator Unger, the constitutional rule requiring a bill to be read on three separate days was suspended by a vote of four fifths of the members present, taken by yeas and nays.



The Senate of West Virginia

DARRELL E. HOLMES
CLERK
CHARLESTON 25305-0800
TELEPHONE 357-7800

I, DARRELL E. HOLMES, CLERK OF THE SENATE OF WEST VIRGINIA, do hereby certify that the documents listed below are true and actual copies of records of the Senate of West Virginia for the First Extraordinary Session of the Legislature, 2011, relating to Enrolled Senate Bill No. 1008 (*Reapportioning congressional districts*).

Select Committee on Redistricting Minutes - August 3, 2011
Select Committee on Redistricting Handouts - August 3, 2011

Select Committee on Redistricting Minutes - August 4, 2011
Select Committee on Redistricting Handouts - August 4, 2011
Select Committee on Redistricting Meeting Transcript - August 4, 2011

Select Committee on Redistricting, Kenneth C. Martis Handout - August 4, 2011

Remarks by Members

Remarks of Senator Herb Snyder - August 4, 2011

Remarks by Members

Question on Adoption of Senator Snyder's amendment to Senate Bill No. 1008

Remarks of Senator Herb Snyder - August 5, 2011
Remarks of Senator John R. Unger II - August 5, 2011
Remarks of Senator Mike Hall - August 5, 2011
Remarks of Senator Brooks F. McCabe, Jr. - August 5, 2011
Remarks of Senator Karen L. Facemyer - August 5, 2011

Question on Passage of Engrossed Senate Bill No. 1008

Remarks of Senator John R. Unger II - August 5, 2011

Vote Explanation of Senator John R. Unger - August 5, 2011

Senate Journal, First Extraordinary Session - August 1-5, 2011

Senate Membership by District - 2010-2011

Darrell E. Holmes

DARRELL E. HOLMES
CLERK OF THE SENATE

Date: 12-19-11

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA

Taken, subscribed and sworn to before me this 19th day of December, 2011.

Nancy J. Smith

Notary Public

My commission expires February 5, 2018.

