IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEPTEMBER 2018 TERM

No. 18-0816

STATE OF WEST VIRGINIA ex rel. MARGARET L. WORKMAN, Petitioner

V.

MITCH CARMICHAEL, as President of the Senate; DONNA J. BOLEY, as President Pro Tempore of the Senate; RYAN FERNS, as Senate Majority Leader, LEE CASSIS, Clerk of the Senate; and the WEST VIRGINIA SENATE, Respondents

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WRIT OF PROHIBITION GRANTED

Filed: October 11, 2018

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ACTING CHIEF JUSTICE JAMES A. MATISH delivered the Opinion of the Court.
ACTING JUSTICE LOUIS H. BLOOM concurs in part and dissents in part and reserves the right to file a separate opinion.
ACTING JUSTICE JACOB E. REGER concurs in part and dissents in part and reserves the right to file a separate opinion.

CHIEF JUSTICE WORKMAN is disqualified.
JUSTICE ALLEN H. LOUGHRY II suspended, therefore not participating
JUSTICE ELIZABETH WALKER is disqualified.
JUSTICE PAUL T. FARRELL sitting by temporary assignment is disqualified.
JUSTICE TIM ARMSTEAD did not participate.
JUSTICE EVAN JENKINS did not participate.

ACTING JUSTICE RUDOLPH J. MURENSKY, II, and ACTING JUSTICE RONALD E. WILSON sitting by temporary assignment.

SYLLABUS BY THE COURT

1. In the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

2. An officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia, may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.

3. To the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

4. West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.

5. This Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct. Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

6. The Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

Matish, Acting Chief Justice:

The Petitioner, the Honorable Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of West Virginia, brought this proceeding under the original jurisdiction of this Court as a petition for a writ of mandamus that seeks to halt impeachment proceedings against her. The Respondents named in the petition are the Honorable Mitch Carmichael, President of the Senate; the Honorable Donna J. Boley, President Pro Tempore of the Senate; the Honorable Ryan Ferns, Senate Majority Leader; the Honorable Lee Cassis, Clerk of the Senate; and the West Virginia Senate.[1] The

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[1] It will be noted that the Petitioner failed to name as a respondent the Acting Chief Justice, the Honorable Justice Paul T. Farrell, that is presiding over the impeachment proceeding that she seeks to halt. Ordinarily the judicial officer presiding over a proceeding that is being challenged is named as a party in a proceeding in this Court. However, the omission of Acting Chief Justice Farrell as a named party in this matter is not fatal to the relief that is being requested. Pursuant to rules adopted by the Senate to govern the impeachment proceedings, the Acting Chief Justice was stripped of his judicial authority over motions, objections and procedural questions. This authority was removed under Rule 23(a) of Senate Resolution 203 as follows:

> All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer [Acting Chief Justice], who shall decide the motion, objection, or procedural question: Provided, That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present and voting shall overturn the Presiding Officer's

Petitioner seeks to have this Court prohibit the Respondents from prosecuting her under three Articles of Impeachment returned against her by the West Virginia House of Delegates. The Petitioner has briefed the following issues to support her contention that she is entitled to the relief sought. The Petitioner has alleged several issues which we have distilled to the essence as alleging that the Articles of Impeachment against her violate the Constitution of West Virginia because (1) an administrative rule promulgated by the Supreme Court supersede statutes in conflict with them; (2) the determination of a violation of the West Virginia Code of Judicial Conduct rests exclusively with the Supreme Court; (3) the Articles of Impeachment were filed in violation of provisions of House Resolution 201. Upon careful review of the briefs, the appendix record, and the applicable legal authority, we grant relief as outlined in this opinion.[2]

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decision on the motion, objection, or procedural question.

As a result of Rule 23(a) Acting Chief Justice Farrell is not an indispensable party to this proceeding.

[2] We are compelled at the outset to note that this Court takes umbrage with the tone of the Respondents brief, insofar as it asserts "that a constitutional crisis over the separation of powers between the Legislature and Judicial Branches" would occur if this Court ruled against them. This Court is the arbiter of the law. Our function is to keep the scales of justice balanced, not tilted in favor of a party out of fear of retribution by that party. We resolve disputes based upon an unbiased application of the law.

INTRODUCTION

Although the Petitioner in this matter requested oral argument under Rule 20 of the Rules of Appellate Procedure, and even though this case presents issues of first impression, raises constitutional issues, and is of fundamental public importance, the Respondents, however, waived that right as follows:

> Oral argument is unnecessary because no rule to show cause is warranted. This case presents the straightforward application of unambiguous provisions of the Constitution of West Virginia that, under governing precedent of this Court, the Supreme Court of the United States and courts across the nation unquestionably affirm the West Virginia Senate's role as the Court of Impeachment.

This Court further notes that the Respondents declined to address the merits of the Petitioner's arguments. The Respondents stated the following:

> At the outset, it [sic] important to note that Respondents take no position with respect to facts as laid out by Petitioner, or the substantive merits of the legal arguments raised in the Petition. In fact, it is constitutionally impermissible for Respondents to do so, as they are currently sitting as a Court of Impeachment in judgment of Petitioner for the allegations made in the Articles adopted by the House.

The Respondents have not cited to any constitutional provision which prevents them from responding directly or through the Board of Managers (the prosecutors), to the merits of the Petitioner's arguments. It is expressly provided in Rule 16(g) of the Rules of Appellate Procedure that "[i]f the response does not contain an argument in response to a question presented by the petition, the Court will assume that the respondent agrees with the petitioner's view of the issue." In light of the Respondent's [sic] waiver of oral argument and refusal to address the merits of the Petitioner's arguments, this Court exercises its discretion to not require oral argument and will rule upon the written Petition, Response, Reply, and various appendices.[3]

Our forefathers in establishing this Country, as well as the leaders who established the framework for our State, had the forethought to put a procedure in place to address issues that could arise in the future; in the ensuing years that system has served us well. What our forefathers did not envision is the fact that subsequent leaders would not have the ability or willingness to read, understand, or to follow those guidelines. The problem we have today is that people

[3] This Court is aware that transparency is important. However, the Respondents have closed the door on themselves by declining to have oral arguments and taking the untenable position of not responding to the merits of the arguments. This Court would have appreciated well-researched arguments from the Respondents on the merits of the issues.

do not bother to read the rules, or if they read them, they decide the rules do not apply to them.

There is no question that a governor, if duly qualified and serving, can call a special session of the Legislature. There is no question that the House of Delegates has the right to adopt a Resolution and Articles of a Bill of Impeachment. There is no question that the Senate is the body which conducts the trial of impeachment and can establish its own rules for that trial and that it must be presided over by a member of this Court. This Court should not intervene with any of those proceedings because of the separation of powers doctrine, and no one branch may usurp the power of any other coequal branch of government. However, when our constitutional process is violated, this Court must act when called upon.

Fundamental fairness requires this Court to review what has happened in this state over the last several months when all of the procedural safeguards that are built into this system have not been followed. In this case, there has been a rush to judgment to get to a certain point without following all of the necessary rules. This case is not about whether or not a Justice of the Supreme Court of Appeals of West Virginia can or should be impeached; but rather it is about the fact that to do so, it must be done correctly and constitutionally with due process. We are a nation of laws and not of men, and the rule of law must be followed.

By the same token, the separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts. So the Legislature should not be dealing with the Code of Judicial Conduct, which authority is limited to the Supreme Court of Appeals.

The greatest fear we should have in this country today is ourselves. If we do not stop the infighting, work together, and follow the rules; if we do not use social media for good rather than use it to destroy; then in the process, we will destroy ourselves.

I.

FACTUAL AND PROCEDURAL HISTORY

The Petitioner was appointed as a judge to the Circuit Court of Kanawha County, by former Governor John D. Rockefeller, IV, on November 16, 1981. She was later elected in 1982 by the voters to fill out the remainder of the unexpired term of her appointment. She was subsequently elected again in 1984 for a full term. In 1988, the Petitioner was elected by the voters to fill a vacancy on the West Virginia Supreme Court of Appeals. She served a full term and left office in 2000. The Petitioner ran again for a position on the Supreme Court in 2008 and won.

In late 2017, the local media began publicizing reports of their investigations into the costs for renovating the offices of the Supreme Court Justices.

Those publicized reports led to an investigation by the Legislative Auditor into the spending practices of the Supreme Court in general. The Auditor's office issued a report in April of 2018. This report was focused on the conduct of Justice Allen Loughry and Justice Menis Ketchum. The report concluded that both Justices may have used state property for personal gain in violation of the state Ethics Act. The report indicated that the matter was referred to the West Virginia Ethics Commission for further investigation.[4] In June of 2018 the Judicial Investigation Commission charged Justice Loughry with 32 violations of the Code of Judicial Conduct and the Rules of Professional Conduct. Justice Loughry was subsequently indicted by the federal government on 22 charges.[5]

On June 25, 2018, Governor Jim Justice issued a Proclamation calling the Legislature to convene in a second extraordinary session to consider the following:

> First: Matters relating to the removal of one or more Justices of the Supreme Court of Appeals of West Virginia, including, but not limited to, censure, impeachment, trial, conviction, and disqualification; and
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> Second: Legislation authorizing and appropriating the expenditure of public funds

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[4] The Auditor's office issued a second report involving the Petitioner, Justice Robin Davis and Justice Elizabeth Walker. That report did not recommend an ethics investigation of those Justices.

[5] Additional charges were later brought against Justice Loughry. He was suspended from office.

> to pay the expenses for the Extraordinary Session.

Pursuant to this Proclamation, the Legislature convened on June 26, 2018, to carry out the task outlined therein.

The record indicates that on June 26, 2018, the House of Delegates adopted House Resolution 201. This Resolution empowered the House Committee on the Judiciary to investigate impeachable offenses against the Petitioner and the other four Justices of the Supreme Court.[6] Under the Resolution, the Judiciary Committee was required to report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact; and, if the recommendation was that of impeachment of any of the Justices, the Committee had to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment. Upon receipt of a proposed Resolution of Impeachment and Articles of Impeachment by the House of Delegates, Resolution 201 authorized the House to adopt a Resolution of Impeachment and formal articles of impeachment as prepared by the Judiciary Committee, and deliver the same to the Senate for consideration.

The Judiciary Committee conducted impeachment hearings between July 12, 2018 and August 6, 2018.

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[6] On July 11, 2018 Justice Ketchum resigned/retired effective July 27, 2018. As a result of his decision the Judiciary Committee did not consider impeachment offenses against him.

On August 7, 2018, the Judiciary Committee adopted fourteen Articles of Impeachment. The Petitioner was named in four of the Articles of Impeachment. On August 13, 2013, the House of Delegates voted to approve only eleven of the Articles of Impeachment. The Petitioner was impeached on three of the Articles of Impeachment.[7] First, the Petitioner and Justice Davis were named in Article IV,[8] which alleged that they improperly authorized the overpayment of senior-status judges.[9] Second, the Petitioner was named exclusively in Article VI, which alleged that she improperly authorized the overpayment of senior-status judges.[10] Third, the Petitioner was named, along with three other justices, in Article XIV, which set out numerous allegations against them which included charges that they failed to implement various administrative policies and procedures.[11]

Subsequent to the House of Delegates' adoption of the Articles of Impeachment they were submitted to the Senate for the purpose of conducting a trial. On August 20, 2018 the Senate adopted Senate Resolution 203, which set forth the rules of procedure for the

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[7] Justice Walker was named in 1 Article; Justice Davis was named in 4 Articles; and Justice Loughry was named in 7 Articles.

[8] Justice Davis retired from office on August 13.

[9] The text of the Article is set out in the Discussion section of the opinion.

[10] The text of the Article is set out in the Discussion section of the opinion.

[11] The text of the Article is set out in the Discussion section of the opinion.

impeachment trial. A pre-trial conference was held on September 11, 2018. At that conference the Petitioner, Justice Walker, and the Board of Managers submitted a "Proposed Stipulation and Agreement of Parties" that would have required the charges against both of them be dismissed.[12] The Senate voted to reject the settlement offer. Thereafter Acting Chief Justice Farrell set a separate trial date for the Petitioner on October 15, 2018. The Petitioner subsequently filed this proceeding to have the Articles of Impeachment against her dismissed.

II.

THIS COURT'S JURISDICTION TO ADDRESS CONSTITUTIONAL ISSUES ARISING FROM THE COURT OF IMPEACHMENT

Before we examine the merits of the issues presented we must first determine whether this Court has jurisdiction over issues arising out of a legislative impeachment proceeding. The Respondents contend that this Court does not have jurisdiction over the impeachment proceeding.[13] This is an issue of first impression for this Court.

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[12] The Board of Managers are "a group of members of the House of Delegates authorized by that body to serve as prosecutors before the Senate in a trial of impeachment." Rule 1, Senate Resolution 203.

[13] One of the arguments made by the Respondents is that this Court should not address the merits of the Petitioner's arguments, because she has raised a similar challenge to the Articles of Impeachment in the proceeding pending before them

Resolution of this issue requires an analysis of constitutional principles. In undertaking our analysis we are reminded that the United States Supreme Court stated in *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962), that the determination of whether a matter is exclusively committed by the constitution to another branch of government "is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution." We are also guided by the principle that

> A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike

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that has not been ruled upon. Ordinarily this Court would defer to a lower tribunals [sic] ruling on a matter before this Court will address it. However, we have carved out a narrow exception to this general rule. In this regard, we have held that "[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. pt. 2, *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005). See *Simpson v. W. Virginia Office of Ins. Com'r*, 223 W. Va. 495, 504, 678 S.E.2d 1, 10 (2009) ("Nevertheless, we may consider this constitutional issue for the first time on appeal because it is central to our resolution of this case."); *State v. Allen*, 208 W. Va. 144, 151 n.12, 539 S.E.2d 87, 94 n.12 (1999) ("this Court may, under the appropriate circumstances, consider an issue initially presented for consideration on appeal."). We exercise our discretion to address the merits of the constitutional issues presented in this matter. See also, *State ex rel. Bd. of Educ. of Kanawha Cty. v. Casey*, 176 W. Va. 733, 735, 349 S.E.2d 436, 438 (1986) (recognizing that exhaustion of an alternative remedy is not required "where resort to available procedures would be an exercise in futility.").

> ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law.

State ex rel. Smith v. Gore, 150 W.Va. 71, 77, 143 S.E.2d 791, 795 (1965). Further,

> It is axiomatic that our Constitution is a living document that must be viewed in light of modern realities. Reasonable construction of our Constitution . . . permits evolution and adjustment to changing conditions as well as to a varied set of facts. . . . The solution [to problems of constitutional interpretation] must be found in a study of the specific provision of the Constitution and the best method [under current conditions] to further advance the goals of the framers in adopting such a provision.

State ex rel. McGraw v. Burton, 212 W. Va. 23, 36, 569 S.E.2d 99, 112 (2002) (internal quotation marks and citation omitted).

As an initial matter, we observe that "[q]uestions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, *Winkler v. State Sch. Bldg. Auth.*, 189 W.Va. 748, 434 S.E.2d 420 (1993). We have held that "[t]he object of construction, as applied to written constitutions, is to give effect to the intent of the people in adopting it." Syl. pt. 3, *Diamond v. Parkersburg-Aetna Corp.*, 146 W.Va. 543, 122 S.E.2d 436 (1961). This Court held in syllabus point 3 of *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791

(1965) that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Therefore, "[i]f a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision." Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953). On the other hand, "if the language of the constitutional provision is ambiguous, then the ordinary principles employed in statutory construction must be applied to ascertain such intent." *State ex rel. Forbes v. Caperton*, 198 W.Va. 474, 480, 481 S.E.2d 780, 786 (1996) (internal quotations and citations omitted). An ambiguous provision in a constitution "requires interpretation consistent with the intent of both the drafters and the electorate." *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 127, 207 S.E.2d 421, 436-437 (1973). Although we are empowered with the authority "to construe, interpret and apply provisions of the Constitution, . . . [we] may not add to, distort or ignore the plain mandates thereof." *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 643, 246 S.E.2d 99, 107 (1978).

It is axiomatic that "in every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself." *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W.Va. 276, 283, 438 S.E.2d 308, 315 (1993). The framework for

impeaching and removing an officer of the state is set out under Article IV, § 9 of the Constitution of West Virginia. The full text of Section 9 provides as follows:

> Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals, or, if from any cause it be improper for him to act, then any other judge of that court,[14] to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state; but the party convicted shall be liable to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the Legislature, for the trial of impeachments.

Pursuant to Section 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the

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[14] "Prior to the Judicial Reorganization Amendment [of 1974], the Justices of the Court were referred to as 'Judges' and the Chief Justice was referred to as 'President.' " *State v. McKinley*, 234 W. Va. 143, 150 n.3, 764 S.E.2d 303, 310 n.3 (2014).

sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). To facilitate the trial of an impeachment proceeding Section 9 created a Court of Impeachment.

It is clear from the text of Section 9 that it does not provide this Court with jurisdiction over an appeal of a final decision by the Court of Impeachment.[15] Consequently, and we so hold, in the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

Although it is clear that an appeal is not authorized from a decision by the Court of Impeachment, we do find under the plain language of Section 9, the actions or inactions of the Court of Impeachment may be subject to a proceeding under the original jurisdiction of this Court.[16] The authority for this proposition is contained in the Law and Evidence Clause found in Section 9, which states: "the senators shall . . . do justice according to law

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[15] The Constitution of West Virginia grants authority to the Legislature to provide appellate jurisdiction to this Court for areas of law that are not set out in the constitution. See W.Va. Const. Art. VIII, § 3 ([The Supreme Court] "shall have such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.").

[16] Article VIII, § 3 of the Constitution of West Virginia provides that "[t]he supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."

and evidence." The Law and Evidence Clause of Section 9 uses the word "shall" in requiring the Court of Impeachment to follow the law. We have recognized that "[t]he word 'shall,' . . . should be afforded a mandatory connotation[,] and when used in constitutions and statutes, [it] leaves no way open for the substitution of discretion." *Silveti v. Ohio Valley Nursing Home, Inc*., 240 W. Va. 468, 813 S.E.2d 121, 125 (2018) (internal quotation marks and citations omitted). See Syl. pt. 3, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense."). Insofar as the Law and Evidence Clause imposes a mandatory duty on the Court of Impeachment to follow the law, there is an implicit right of an impeached official to have access to the courts to seek redress, if he or she believes actions or inactions by the Court of Impeachment violate his or her rights under the law.[17]

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[17] It must be clearly understood that the Law and Evidence Clause is not superfluous language. Under the 1863 Constitution of West Virginia the impeachment provision was set out in Article III, § 10. The original version of the impeachment provision did not contain a Law and Evidence Clause. The 1863 version of the impeachment provision read as follows:

> Any officer of the State may be impeached for maladministration, corruption, incompetence, neglect of duty, or any high crime or misdemeanor. The house of delegates shall have the sole power of impeachment. The senate shall have the sole power to try impeachments. When sitting for that purpose, the senators shall be on oath or affirmation; and no

The implicit right of redress in the courts found in the Law and Evidence Clause, is expressly provided for in Article III, § 17 of the Constitution of West Virginia. Section 17 provides as follows:

> The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have

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> persons shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold any office of honor, trust or profit, under the State; but the party convicted shall, nevertheless, be liable and subject to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the legislature, for the trial of impeachments.

The Law and Evidence Clause was specifically added to the impeachment provision in the constitution of 1872. The affirmative creation and placement of the Law and Evidence Clause in the new constitution supports the significance this Court has given to that clause. A similar Law and Evidence Clause appears in the impeachment laws of 11 states. See Ariz. Const. Art. VIII, Pt. 2 § 1 (1910); Colo. Const. Art. XIII, § 1 (1876); Kan. Const. Art. II, § 27 (1861); Md. Const. Art. III, § 26 (1867); Miss. Const. Art. 4, § 49 (1890); Nev. Const. Art. VII, § 1 (1864); N.D. Cent. Code Ann. § 44-09-02 (1943); Ohio Const. Art. II, § 23 (1851); Utah Const. Art. VI, § 18 (1953); Wash. Const. Art. V, § 1 (1889); Wyo. Const. Art. III, § 17 (2016). There does not appear to be any judicial decisions from those jurisdictions addressing the application of the Law and Evidence Clause. It is also worth noting that under the 1863 Constitution of West Virginia there was no provision for a presiding judicial officer. The 1872 Constitution of West Virginia added the provision requiring a judicial officer preside over an impeachment proceeding. This requirement is further evidence that an impeachment proceeding was not beyond the jurisdiction of this Court, insofar as it solidified the quasi-judicial nature of the proceeding.

> remedy by due course of law; and justice shall be administered without sale, denial or delay.

The Certain Remedy Clause of Section 17 has been found to mean that "[t]he framers of the West Virginia Constitution provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system." *Bias v. E. Associated Coal Corp*., 220 W. Va. 190, 204, 640 S.E.2d 540, 554 (2006) (Starcher, J., dissenting). See *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977) ("[T]he concept of American justice . . . pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]"); *Gardner v. Buckeye Sav. & Loan Co*., 108 W.Va. 673, 680, 152 S.E. 530, 533 (1930) ("It is the proud boast of all lovers of justice that for every wrong there is a remedy."); *Lambert v. Brewster*, 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924) ("As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."). In the leading treatise on the Constitution of West Virginia, the following is said,

> The second clause of section 17, providing that all persons "shall have remedy by due course of law" . . . limits . . . the ability of the government to constrict an individual's right to invoke the judicial process[.]

Robert M. Bastress, *The West Virginia State Constitution*, at 124 (2011).

This Court has held that "enforcement of rights secured by the Constitution of this great State is engrained in this Court's inherent duty to neutrally and impartially interpret and apply the law." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 544, 782 S.E.2d 223, 239 (2016). That is, "[c]ourts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syl. pt. 3, *State ex rel. Casey v. Pauley*, 158 W.Va. 298, 210 S.E.2d 649 (1975).

Insofar as an officer of the state facing impeachment in the Court of Impeachment has a constitutional right to seek redress for an alleged violation of his or her rights by that court, we now hold that an officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia, may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.[18] See

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[18] The Respondents have argued in a footnote of their brief that "the Impeachment Clause vests absolute discretion in the context of impeachment in the Legislature." The Respondents cite to the decision in *Goff v. Wilson*, 32 W. Va. 393, 9 S.E. 26 (1889) as support for that proposition. *Goff* does not support the proposition and is not remotely relevant to this case. In *Goff* the petitioner wanted this Court to declare that he received the highest number of votes for the office of governor, before the Legislature carried out its duties in certifying the results of the election. We declined to intervene because no authority permitted this Court to intervene. Contrary to the Respondents' assertion, that the Legislature has absolute discretion in impeachment

Kinsella v. Jaekle, 192 Conn. 704, 723, 475 A.2d 243, 253 (1984) ("A court acting under the judicial power of . . . the constitution may exercise jurisdiction over a controversy arising out of impeachment proceedings only if the legislature's action is clearly outside the confines of its constitutional jurisdiction to impeach any executive or judicial officer; or egregious and otherwise irreparable violations of state or federal constitutional guarantees are being or have been committed by such proceedings."); *Smith v. Brantley*, 400 So.2d 443, 449 (Fla. 1981) ("The issue of subject matter jurisdiction for impeachment is properly determined by the judiciary, of course. Our conclusion on this question is that one must be such an officer to be impeachable."); *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) ("the courts have no jurisdiction in impeachment proceedings, and no control over their conduct, *so long as actions taken are within constitutional lines*.") (emphasis added); *People ex rel. Robin v. Hayes*, 82 Misc. 165, 172–73, 143 N.Y.S. 325, 330 (Sup. Ct. 1913) ("[A court] has no jurisdiction to inquire into the sufficiency of charges for which a Governor may be impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, *unless at their foundation, in their exercise,*

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matters, the Law and Evidence Clause of the constitution strips the Legislature of "absolute" discretion in such matters.

constitutional guaranties are broken down or limitations ignored.") (emphasis added).[19]

It will be noted that this Court held in syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) that "[u]nder the Separation of Powers doctrine, Article V, Section 1 of the Constitution of West Virginia, courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." This holding is not

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[19] This is not the first time that we have permitted access to this Court, under our original jurisdiction, when no right of appeal existed from a quasi-judicial proceeding. For example, a litigant in the former Court of Claims had no right to appeal a decision from that tribunal. However, this Court found that constitutional principles permitted access to this Court under our original jurisdiction:

> [T]his Court obviously may review decisions of the court of claims under the original jurisdiction granted by article VIII, section 2 of our Constitution, through proceedings in mandamus, prohibition, or certiorari. Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse must be available to protect basic principles of separation of powers.

G.M. McCrossin, Inc. v. W. Virginia Bd. of Regents, 177 W. Va. 539, 541 n.3, 355 S.E.2d 32, 33 n.3 (1987). See Syl. pt. 3, *City of Morgantown v. Ducker*, 153 W. Va. 121, 121, 168 S.E.2d 298, 299 (1969) ("Mandamus is the proper remedy to require the State Court of Claims to assume jurisdiction of a monetary claim against the Board of Governors of West Virginia University."). The Court of Claims was renamed in 2017 and is now called the "West Virginia Legislative Claims Commission." See W. Va. Code § 14-2-4 (2017).

applicable to the issue under consideration in the instant matter.[20] In *Holmes* the Court was called upon to address the issue of a circuit court issuing an order that required the Clerk of the Senate and the Clerk of the House of Delegates remove references to a pardon by the Governor in the official journals of the Senate and the House of Delegates. When the Clerks refused to obey the order, the circuit court issued a rule to show cause as to why they should not be held in contempt. This Court determined that the judicial order encroached on the exclusive authority of the Legislature to maintain journals:

> [T]he Clerks argue that it is beyond the authority of a circuit court to compel them to alter the Journals, whether in their printed form or in their electronic form published on the internet. The Clerks generally assert that the circuit court exceeded its jurisdiction, because the Journals are a protected legislative function under the Constitution of West Virginia. The Constitution of West Virginia vests the State's legislative power in a Senate and a House of Delegates. W.Va. Const., Art. VI, § 1. Each house of the Legislature is charged with determining its own internal rules for its proceedings and with choosing its own officers. W.Va. Const., Art. VI, § 24.

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[20] The Respondents cited to this case three times in their brief, but did not provide any discussion of the case.

> The Constitution mandates that each house must keep and publish a "journal of its proceedings." Article VI, Section 41 states:
>
> > Each house shall keep a journal of its proceedings, and cause the same to be published from time to time, and all bills and joint resolutions shall be described therein, as well by their title as their number, and the yeas and nays on any question, if called for by one tenth of those present shall be entered on the journal.
>
> A variation of this mandate has been in our Constitution since the founding of our State in 1863. The founding fathers indicated during the constitutional convention that there are two goals underlying this provision: to ensure that the votes of legislators are correctly recorded, and to make a public record of the actions of legislators.

Holmes, 226 W. Va. at 483–84, 702 S.E.2d at 615–16. The facts giving rise to syllabus point 3 in *Holmes* clearly establish the limitations of that syllabus point. That is, the facts of the case concerned a trial court interfering in legislative administrative matters when no legal authority permitted such interference. Neither the opinion nor syllabus point 3 were intended to limit the authority of this Court to entertain an extraordinary writ against the Legislature when the law permits. For example, the case of *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) involved several consolidated actions for

prohibition and mandamus against the Speaker of the House of Delegates and government officials concerning the constitutionality of redistricting. This Court denied the writs and in doing so held that

> In the absence of constitutional infirmity, as the precedent evaluated above irrefutably establishes, the development and implementation of a legislative redistricting plan in the State of West Virginia are entirely within the province of the Legislature. The role of this Court is limited to a determination of whether the Legislature's actions have violated the West Virginia Constitution.

Cooper, 229 W. Va. at 614, 730 S.E.2d at 397. See *State ex rel. W. Virginia Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 715 S.E.2d 36 (2011) (granting mandamus in part against the Governor, Speaker of the House of Delegates and other government officials requiring a special election be called); *State ex rel. League of Women Voters of W. Virginia v. Tomblin*, 209 W. Va. 565, 578, 550 S.E.2d 355, 368 (2001) (finding that mandamus would be issued against the President of the Senate, Speaker of the House of Delegates and other government officials that required "the Legislature to only include as part of the budget digest information that has been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill."); *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 19, 462 S.E.2d 586, 594 (1995) granting mandamus against the President of the Senate and Speaker of the House of Delegates that required

"the Legislature to promptly draft legislation to replace the unconstitutional section of article 29A and additionally, to consider passage of legislation that would exempt certain administrative regulations from conformance with APA implementation requirements, such as where compliance with federal law is mandated."). In view of the foregoing, we hold that to the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

The Respondents have cited to the decision in *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) as authority for the proposition that the judiciary does not have jurisdiction over impeachment proceedings. In *Nixon*, a federal district judge was impeached and removed from office, in a proceeding in which the United States Senate allowed a committee to take testimony and gather evidence. The former judge filed a declaratory judgment action in a district court seeking a ruling that the Senate's failure to hold a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments. The District Court denied relief and dismissed the case. The Court of Appeals affirmed. The United States Supreme Court granted certiorari to determine whether the constitutional requirement that the Senate "try" cases of impeachment precludes the use of a committee to hear evidence. The opinion

held that the issue presented could not be brought in federal court. The Court reasoned as follows:

> We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Nixon, 506 U.S. at 236, 113 S.Ct. at 739.

The decision in *Nixon* is not controlling and is distinguishable. See *Peters v. Narick*, 165 W. Va. 622, 628 n.13, 270 S.E.2d 760, 764 n.13 (1980), modified on other grounds by *Israel by Israel v. W. Virginia Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) ("States have the power to interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted

comparable federal constitutional guarantees."). The narrowly crafted text of the impeachment provision found in the Constitution of the United States prevented the Supreme Court from finding a basis for allowing a constitutional challenge to the impeachment procedure adopted by the Senate. The text of the federal impeachment provision is found in Article I, § 3 of the Constitution of the United States and provides the following:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

It is clear that Article 1 [sic], § 3 does not contain the Law and Evidence Clause that is found in Article IV, § 9 of the Constitution of West Virginia. Therefore, our constitution provides greater impeachment protections

than the Constitution of the United States.[21] See *State ex rel. K.M. v. W. Virginia Dep't of Health & Human Res.*, 212 W. Va. 783, 794 n.15, 575 S.E.2d 393, 404 n.15 (2002) ("it is clear that our Constitution may offer greater protections than its federal counterpart."); *State ex rel. Carper v. W. Virginia Parole Bd.*, 203 W. Va. 583, 590 n.6, 509 S.E.2d 864, 871 n.6 (1998) ("This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart."); *State v. Bonham*, 173 W. Va. 416, 418, 317 S.E.2d 501, 503 (1984) ("[T]he United States Supreme Court has also recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution. There are a number of cases where state supreme courts have set a higher level of protection under their own constitutions."); Syl. pt.2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) ("The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution."). Moreover, *Nixon* was not called upon to address the substantive type of issues presented in this case. The case was focused upon the right of the Senate to craft rules of procedure for impeachment.

The Respondents have cited to the decision in *In re Judicial Conduct Comm.*, 145 N.H. 108, 111, 751 A.2d 514, 516 (2000). In that case the New Hampshire

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[21] Even the Respondents have conceded in their brief that "West Virginia's Impeachment Clause is significantly broader than its counterpart in the United States Constitution."

House Judiciary Committee began an impeachment investigation into conduct by the state Supreme Court chief justice and other members of that court. The state Supreme Court Committee on Judicial Conduct filed a motion seeking an order requiring the House Committee to allow it to attend any House Committee deposition of any Judicial Conduct member or employee. The state Supreme Court held that the issue presented was a nonjusticiable political question and therefore denied relief. However, the opinion was clear in holding that the judiciary had authority to intervene in an impeachment proceeding:

> The [House Judiciary Committee] first argues that the judicial branch lacks jurisdiction over any matter related to a legislative impeachment investigation. We disagree.
>
> > The investigative power of the Legislature, however penetrating and persuasive its scope, is not an absolute right but, like any right, is "limited by the neighborhood of principles of policy which are other than those on which [that] right is founded, and which become strong enough to hold their own when a certain point is reached." United States v. Rumely, 345 U.S. 41, 44 [73 S.Ct. 543, 97 L.Ed. 770]; Hudson Water Co. v. McCarter, 209 U.S. 349, 355, [28 S.Ct. 529, 52 L.Ed. 828]. The contending principles involved here are those underlying the power of the Legislature to investigate on the one

> hand and those upon which are based certain individual rights guaranteed to our citizens by the State and National Constitutions.

Nelson v. Wyman, 99 N.H. 33, 41, 105 A.2d 756, 764 (1954).

* * *

The court system is available for adjudication of issues of constitutional or other fundamental rights. . . . In such circumstances, Part I, Article 17 of the New Hampshire Constitution does not deprive persons whose rights are violated from seeking judicial redress simply because the violation occurs in the course of an impeachment investigation.

* * *

The constitutional authority of the House of Representatives to conduct impeachment proceedings without interference from the judicial branch is extensive, but not so extensive as to preclude this court's jurisdiction to hear matters arising from legislative impeachment proceedings. "It is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it." *Petition of Mone*, 143 N.H. at 133, 719 A.2d at 631 (quoting *Monier*, 122 N.H. at 476, 446 A.2d at 455; citing *Merrill v. Sherburne*, 1 N.H. 199, 201-02 (1818)). However, upon briefing and argument, it is apparent that the specific issue raised by the JCC is nonjusticiable.

> Accordingly, the JCC's request for its special counsel to attend HJC depositions of JCC members and employees is denied.

In re Judicial Conduct, 145 N.H. at 110-113, 751 A.2d at 515. Although the Respondents cited to the decision in *In re Judicial Conduct*, it is clear that the constitutional principles of law discussed in the case are consistent with this Court's ruling, i.e., the judiciary may intervene in an impeachment proceeding to protect constitutional rights.

The Respondents cited to the decision in *Larsen v. Senate of Pennsylvania*, 166 Pa. Cmwlth. 472, 646 A.2d 694 (1994) without any discussion. In *Larsen* a former justice on the state Supreme Court was sentenced to removal from office by a trial court after he was found guilty of an infamous crime. The former justice filed for a preliminary injunction to prevent a senate impeachment trial and asserted numerous grounds for relief, that included: (1) he was no longer in office and could not be removed by the senate, (2) senate rules were unconstitutional, (3) the senate could not permit a committee to hear the case, and (4) he was denied sufficient time to prepare. The court, relying on the decision in *Nixon*, found that the state's impeachment clause was similar to the federal clause and therefore denied relief. However, the opinion noted that the decision by the state Supreme Court decision in *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) held that "the courts have no jurisdiction in impeachment proceedings and no control over their conduct, so long

as actions taken are within constitutional lines. . . ." *Larsen*, 166 Pa. Cmwlth. at 482, 646 A.2d at 699. The opinion limited *Dauphin's* qualification on judicial intervention to impeachment proceedings that had ended. The decision in *Larsen* is distinguishable because that state's impeachment clause was aligned with the federal impeachment clause, and did not have a Law and Evidence Clause like the Constitution of West Virginia. Moreover, Larsen recognized that it could not overrule the state Supreme Court's ruling in *Dauphin*, which left open the door for intervention in an impeachment proceeding for "actions [not] taken within constitutional lines." *Larsen* limited intervention to post-impeachment.

The Respondents have also cited to the decision in *Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988). In that case the state Governor filed a petition for injunctive relief with the state Supreme Court, to prevent the state senate from conducting an impeachment trial against him until his criminal trial was over. The Governor also challenged the impeachment procedures. The state Supreme Court denied relief as follows:

> [W]e can only conclude that the power of impeachment is exclusively vested in the House of Representatives and the power of trial on articles of impeachment belongs solely to the Senate. The Senate's task is to determine if the Governor should be removed from office. Aside from disqualification from holding any other state position of "honor,

> trust, or profit," the Senate can impose no greater or lesser penalty than removal and can impose no criminal punishment. Trial in the Senate is a uniquely legislative and political function. It is not judicial.

Mecham, 156 Ariz. at 302, 751 P.2d at 962. The decision in *Mecham* is factually distinguishable because it did not involve allegations of a violation of substantive constitutional rights. More importantly, even though the court in *Mecham* denied the requested relief, it made clear that the judiciary could intervene in an impeachment proceeding to protect the constitutional rights of an impeached official:

> This Court does have power to ensure that the legislature follows the constitutional rules on impeachment. For instance, should the Senate attempt to try a state officer without the House first voting articles of impeachment, we would not hesitate to invalidate the results.

Mecham, 156 Ariz. at 302-303, 751 P.2d at 962-963. See *Mecham v. Arizona House of Representatives*, 162 Ariz. 267, 782 P.2d 1160 (1989) (declining to review impeachment of state Governor because constitutional requirements were met).

In the instant proceeding the Petitioner has alleged that the impeachment charges brought against her are unlawful and violate her constitutional rights.

In view of the above analysis, we have jurisdiction to consider the validity of these allegations.[22]

III.

STANDARD OF REVIEW

The Petitioner filed this matter seeking a writ of mandamus to prohibit enforcement of the Articles of Impeachment filed against her. This Court has explained that the function of mandamus is "the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." *State ex rel. Ball v.*

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[22] The Respondents have argued that intervention in the impeachment proceeding violates the Guarantee Clause of the federal constitution. This clause provides as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Conts. [sic] Art. IV, § 4. The Respondents contend that the Guarantee Clause requires that a state have "separate and coequal branches" of government. In a convoluted manner the Respondents contend that this Court's intervention in this matter would destroy the "separate and coequal branches" of government. The Respondents have not cited to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause. See *New York v. United States*, 505 U.S. 144, 184, 112 S.Ct. 2408, 2432, 120 L.Ed.2d 120 (1992) ("In most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."). We find no merit in the contention. Further, the issue of the separation of powers doctrine is fully addressed in the Discussion section of this opinion.

Cummings, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999). It was held in syllabus point two of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) that

> A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

In our review of the type of relief the Petitioner seeks we do not believe that mandamus is the appropriate remedy. "In appropriate situations, this Court has chosen to treat petitions for extraordinary relief according to the nature of the relief sought rather than the type of writ pursued." *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 699, 619 S.E.2d 209, 212 (2005). See *State ex rel. Potter v. Office of Disciplinary Counsel of State*, 226 W. Va. 1, 2 n.1, 697 S.E.2d 37, 38 n.1 (2010) ("this Court has, in past cases, treated a request for relief in prohibition as a petition for writ of mandamus if so warranted by the facts. Accordingly, we consider the present petition as a request for mandamus relief."); *State ex rel. Beirne v. Smith*, 214 W. Va. 771, 774, 591 S.E.2d 329, 332 (2003) ("Although Mr. Bradley brought his case as a petition for a writ of prohibition, while Mr. Beirne requested a writ of mandamus, we choose to treat each as a petition for a writ of mandamus, because both petitioners wish to compel the Commissioner to do an affirmative act, i.e., pay benefits."); *State ex rel. Wyant v. Brotherton*,

214 W. Va. 434, 437, 589 S.E.2d 812, 815 (2003) ("Because we find this case to be in the nature of prohibition as opposed to mandamus, we will henceforth treat it as a petition for writ of prohibition."); *State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 771–72, 575 S.E.2d 377, 381–82 (2002) ("This case was initially brought as a petition for writ of habeas corpus and/or mandamus. We granted the writ of habeas corpus, leaving for resolution only issues related to mandamus. Upon further consideration of the issues herein raised, however, we choose (as we have done in many appropriate cases) to treat this matter as a writ of prohibition."); *State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 346, 571 S.E.2d 333, 336 (2002) ("Although this case was brought and granted as a petition for a writ of prohibition, we choose to treat it as a writ of mandamus action."); *State ex rel. Conley v. Hill*, 199 W.Va. 686, 687 n. 1, 487 S.E.2d 344, 345 n. 1 (1997) ("Although this case was brought and granted as a petition for mandamus, we choose to treat this matter as a writ of prohibition.").

In light of the issues raised by the Petitioner, we find that the more appropriate relief lies in a writ of prohibition. As a quasi-judicial body the Court of Impeachment is subject to the writ of prohibition. See *State ex rel. York v. W. Virginia Office of Disciplinary Counsel*, 231 W. Va. 183, 187 n.5, 744 S.E.2d 293, 297 n.5 (2013) ("prohibition lies against only judicial and 'quasi-judicial tribunals'[.]"); *Lewis v. Ho-Chunk Nation Election Bd.*, No. CV 06-109, 2007 WL 5297075 (Ho-Chunk Trial Ct. Apr. 17, 2007) ("Therefore, the

House may institute a case against a sitting president after determining probable cause of official wrongdoing, and, through designated managers, present the matter before the Senate, which assumes a quasi-judicial role in hearing and deliberating the charges."); *Mayor & City Council of Baltimore ex rel. Bd. of Police of City of Baltimore*, 1860 WL 3363, 15 Md. 376, 459 (1860) ("the present Constitution, invested the Legislature with quasi judicial functions, in exercising the power of impeachment and punishment, as therein provided."). The purpose of the writ is "to restrain inferior courts from *proceeding in causes over which they have no jurisdiction*[.]" Syl. pt. 1, in part, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953) (emphasis added). "The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 394, 655 S.E.2d 137, 140 (2007) (internal citation and quotation marks omitted). See W. Va. Code § 53-1-1 (1923) ("The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.").

In syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), we set forth the following guideline for issuance of a writ of prohibition that does not involve lack of jurisdiction:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

With the foregoing in mind, we turn to the merits of the case.

IV.

DISCUSSION

The Petitioner has presented several issues that she contends ultimately require the dismissal of the impeachment charges against her.[23] All of the arguments presented by the Petitioner have one common thread: they expressly or implicitly contend that the charges are brought in violation of the separation of powers doctrine. Because this common theme permeates all of her arguments, we will provide a separate discussion of that doctrine before we address the merits of each individual issue.

A.

The Separation of Powers Doctrine

"[T]he separation of powers doctrine [is] set forth in our State Constitution." *Erie Ins. Prop. & Cas. Co. v. King*, 236 W. Va. 323, 329, 779 S.E.2d 591, 597 (2015). The doctrine is set out in Article V, § 1 of the Constitution of West Virginia as follows:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor

[23] It was previously noted in this opinion that the Respondents chose not to address the merits of the issues presented. Even though the Respondents have not presented any sufficiently briefed legal arguments against the merits of Petitioner's arguments, they have referenced in general as to why certain claims by the Petitioner are not valid.

> shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.[24]

With regard to this provision, this Court has stated:

> The separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed.

State ex rel. W. Virginia Citizen Action Grp. v. Tomblin, 227 W. Va. 687, 695, 715 S.E.2d 36, 44 (2011), quoting *State v. Huber*, 129 W.Va. 198, 209, 40 S.E.2d 11, 18 (1946). It has been held that "Article V, section 1 of the Constitution . . . is not merely a suggestion; it is part of the fundamental law of our State and, as such, it

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[24] Under the 1863 Constitution of West Virginia the separation of powers doctrine was found in Article I, § 4. The doctrine was worded slightly differently in its original form as follows:

> The legislative, executive and judicial departments of the government shall be separate and distinct. Neither shall exercise the powers properly belonging to either of the others. No person shall be invested with or exercise the powers of more than one of them at the same time.

The 1872 Constitution of West Virginia rewrote the separation of powers doctrine and placed it in its present location.

must be strictly construed and closely followed." Syl. pt. 1, in part, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). We have observed that

> The separation of powers doctrine implies that each branch of government has inherent power to "keep its own house in order," absent a specific grant of power to another branch. . . . This theory recognizes that each branch of government must have sufficient power to carry out its assigned tasks and that these constitutionally assigned tasks will be performed properly within the governmental branch itself.

State v. Clark, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013). Further, the "separation of powers doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them." *Simpson v. W. Virginia Office of Ins. Com'r*, 223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009). It has also been observed that

> The Separation of Powers Clause is not self-executing. Standing alone the doctrine has no force or effect. The Separation of Powers Clause is given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of the doctrine.

State ex rel. Affiliated Constr. Trades Found. v. Vieweg, 205 W.Va. 687, 702, 520 S.E.2d 854, 869 (1999) (Davis, J., concurring). Professor Bastress has pointed out the purpose and application of the separation of powers doctrine as follows:

> A system of divided powers advances several purposes. First, it helps to prevent government tyranny. By allocating the powers among the three branches and establishing a system of checks and balances, the constitution ensures that no one person or institution will become too powerful and allow ambition to supersede the public good. . . .
>
> * * *
>
> Thus, under the current doctrine, the court's role is to apply Article V to ensure that the system of government in the state remains balanced and that no one branch assumes powers specifically delegated to another, or imposes burdens on another, or passes on its own responsibilities to another branch in such a manner as to threaten the balance of power, facilitate tyranny, or weaken the system of government.

Bastress, *West Virginia State Constitution*, at 141-144. See Syl. pt. 2, *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W.Va. 757, 296 S.E.2d 887 (1982) ("Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine

contained in Section 1 of Article V of the West Virginia Constitution.").

The decision in *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 207 S.E.2d 421 (1973) summarized the development of the separation of powers doctrine as follows:

> From the time of its adherence to by Montesquieu, the author or at least an early supporter of the concept of separation of powers, the political merit of that design of government has not been seriously questioned. Hodges v. Public Service Commission, 110 W.Va. 649, 159 S.E. 834; Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377. That concept was invoked in the early consideration of the formulation of our federal Constitution. Reflecting the import which he attributed to the concept of separation of powers in government, James Madison, in support of the proposed Constitution, wrote: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. * * * where the Whole power of one department is exercised by the same hands which possess the Whole *114 power of another department, the fundamental principles of a free constitution are subverted.' Speaking of the judiciary, Madison, quoting Montesquieu, wrote: "Were it (judicial power) joined to the executive power, The judge might behave

with all the violence of An oppressor." The Federalist Papers, Hamilton, Madison and Jay (Rossiter, 1961). Commenting on the relationship between the three recognized branches of government and the urgency of maintaining a wholly independent judiciary, Alexander Hamilton, in Essay No. 78 of The Federalist Papers, noted: 'The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.' With the real affirmative powers of government reposing in the hands of the executive and legislative branches, it becomes urgent that the judiciary department, one function of which under our fundamental law is to prevent encroachment by the other two branches, remains free and completely independent. As noted by Montesquieu in Spirit of Laws, Vol. 1, page 181: '* * * there is no liberty if the power of judging be not separated from the legislative and executive powers.' Thus, judicial independence is essential to liberty—lest the executive sword become a 'Sword of Damocles', precariously

> and intimidatingly suspended over the judicial head and the legislative law making power be used to usurp the rights granted by the Constitution to the people.

Brotherton, 157 W. Va. at 113–14, 207 S.E.2d at 430.

We have recognized that "[t]he system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." Syl. pt. 1, *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994). We have also determined that "the role of this Court is vital to the preservation of the constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." *State ex rel. Steele v. Kopp*, 172 W. Va. 329, 337, 305 S.E.2d 285, 293 (1983). See *State ex rel. W. Virginia Citizens Action Grp. v. W. Virginia Econ. Dev. Grant Comm.*, 213 W. Va. 255, 264, 580 S.E.2d 869, 878 (2003) ("Underlying any encroachment of power by one branch of government is the paramount concern that such action will impermissibly foster[] . . . dominance and expansion of power."). Moreover, this Court has never "hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers

of another branch of government." *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982). See, e.g., *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm.*, 213 W.Va. 255, 580 S.E.2d 869 (2003) (finding statute that gave legislature a role in appointing members of the West Virginia Economic Grant Committee violated Separation of Powers Clause); *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995) (finding statute which permitted administrative regulations to die if legislature failed to take action violated Separation of Powers Clause); *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966) (finding statute naming legislative officers to State Building Commission violated Separation of Powers Clause).

The United States Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933) articulated the need for separating the powers of government into three distinct branches:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Government of Philippine Islands*, 277 U.S. 189, 201, 48 S.Ct. 480, 72 L.Ed. 845; namely, to preclude a commingling of these essentially different powers of government in the same hands. . . .

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, *but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments*. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." 1 Andrews, The Works of James Wilson (1896), Vol. 1, p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." 1 Story on the Constitution, 4th ed. s 530.

O'Donoghue, 289 U.S. at 530–31, 53 S.Ct. at 743 (emphasis added).[25]

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[25] Although federal courts recognize the separation of powers doctrine, "the federal Constitution has no specific provision

It must also been understood that this Court "has long recognized that it is not possible that division of power among the three branches of government be so precise and exact that there is no overlapping whatsoever." *State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 341, 151 S.E.2d 870, 873 (1966), overruled in part by *State ex rel. Hill v. Smith*, 172 W. Va. 413, 305 S.E.2d 771 (1983). See *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982) ("we have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government[.]"). "While the Constitution contemplates the independent operation of the three fields of government as to all matters within their respective fields, there can be no doubt that the people, through their Constitution, may authorize one of the departments to exercise powers otherwise rightfully belonging to another department." *State ex rel. Thompson v. Morton*, 140 W.Va. 207, 223, 84 S.E.2d 791, 800–801 (1954).

With these general principles of the separation of powers doctrine guiding our analysis, we now turn to the merits of the issues presented.

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analogous to [Article V, § I [sic]]." Bastress, *West Virginia State Constitution*, at 141.

B.

An Administrative Rule Promulgated by the Supreme Court Supersede Statutes in Conflict with Them

The first issue we address is the Petitioner's contention that two of the Articles of Impeachment against her are invalid, because they can only be maintained by violating the constitutional authority of the Supreme Court to promulgate rules that have the force of law and supersede any statute that conflicts with them. The two Articles of Impeachment in question are Article IV[26] and Article

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[26] The text of Article IV was set out as follows:

> That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the

VI.[27] Both of those Articles charge the Petitioner with improperly overpaying senior-status judges. The

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salaries fixed by law" and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of 15 the [sic] provisions of W.Va. Code § 61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code § 61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

[27] The text of Article VI was set out as follows:

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-10; her authorization of such overpayments was a violation of the clear

Petitioner argues that the statute relied upon by Article IV and Article VI is in conflict with an administrative order promulgated by the Chief Justice.

We begin by observing that the 1974 Judicial Reorganization Amendment of the Constitution of West Virginia centralized the administration of the state's judicial system and placed the administrative authority of the courts in the hands of this Court.[28] See *State ex rel. Casey v. Pauley*, 158 W. Va. 298, 300, 210 S.E.2d 649, 651 (1975) ("The Judicial Reorganization Amendment was ratified by a large majority throughout the state."). The Amendment rewrote Article VIII, substituting §§ 1 to 15 for former §§ 1 to 30, amended § 13 of Article III, and added §§ 9 to 13 to Article IX. Justice Cleckley made the following observations regarding the changes:

> These changes include the entirety of the Reorganization Amendment and its concept

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> statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code § 61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code § 61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

[28] "The Judicial Reorganization Amendment was ratified on November 5, 1974." *State ex rel. Dunbar v. Stone*, 159 W. Va. 331, 333, 221 S.E.2d 791, 792 (1976).

of a unified court system administered by this Court and not the legislature. More specifically, that same amendment altered Section 1 of Article VIII to provide that the judicial power of the State "shall be vested solely " in this Court and its inferior courts. The predecessor provision to Section 1, though similarly worded, did not include the limiting adverb "solely." In addition, the Modern Budget Amendment insulated the judiciary from political retaliation by preventing the governor and legislature from reducing the judiciary's budget submissions. W.Va. Const., art. V, § 51; *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978); *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973). Taken together, these amendments create a strong and independent judiciary that can concentrate on delivering a high quality, fair, and efficient system of justice to the citizens of West Virginia. Such measures are particularly useful in a State such as ours that continues, and appropriately so, to elect judges to fixed terms of office. That is, because judges remain ultimately beholden to the electorate, the need is even greater to insulate the judiciary from the more routine politics of the annual budget process and legislative or executive manipulation.

* * *

[A]ltering the administrative structure did not negate all prior laws that are tangentially related to administrative matters. To the

> contrary, the Reorganization Amendment provides us with a hierarchy to be used in resolving administrative conflicts and problems. As we explained in *Rutledge*, this Court's "exclusive authority over the administration, and primary responsibility for establishing rules of practice and procedure, secures businesslike management for the courts and promotes simplified and more economical judicial procedures." 175 W.Va. at 379, 332 S.E.2d at 834. Under the Amendment, the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel. The judicial system was revised, among other things, to simplify the administrative process and to complement prior nonconflicting statutory and case law. Clearly, the administrative structure requires that if there is a conflict, we must not only consider the concerns of the parties, but also look at the hierarchy of the court system. The administration of the court is very important to the unobstructed flow of court proceedings and business. Court actions are complicated enough without adding to their complexity a struggle over every administrative decision to be made. The purpose of judicial administrative authority is to enhance and simplify our court system and not to burden it.

State ex rel. Frazier v. Meadows, 193 W. Va. 20, 26-28, 454 S.E.2d 65, 71-73 (1994). Professor Bastress has

compared the general authority of the Supreme Court before and after the Reorganization Amendment as follows:

> The third and fourth paragraphs, added by the Judicial Reorganization Amendment of 1974, establish the unitary judicial system in West Virginia. The first of those grants the court the power to promulgate rules of procedure relating to all aspects of judicial proceedings in the state. Although the court had previously asserted that as an inherent power, it also conceded that the legislature retained the ultimate authority. After the 1974 amendment, however, the court has ruled, in justifiable reliance on the language of section 3, that the court's rules supersede any legislation in conflict with a court-promulgated rule.

Bastress, *West Virginia State Constitution*, at 227. See *Foster v. Sakhai*, 210 W. Va. 716, 724 n.3, 559 S.E.2d 53, 61 n.3 (2001) ("the constitutional power and inherent power of the judiciary prevent another branch of government from usurping the Court's authority.").

One of the most important changes that the Reorganization Amendment made was to provide this Court with the exclusive constitutional authority to promulgate administrative rules for the effective management of the judicial system, that "have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl.

pt. 1, in part, *Stern Brothers, Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977). This authority is found in Article VIII, § 3 of the Constitution of West Virginia. We will address the relevant text of both provisions separately.[29]

To begin, we will look at the Rule-Making Clause of Section 3. The relevant text of the Rule-Making Clause of Section 3 provides as follows:

> The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.

Section 3 unquestionably provides this Court with the sole constitutional authority to promulgate rules for the judicial system, and demands that those rules have the force of law. See Syl. pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."); Syl. pt. 10, *Teter v. Old Colony Co*., 190 W. Va. 711, 714, 441 S.E.2d 728, 731 (1994) "Under Article VIII, . . . Section 3 of the Constitution of West Virginia (commonly

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[29] The authority of the Court to promulgate rules is also contained in Article VIII, § 8. This provision is discussed in the next section of this opinion.

known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988), superseded by statute as stated in *Miller v. Allman*, 240 W. Va. 438, 813 S.E.2d 91 (2018) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.").

The responsibility imposed on this Court by Section 3 was articulated in *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978):

> The Judicial Reorganization Amendment, Article VIII, Section 3, of the Constitution, placed heavy responsibilities on this Court for administration of the state's entire court system. The mandate of the people, so expressed, commands the members of the Court to be alert to the needs and requirements of the court system throughout the state.

Bagley, 161 W.Va. at 644–45, 246 S.E.2d at 107. "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." Syl. pt. 2, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997).

In carrying out the responsibility imposed by Section 3, this Court has not been hesitant in finding statutes void when they were in conflict with any rule promulgated by this Court. See Syl. pt. 1, *Witten v. Butcher*, 238 W. Va. 323, 794 S.E.2d 587 (2016) ("The provision in W. Va. Code § 3–7–3 (1963) requiring oral argument to be held in an appeal of a contested election, is invalid because it is in conflict with the oral argument criteria of Rule 18 of the West Virginia Rules of Appellate Procedure."); Syl. pt. 6, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013) ("Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule–Making Clause, Article VIII, § 3 of the West Virginia Constitution, West Virginia Code § 57–3–1 (1937), commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence."); Syl. pt. 3, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005) ("The provisions contained in W. Va. Code § 55–7B–6d (2001) were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code § 55–7B–6d, in its entirety, is unconstitutional and unenforceable."); *Games-Neely ex rel. W. Virginia State Police v. Real Property*, 211 W. Va. 236, 245, 565 S.E.2d 358, 367

(2002) ("Rule 60(b) has the force and effect of law; applies to forfeiture proceedings under the Forfeiture Act; and supersedes West Virginia Code § 60A–7–705(d) to the extent that Section 705(d) can be read to deprive a circuit court of its grant of discretion to review a default judgment order."); *Oak Cas. Ins. Co. v. Lechliter*, 206 W. Va. 349, 351 n.3, 524 S.E.2d 704, 706 n.3 (1999) ("We note, however, that to any extent that W. Va. Code § 56–10–1 may be in conflict with W. Va. R. Civ. P. Rule 22, it has been superseded."); *W. Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 150, 516 S.E.2d 769, 773 (1999) ("if W.Va. Code § 37–14–1 et seq., unambiguously prohibited anyone but a licensed or certified appraiser from testifying with regard to the value of real estate in a court proceeding, this prohibition would be contrary to the Rules of Evidence promulgated by this Court, pursuant to article eight, section three of our Constitution, and, thus, the prohibition would be void."); *State v. Jenkins*, 195 W. Va. 620, 625 n.5, 466 S.E.2d 471, 476 n.5 (1995) (finding W.Va. R. Evid. Rule 901 superseded W.Va. Code § 57-2-1); Syl. pt. 2, *Williams v. Cummings*, 191 W. Va. 370, 445 S.E.2d 757 (1994) ("West Virginia Code § 56-1-1(a)(7) provides that venue may be obtained in an adjoining county '[i]f a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court. . . .' This statute refers to a situation under which a judge might be disqualified, and therefore it is in conflict with and superseded by Trial Court Rule XVII, which addresses the disqualification and temporary assignment of

judges."); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (finding W.Va. Code, 55-7B-7, which outlined the qualifications of an expert in a medical malpractice case, was superseded by W.Va. R. Evid. 702); *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994) ("a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid."); Syl. pt. 2, *State ex rel. Gains v. Bradley*, 199 W. Va. 412, 484 S.E.2d 921 (1997) ("Rule 1B of the Administrative Rules for Magistrate Courts supersedes W.Va. Code § 50-4-7 (1992), and prospectively provides there is no automatic mandatory right of a party to have a magistrate disqualified."); *Gilman v. Choi*, 185 W. Va. 177, 178, 406 S.E.2d 200, 201 (1990), overruled on other grounds by *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) ("W.Va. Code, 55-7B-7 [1986], being concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence."); Syl. pt. 2, *State v. Davis*, 178 W. Va. 87, 88, 357 S.E.2d 769, 770 (1987), overruled on other grounds *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994) ("Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure supersedes the provisions of W.Va. Code, 62-9-1, to the extent that the indorsement of the grand jury foreman and attestation of the prosecutor are no longer required to be placed on the reverse side of the indictment. Such indorsement and attestation are sufficient if they appear on the face of the indictment."); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute in part that

was in conflict with W. Va. R.App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 425, 306 S.E.2d 233, 236 (1983) ("W.Va. Code, 30-2-1, as amended, is an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State."); Syl. pt. 2, in part, *Carey v. Dostert*, 170 W. Va. 334, 294 S.E.2d 137 (1982) "(West Virginia Code, 30-2-7 and a circuit court's common-law power to disbar are obsolete and have been superseded by . . . the Judicial Reorganization Amendment of our Constitution, Article VIII."); *State ex rel. Askin v. Dostert*, 170 W. Va. 562, 567, 295 S.E.2d 271, 276 (1982) (holding that to the extent W.Va. Code § 30-2-1 required security from attorneys to insure their good behavior, it "conflicts with the rules promulgated by this Court [and] must fall.").

Before we address the issue of overpayment of senior-status judges, we must examine the text of the Senior-Status Clause found in Article VIII, § 8 of the Constitution of West Virginia provides as follows:

> A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court.

The issue of the authority of the Chief Justice to appoint judges for temporary service has been addressed in two cases by this Court. First, in *State*

ex rel. Crabtree v. Hash, 180 W. Va. 425, 376 S.E.2d 631 (1988) the judge for the Fifth Judicial Circuit (consisting of Calhoun, Jackson and Roane counties) retired from office. A special judge was elected and appointed to fill the vacancy by several members of the Jackson County Bar Association, pursuant to W.Va. Code § 51-2-10.[30] The Administrative Director of this Court filed a writ of prohibition to prevent the newly appointed judge from holding office. The opinion succinctly held that the statute was void as follows:

> W.Va. Const. art. VIII, §§ 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede W.Va. Code, 51-2-10 [1931] and vest the Chief Justice of the Supreme Court of Appeals with the sole power to appoint a judge for temporary service in any situation which requires such an appointment.
>
> * * *
>
> Any election conducted pursuant to W.Va. Code, 51-2-10 [1931] is void as the constitutional power to assign judges for temporary service rests with the Chief Justice of the West Virginia Supreme Court of Appeals.

Crabtree, 180 W. Va. at 428, 376 S.E.2d at 634. In a footnote in *Crabtree* this Court made further observations relevant to this proceeding:

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[30] This statute was subsequently repealed.

> W.Va. Const. art. VIII, governing the judiciary, has only been amended twice in the State's history, in 1880 and 1974. Prior to 1974, the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the legislature had substantial authority, including the power to create laws concerning special judges. W.Va. Const. art. VIII, § 15 (repealed) stated: "The legislature shall provide by law for holding regular and special terms of the circuit courts, where from any cause the judge shall fail to attend, or, if in attendance, cannot properly preside."
>
> The upshot of this authority was W.Va. Code, 51-2-10 [1931]. By virtue of former art. VIII, § 15, this Court had no constitutional authority to act in such matters.
>
> However, as a result of the Judicial Reorganization Amendment of 1974, the legislature was divested of all administrative powers over state court judges. No provision similar to former art. VIII, § 15 exists. Instead, this Court was given "general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts," and the Chief Justice, as "administrative head of all the courts," was specifically given the power of temporary assignment of circuit judges.

Crabtree, 180 W. Va. at 427 n.3, 376 S.E.2d at 633 n.3 (internal citations omitted).

The decision in *Stern Bros. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977) addressed the issue of statutes that attempted to control assignments of judges, but were in conflict with an administrative rule of this Court. In *Stern* the defendants filed a writ of prohibition with this Court to have a substitute trial judge removed from their case. The trial judge was appointed by the Chief Justice of this Court because the original judge was disqualified. The defendants argued that the manner in which the substitute judge was appointed was inconsistent with the statutory scheme for appointing a substitute judge when the original judge is disqualified. This Court found that the administrative rule adopted by this Court for the appointment of a substitute judge invalidated the statutes. The opinion reasoned as follows:

> Procedures for appointment of a substitute judge were promulgated by this Court on May 29, 1975, in an administrative rule dealing with the temporary assignment of circuit court judges where a particular judge is disqualified from handling a case. . . .
>
> The power to promulgate administrative rules is expressly conferred upon this Court under the Judicial Reorganization Amendment, and under Section 8 explicit recognition is made of the inherent rulemaking power of the Court, which prior to the Judicial Reorganization Amendment had been utilized by this Court to adopt judicial rules.
>
> Such rules have the force and effect of statutory law by virtue of Article VIII,

Section 8 of the Judicial Reorganization Amendment. . . . Prior to the adoption of the Judicial Reorganization Amendment, there may have been some question as to this Court's supervisory powers over lower courts. It is now quite clear under the Judicial Reorganization Amendment that considerable supervisory powers have been conferred upon this Court. There was also some confusion prior to the Judicial Reorganization Amendment as to what further action a disqualified judge could take in the case. This arose partly out of the fact that there was no clear authority in the Supreme Court to temporarily assign judges in such situations.

Consequently, the disqualified judge had either to initiate the election of a special judge pursuant to W.Va. Code, 51-2-10, or to attempt to transfer the case to another circuit court in accordance with W.Va. Code, 56-9-2.

The statute relating to disqualification of judges contained a proviso permitting the judge " . . . to enter a formal order designed merely to advance the cause towards a final hearing and not requiring judicial action involving the merits of the case." W.Va. Code, 51-2-8. . . .

Undoubtedly, one of the reasons behind the Judicial Reorganization Amendment was to provide a more simplified system of handling the problem of securing a replacement judge where the original judge is disqualified. The former procedures were cumbersome at

> best. Special judge elections were constantly attacked and in many instances overturned because of some technical failure to follow W.Va. Code, 51-2-10.
>
> The administrative rule promulgated by this Court now controls the procedure for selection of a temporary judge where a disqualification exists as to a circuit court judge. Under Article VIII, Section 8 of the West Virginia Constitution, it operates to supersede the existing statutory provisions found in W.Va. Code, 51-2-9 and -10, and W.Va. Code, 56-9-2, insofar as they relate to the selection of special judges or the assignment of the case to another circuit judge when a circuit judge is disqualified.

Stern, 160 W. Va. at 572-575, 236 S.E.2d at 225-227.[31]

In the final analysis, the foregoing discussion instructs this Court that statutory laws that are repugnant to the constitutionally promulgated rules of this Court are void. With these legal principles in full view, we turn to the merits of the issue presented.

Two of the Articles of Impeachment brought against the Petitioner, Article IV and Article VI, charge

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[31] It will be noted that the Legislature repealed W.Va. Code §§ 51-2-9 and 10 in 1992. Although W.Va. Code § 56-9-2, which was enacted in 1868 and last amended 1923, was invalidated by *Stern* the Legislature has not repealed it.

her with overpaying senior-status judges in violation of the maximum payment allowed under W.Va. Code § 51-9-10. The Articles of Impeachment also state that the overpayments violated W.Va. Code § 51-2-13, W.Va. Const. Art. VIII, § 7, an administrative order of the Supreme Court and Canon [sic] I and II of the West Virginia Code of Judicial Conduct. The Articles also allege that the overpayments "potentially" violate two criminal statutes: W.Va. Code § 61-3-22 (falsification of accounts) and W.Va. Code § 61-3-24 (obtaining money by false pretenses).[32] The viability of all of the alleged violations in the two Articles hinge upon whether the Petitioner overpaid senior-status judges. The determination of overpayment is controlled by W.Va. Code § 51-9-10, which limits the payment to senior-status judges. The full text of W.Va. Code § 51-9-10 provides as follows:

> The West Virginia supreme court of appeals is authorized and empowered to create a panel of senior judges to utilize the talent and experience of former circuit court judges and supreme court justices of this state. The supreme court of appeals shall promulgate rules providing for said judges and justices to be assigned duties as needed and as feasible toward the objective of reducing caseloads and

[32] We must note that "potentially" violating a criminal statute is not wrongful impeachable conduct. Therefore the language in the Articles of Impeachment that state that W.Va. Code § 61-3-22 and W.Va. Code § 61-3-24 were "potentially" violated are meaningless allegations.

> providing speedier trials to litigants throughout the state: Provided, That reasonable payment shall be made to said judges and justices on a per diem basis: Provided, however, That *the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting judge*, and allowances shall also be made for necessary expenses as provided for special judges under articles two and nine of this chapter.[33] (Emphasis added.)

The Petitioner does not dispute that she authorized the payment of senior-status judges, when necessary, in excess of the limitation imposed by the statute. Although the Petitioner has advanced several arguments as to why her conduct was valid, we need only address one of her arguments. That argument centers on an administrative order promulgated by the Chief Justice on May 17, 2017.[34] The order expressly authorized the payment of senior-status judges in excess of the limitation imposed by W.Va. Code § 51-9-10. The order stated that it was being promulgated under the authority of Article III, §§ 3, 8, and 17. The order also stated the reason for the decision to authorize payment in excess of the statutory limitation:

> In the vast majority of instances, the statutory proviso [W.Va. Code § 51-9-10] does not interfere with providing essential

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[33] This statute was originally enacted in 1949 and was amended in 1975 and 1991.

[34] The Chief Justice at that time was Justice Loughry.

> services. However, in certain exigent circumstances involving protracted illness, lengthy suspensions due to ethical violations, or other extraordinary circumstances, it is impossible to assure statewide continuity of judicial services without exceeding the payment limitation imposed by the statutory proviso.

The Petitioner provided an illustration of a situation where it was necessary to pay a senior-status judge in excess of the statutory limitation:

> For example, in 2017, the Supreme Court of Appeals suspended a newly elected circuit court judge of Nicholas County for two years because of violations of the code of judicial ethics in certain campaign advertisements. *In re Callaghan*, 238 W.Va. 495, 503, 796 S.E.2d 604, 612, cert. denied sub. nom., *Callaghan v. W. Virginia Judicial Investigation Comm'n*, 138 S.Ct. 211, 199 L.Ed.2d 118 (2017). Because the newly elected Judge was suspended for two years, and because Nicholas County is a single judge judicial circuit, an extraordinary need for temporary judicial services arose in order to provide the people of Nicholas County with court services and to avoid the unconstitutional denial of access to the speedy administration of justice. The Chief Justice appointed senior status Judge James J. Rowe to serve as the temporary circuit judge of Nicholas County. Judge Rowe travels from his home in Lewisburg each day to perform this service. Judge Rowe serves the people of Nicholas

> County effectively, attending to the cases on the circuit court's docket. Using one senior status judge, rather than parading multiple judges through the courthouse, allows for the efficient and consistent adjudication of the matters pending in Nicholas County.

Prior to the Reorganization Amendment, "the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the Legislature had substantial authority, including the power to create laws concerning special judges." *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 427, 376 S.E.2d 631, 633 (1988). This authority is evident in W.Va. Code § 51-9-10 which, as noted, was enacted in 1949. We have observed as a general matter that "[t]he 1974 Judicial Reorganization Amendment to our State Constitution also recognized that previously enacted laws repugnant to it were voided." *Carey v. Dostert*, 170 W. Va. 334, 336, 294 S.E.2d 137, 139 (1982). See W.Va. Const. Art. VIII, § 13 ("Except as otherwise provided in this article, such parts of the common law, and of the laws of this state as are in force on the effective date of this article *and are not repugnant thereto*, shall be and continue [sic] the law of this state until altered or repealed by the Legislature.") (emphasis added). West Virginia Code § 51-9-10, in its entirety, is repugnant to Article VIII, § 3 and § 8. The statute seeks to control a function of the judicial system, appointing senior-status judges for temporary service, when Article VIII, § 8 has expressly given that function exclusively to the Supreme Court. Moreover, the statute's limitation

on payment to senior-status judges is void and unenforceable, because of the administrative order promulgated on May 17, 2017.[35] See Syl. pt. 4, *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973) ("The judiciary department has the inherent power to determine what funds are necessary for its efficient and effective operation."). Finally, as we have long held, "[l]egislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). To be clear, and we so hold, West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.[36]

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[35] It is not relevant that the administrative order was entered several years after the Petitioner's authorized payments. The statute was void at the time in which the Respondents sought to impeach her.

[36] We summarily dispense with the Articles of Impeachment's reference to the Salary Clause of Article VIII, § 7 as a source of legislative authority for regulating payments to senior-status judges. This clause does not provide such authority. The Salary Clause provides as follows:

> Justices, judges and magistrates shall receive the salaries fixed by law, which shall be paid entirely out of the state treasury, and which may be increased but

In light of our holding, the Petitioner did not overpay any senior-status judge as alleged in Article IV and Article VI of the Articles of Impeachment, therefore the Respondents are prohibited fromP further prosecution of the Petitioner under those Articles.

C.

The Supreme Court has Exclusive Jurisdiction to Determine whether a Judicial Officer's Conduct Violates a Canon of the Code of Judicial Conduct

The Petitioner next contends that Article XIV of the Impeachment Articles is invalid because it is based upon alleged violations of the West Virginia Code of Judicial Conduct, which, she contends, is

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> shall not be diminished during their term of office, and they shall receive expenses as provided by law. The salary of a circuit judge shall also not be diminished during his term of office by virtue of the statutory courts of record of limited jurisdiction of his circuit becoming a part of such circuit as provided in section five of this article.

It is clear from the plain text of the Salary Clause that it only applies to salaries of judges "during their term of office." See Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("If a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision."). Senior-status judges are retired judges and do not hold an office. Therefore, the Salary Clause does not provide the Legislature with authority to regulate the per diem payment of senior-status judges.

constitutionally regulated by the Supreme Court.[37] To be blunt, Article XIV is an unwieldy compilation

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[37] The text of Article XIV was set out as follows:

> That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets-including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:
>
> > A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a

of allegations that culminate with the accusation that the Petitioner's conduct, with respect to the allegations, violated Canon I[38] and Canon II[39] of the Code of Judicial Conduct.[40] We agree with the Petitioner that this Court has exclusive constitutional jurisdiction over conduct alleged to be in violation of the Code of Judicial Conduct.

The controlling constitutional authority is set out under Article VIII, § 8 of the Constitution of West Virginia. We have held that "[p]ursuant to article VIII, section 8 of the West Virginia Constitution, this Court has the inherent and express authority to 'prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices,

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> system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.
>
> The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute [sic] a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

[38] Canon I states the following:

> A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

[39] Canon II states the following:

> A judge shall perform the duties of judicial office impartially, competently, and diligently.

[40] We will note that Article IV and Article VI of the Articles of Impeachment also contained allegations that Canon I and Canon II were violated.

judges and magistrates, along with sanctions and penalties for any violation thereof[.]'" Syl. pt. 5, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994). The relevant text of Section 8 provides as follows:

> Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this state) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.
>
> * * *
>
> When rules herein authorized are prescribed, adopted and promulgated, they shall supersede

> all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

This Court's express constitutional authority to adopt rules of judicial conduct and discipline is obvious from the language of Section 8. Pursuant to this express authority, we have adopted the Code of Judicial Conduct and the Rules of Judicial Disciplinary Procedure. Under Rule 4.10 and Rule 4.11 of the Rules of Judicial Disciplinary Procedure, this Court has the exclusive authority to determine whether a justice, judge, or magistrate violated the Code of Judicial Conduct. The record does not disclose that this Court has found that the Petitioner violated Canon I or Canon II, based upon the allegations alleged in Article XIV of the Articles of Impeachment. Moreover, even if the record had disclosed that the Petitioner was previously found to have violated the Canons in question, those violations could not have formed the basis of an impeachment charge. This is because of the limitations imposed upon the scope of a Canon violation that is found by this Court. The following is provided in Item 7 of the Scope of the Code of Judicial Conduct:

> The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to

> obtain tactical advantages in proceedings before a court.

It is quite clear that Item 7 prohibits a Canon violation from being used as the "basis" of a civil or criminal charge and, thus, could not be used as a basis for impeaching the Petitioner.[41] This Court observed in *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013):

> Just as the legislative branch has the power to examine the qualifications of its own members and to discipline them, this Court has the implicit power to discipline members of the judicial branch. The Court has this power because it is solely responsible for the protection of the judicial branch, and because the power has not been constitutionally granted to either of the other two branches.

Watkins, 233 W. Va. at 177, 757 S.E.2d at 601.

It is quite evident to this Court that the impeachment proceedings under Article XIV of the Articles of Impeachment requires the Court of Impeachment to make a determination that the Petitioner violated Canon I and Canon II. Such a determination in that forum violates the separation of

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[41] It has long been recognized that an impeachment proceeding is civil in nature. See *Skeen v. Craig*, 31 Utah 20, 86 P. 487, 487-488 (1906) ("The question as to whether [impeachment] proceedings of this kind to remove from office a public official are civil or criminal has been before the courts of other states, and, while the decisions are not harmonious, yet the great weight of authority, and as we think the better reasoned cases hold that such actions are civil.").

powers doctrine, because pursuant to Article VIII, § 8 of the Constitution of West Virginia, this Court has the exclusive authority to determine whether the Petitioner violated either of those Canons. In other words, and we so hold, this Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct. Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

The Respondents have argued that "to hold that the Legislature cannot consider the Code of Judicial Conduct in its deliberation of impeachment proceedings against a judicial officer would have the absurd result of prohibiting removal from office for any violations of the Code of Judicial Conduct." This argument misses the point. Unquestionably, the Legislature can consider in its deliberations whether there was evidence showing that this Court found a judicial officer violated a Canon. However, the Canon violation itself cannot be the basis of the impeachment charge—at most it could only act as further evidence for removal based upon other valid charges of wrongful conduct.

In light of our holding, the Court of Impeachment does not have jurisdiction over the alleged violations set out in Article XIV of the Articles of Impeachment,

therefore the Respondents are prohibited from further prosecution of the Petitioner under that Article as written.[42]

D.

The Articles of Impeachment were Filed in Violation of Provisions of House Resolution 201

Although we have determined that the Petitioner is entitled to relief based upon the foregoing, we believe that the remaining issues involving the failure to comply with two provisions of House Resolution 201 are not moot. This Court set forth a three-prong test to determine whether we should rule on the merits of technically moot issues in syllabus point 1 of *Israel by*

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[42] We must also note that even if Article XIV of the Articles of Impeachment had set out a valid basis for impeachment, it would still not pass constitutional muster on due process grounds, because it is vague and ambiguous. See *State v. Bull*, 204 W. Va. 255, 261, 512 S.E.2d 177, 183 (1998) ("Claims of unconstitutional vagueness in [charging instruments] are grounded in the constitutional due process clauses, U.S. Const. amend. XIV, Sec. 1, and W.Va. Const. art. III, Sec. 10."). As drafted, the Article failed to specify which Justice committed any of the myriad of conduct allegations. The Petitioner had a constitutional right to be "adequately informed of the nature of the charge[.]" *State v. Hall*, 172 W. Va. 138, 144, 304 S.E.2d 43, 48 (1983). See Single Syllabus, *Myers v. Nichols*, 98 W. Va. 37, 126 S.E. 351 (1925) ("While charges for the removal of a public officer need not be set out in the strict form of an indictment, they should be sufficiently explicit to give the defendant notice of what he is required to answer.").

Israel v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 454, 388 S.E.2d 480 (1989):

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

We believe that there may be collateral consequences in failing to address the issues, the issues are of great public importance, and the issues may present themselves again. *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 297, 569 S.E.2d 809, 818 (2002) ("Because of the possibility that the Division's continued utilization of this system may escape review at the appellate level, we address the merits of this case under the . . . exception to the mootness doctrine.").

The Petitioner has argued that House Resolution 201 required the House Committee on the Judiciary to set out findings of fact in the Articles of Impeachment and required the House of Delegates adopt a resolution of impeachment. The Petitioner contends that neither of these required tasks were performed and that her

right to due process was violated as a consequence. We agree.

We begin by noting that "[t]he threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." *Clarke v. West Virginia Board of Regents*, 166 W.Va. 702, 709, 279 S.E.2d 169, 175 (1981).[43] See Syl. Pt. 1, *Waite v. Civ. Serv. Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against state action which affects a liberty or property interest."). We have held as a general matter that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *State ex rel. Wilson v. Truby*, 167 W. Va. 179, 188, 281 S.E.2d 231, 236 (1981). The Petitioner has both a liberty[44]

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[43] Article III, § 10 of the Constitution of West Virginia provides as follows:

> No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

[44] See Syl. pt. 2, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The 'liberty interest' includes an individual's right to freely move about, live and work at his chosen vocation, without

and property[45] interest in having the impeachment rules followed. The Petitioner has a liberty interest in not having her reputation destroyed in the legal community and public at-large by being impeached and removed from office; and she has a property interest in obtaining her pension when she chooses to retire.

We begin by noting the record supports the Petitioner's contention that House Resolution 201 required the Judiciary Committee to set out findings of fact, and that this was not done. Rule 3 and 4 of Resolution 201 required the Judiciary Committee to do the following:

> 3. To make findings of fact based upon such investigation and hearing(s);
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> 4. To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact which the Committee may deem proper.

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the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities.").

[45] See Syl. pt. 3, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.").

The record demonstrates that the Judiciary Committee was aware that it failed to carry out the above duties, but refused to correct the error. The following exchange occurred during the proceedings in the House regarding the failure to follow Rules 3 and 4:

> MINORITY VICE CHAIR FLUHARTY: Thank you, Mr. Chairman. Counsel, I was going through these Articles. Where are the findings of fact?
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> MR. CASTO: Well, there—there are no findings of fact there. The Committee—
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> MINORITY VICE CHAIR FLUHARTY: Where?
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> MR. CASTO: I said, sir, there are no findings of fact.
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> MINORITY VICE CHAIR FLUHARTY: There are no findings of fact? All right. Have you read House Resolution 201?
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> MR. CASTO: I have sir, but I have not read it today.
>
> MINORITY VICE CHAIR FLUHARTY: Well, do you know that we're required to have findings of fact?
>
> MR. CASTO: I think, sir, that my understanding is—based upon the Manchin Articles—that the term "findings of fact" which was used at the same time, that the profferment of these Articles is indeed

> equivalent to a findings of fact. The—but that, again, is your interpretation, sir.
>
> MINORITY VICE CHAIR FLUHARTY: So based upon the clear wording of House Resolution 201, it says we're "To make findings of fact based upon such investigation and hearings;" and "To report to the Legislature its findings of facts and any recommendations consistent with those findings of facts which the Committee may deem proper." I mean, you're—you're aware how this works in the legal system. You draft separate findings of fact. I'm just wondering why we haven't done that.
>
> MR. CASTO: Because, sir, that is not the manner in which impeachment is done.
>
> MINORITY VICE CHAIR FLUHARTY: Well, findings of fact in House Resolution 201 are referenced separate from proposed Articles of Impeachment. Am I wrong in that observation?
>
> MR. CASTO. I don't believe that you're wrong in that.

The record also discloses that the Judiciary Committee was warned by one of its members of the consequences of its failure to follow its own rules:

> MINORITY CHAIR FLEISCHAUER: Thank you, Mr.—thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it—it says that we are to

> make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.
>
> * * *
>
> And I'm just a little concerned that if we don't have findings of fact that there could be some flaw that could mean that the final Resolution by the House would be deemed to be not valid.
>
> * * *
>
> So I think we—if there—there would be some wisdom in trying to track the language of the Resolution, and it would be consistent with any other proceeding that we have in West Virginia that when there are requirements of findings of fact and—in this case, it's not conclusions of law, but it's recommendations—that we should follow that.

As previously stated, the Petitioner has also asserted that the House of Delegates failed to adopt a resolution of impeachment. Rule 2 of the last Further Resolved section of Resolution 201 provides as follows:

> Further resolved . . . that the House of Delegates adopt a resolution of impeachment and formal articles of impeachment as prepared by the Committee; and that the House of Delegates deliver the same to the Senate in accordance with the procedures of

> the House of Delegates, for consideration by the Senate according to law.

A review of the Articles of Impeachment that were submitted to the Senate unquestionably shows that the House of Delegates failed to include language indicating that the Articles were adopted by the House.

We are gravely concerned with the procedural flaws that occurred in the House of Delegates. Basic due process principles demand that governmental bodies follow the rules they enact for the purpose of imposing sanctions against public officials. This right to due process is heightened when the Legislature attempts to impeach a public official. Therefore we hold, in the strongest of terms, that the Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

We must also point out that the Petitioner was denied due process because none of the Articles of Impeachment returned against her contained a statement that her alleged wrongful conduct amounted to maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor, as required by Article IV, § 9 of the Constitution of West Virginia. This is the equivalent of an indictment failing to allege the essential elements of wrongful conduct. See Syl. pt. 1, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d

115 (1966) ("In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.").

V.

CONCLUSION

We have determined that prosecution of Petitioner for the allegations set out in Article IV, Article VI and Article XIV of the Articles of Impeachment violates the separation of powers doctrine. The Respondents do not have jurisdiction over the alleged violations in Article IV and Article VI. The Respondents also do not have jurisdiction over the alleged violation in Article XIV as drafted. In addition, we have determined that the failure to set out findings of fact, and to pass a resolution adopting the Articles of Impeachment violated due process principles. Consequently, the Respondents are prohibited from proceeding against the Petitioner for the conduct alleged in Article IV and Article VI, and in Article XIV as drafted. The Writ of Prohibition is granted. The Clerk is hereby directed to issue the mandate contemporaneously forthwith.

Writ granted.

Bloom, J. and Reger, J., concurring in part and dissenting in part:

In this proceeding the Court was called upon to decide whether three Articles of Impeachment against the Petitioner, Article IV, Article VI, and Article XIV, were constitutionally valid. The majority opinion concluded that all three Articles of Impeachment were constitutionally invalid and therefore prohibited the Respondents from prosecuting the Petitioner on those charges. We concur in the resolution of those three Articles of Impeachment. Even though the dispositive issues in this case were resolved when it was determined that all three Articles of Impeachment were invalid, the majority opinion chose to address another issue that was not necessary for the resolution of the case. For the reasons set out below, we dissent from the majority decision to address that issue.[1]

Prefatory Remarks

Before we address the substantive issues of our concurring opinion, we feel that it is imperative that we make clear that it is our belief that the Legislature

[1] It will also be noted that we believe the Court should have exercised its authority and set the case for oral argument, even though the Respondents waived oral argument. Many of the issues presented are related to transparency. Not having oral argument eliminates the opportunity for a more thoughtful discussion with the parties and perhaps greater illumination of the issues for the Court. Also in a case both constitutionally and politically charged, transparency better serves the parties, the court and the public interest.

has absolute authority to impeach a judicial officer or any State public officer for wrongful conduct. Through the State Constitution the people of West Virginia provided that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others. . . ." W.Va. Const. Art. 5[sic], § 1. It has been observed that "[t]he doctrine of separation of powers 'is at the heart of our Constitution.' " *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 471 (D.C. Cir. 1982). The objective of that doctrine has been eloquently and concisely stated as follows:

> The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 84, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting).

The State Constitution, Article IV, § 9, invests absolute authority in the Legislature to bring impeachment charges against a public officer and to prosecute those charges. Pursuant to Article IV, § 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). Courts around the country have

long recognized that the Legislature has "exclusive jurisdiction in impeachment matters or matters pertaining to impeachment of impeachable officers[.]" *State v. Chambers*, 220 P. 890, 892 (Okla. 1923). Of course "that authority is not unbounded and legislative encroachment upon other constitutional principles may, in an appropriate case, be subject to judicial review." *Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 574, 858 A.2d 709, 730 (2004). Even so, judicial intervention in an impeachment proceeding should be extremely rare, and only in the limited situation where an impeachment charge is prohibited by the Constitution.

Courts have observed that the "political question doctrine" is part of the separation of powers doctrine. "[T]he political question doctrine is essentially a function of the separation of powers, . . . existing to restrain courts from inappropriate interference in the business of the other branches of Government, . . . and deriving in large part from prudential concerns about the respect we owe the political departments." *Nixon v. United States*, 506 U.S. 224, 252-253, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Souter, J., concurring) (internal quotation marks and citations omitted). The United States Supreme Court has summarized the political question doctrine as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and

> manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L.Ed. 2d 663 (1962). In the final analysis, "if the text of the constitution has demonstrably committed the disposition of a particular matter to a coordinate branch of government, a court should decline to adjudicate the issue to avoid encroaching upon the powers and functions of that branch." *Horton v. McLaughlin*, 149 N.H. 141, 143, 821 A.2d 947, 949 (2003). See *Smith v. Reagan*, 637 F. Supp. 964, 968 (E.D.N.C. 1986), rev'd on other grounds, 844 F.2d 195 (4th Cir. 1988) ("The courts have often recognized that this doctrine calls for the exercise of judicial restraint when the issues involve the resolution of questions committed by the text of the Constitution to a coordinate branch of government.").

As we demonstrate below, the political question doctrine precluded the majority from addressing two procedural flaws in the impeachment proceeding.

1.

Resolution of the Procedural Flaws in the Impeachment Proceeding Should have been Resolved by the Court of Impeachment

The majority opinion correctly determined that the judiciary has a limited role in impeachment proceedings, that extend to protecting the constitutional rights of an impeached official. However, the majority opinion went beyond that limited role. Specifically, the majority opinion determined that it had authority to decide that two alleged procedural errors invalidated the entire impeachment proceedings. Those alleged errors involved the House of Delegates failure to include findings of fact in the Articles of Impeachment, and in failing to pass a resolution adopting the Articles of Impeachment.

The United States Supreme Court has observed, and we agree, that there should not be "judicial review to the procedures used by the [Legislature] in trying impeachments[.]" *Nixon v. United States*, 506 U.S. 224, 236, 113 S. Ct. 732, 739, 122 L.Ed. 2d 1 (1993). It is the exclusive province of the Legislature to determine what, if any, consequences should follow from its failure to adhere to an impeachment procedure. In this case, as we mentioned, the House of Delegates are alleged to have failed to make findings of facts and to adopt a resolution of impeachment. The impact of both of those alleged errors on the impeachment proceedings was a matter for the House of Delegates to resolve and, in the absence of the matter being resolved by the House, it should have been presented

to the Court of Impeachment for the Senate to resolve. See *Hastings v. United States*, 837 F. Supp. 3, 5 (D.D.C. 1993) ("Thus, the Senate's procedures for trying an impeached individual cannot be subject to review by the judiciary."); *Alabama House of Representatives Judiciary Comm. v. Office of the Governor of Alabama*, 213 So. 3d 579 (Ala. 2017) ("[T]he method of impeachment of the governor rests in the legislature, courts are required to refrain from exercising judicial power over this matter. The exercise of such power would infringe upon the exercise of clearly defined legislative power."); *Mecham v. Gordon*, 156 Ariz. 297, 303, 751 P.2d 957, 963 (1988) ("[T]he Constitution gives the Senate, rather than this Court, the power to determine what rules and procedures should be followed in the impeachment trial."). Ultimately, the House or the Senate could have determined that the alleged errors were harmless and did not affect the substantial rights of the Petitioner. See *State v. Swims*, 212 W.Va. 263, 270, 569 S.E.2d 784, 791 (2002) ("Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the outcome of the trial."); Syl. pt. 14, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998) ("Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.").

Even if we agreed that the procedural issues were properly before this Court, the longstanding practice of this Court is not to address an issue that is not

necessary in order to grant the litigant the relief he or she seeks. See *State ex rel. Am. Elec. Power Co. v. Swope*, 239 W. Va. 470, 476 n.9, 801 S.E.2d 485, 491 n.9 (2017) ("Because this case can be resolved on the first issue presented, the applicability of the public policy exception, we need not address the remaining issues presented by Petitioners."); *Littell v. Mullins*, No. 15-0364, 2016 WL 1735234, at *5 n.6 (W. Va. 2016) ("Because our resolution of the first issue raised by Mr. Littell is dispositive of the case sub judice, we need not address his remaining assignments of error[.]"); *State v. Stewart*, 228 W. Va. 406, 419 n.13, 719 S.E.2d 876, 889 n.13 (2011) ("Because we have found the issues discussed dispositive, we need not address the defendant's remaining assignments of error."); *Gibson v. McBride*, 222 W. Va. 194, 199 n.17, 663 S.E.2d 648, 653 n.17 (2008) ("Because we affirm the granting of the writ on the issue of prison garb and shackles, we need not address the remaining issues[.]"); State ex rel. Pritt v. Vickers, 214 W. Va. 221, 227 n.21, 588 S.E.2d 210, 216 n.21 (2003) ("Because of our resolution of the scheduling order motion, we need not address the remaining issues presented by Ms. Pritt."); *Am. Tower Corp. v. Common Council of City of Beckley*, 210 W. Va. 345, 350 n.14, 557 S.E.2d 752, 757 n.14 (2001) ("As a result of our resolution of this issue, we need not address further the Council's remaining assignments of error."). It is clear that when the majority opinion resolved the substantive issues in Article IV, Article VI, and Article XIV, the Petitioner had obtained the relief she sought. Thus, there was no need to address the remaining issues raised.

By addressing the non-dispositive procedural issues, the majority decision is rendering an advisory opinion on those issues. It is a fundamental principle that "this Court is not authorized to issue advisory opinions[.]" *State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 891, 207 S.E.2d 113, 122 (1973) (Haden, J., dissenting). The Court has observed that "[s]ince President Washington, in 1793, sought and was refused legal advice from the Justices of the United States Supreme Court, courts—state and federal—have continuously maintained that they will not give 'advisory opinions.'" *Harshbarger v. Gainer*, 184 W.Va. 656, 659, 403 S.E.2d 399, 402 (1991). See *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185, 27 S.E.2d 486, 487-488 (1943) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes."). Specifically, this Court has expressly held "that the writ of prohibition cannot be invoked[ ] to secure from th[is] Court . . . an advisory opinion[.]" *F.S.T., Inc. v. Hancock Cty. Comm'n*, No. 17-0016, 2017 WL 4711427, at *3 (W. Va. 2017) (internal quotation marks and citation omitted). More importantly, the advisory opinion on the two issues has a lethal consequence—it has invalidated the impeachment trials of the two remaining judicial officers.

2.

The Legislature May Seek to Impeach the Petitioner again Based upon Some of the Allegations in Article XIV of the Articles of Impeachment

It is clear that the Legislature cannot seek to impeach the Petitioner once again on the charges set out in Article IV and Article VI. However, we believe the Legislature has the right to seek to institute new impeachment proceedings to craft a constitutionally acceptable impeachment charge based upon the allegations set out in Article XIV.

It has been recognized that "[i]mpeachment is in the nature of an indictment by a grand jury." *State v. Leese*, 55 N.W. 798, 799 (Neb. 1893). See *Brumbaugh v. Rehnquist*, 2001 WL 376477, at *1 (N.D. Tex. Apr. 13, 2001) ("This process produces articles of impeachment resembling an indictment which trigger the 'sole Power' of the Senate to 'try all Impeachments.'"); *Ferguson v. Wilcox*, 119 Tex. 280, 297, 28 S.W.2d 526, 534 (Tex. 1930) ("The House of Representatives first acts in the capacity of a grand jury, and it must, in effect, return the indictment, to wit, the articles of impeachment."); *State v. Buckley*, 54 Ala. 599, 618 (1875) (recognizing "articles of impeachment are a kind of bill of indictment."). The law in this State is clear in holding that a defective indictment may be amended by a court in limited circumstances, and may be resubmitted to a grand jury to correct a defect. This principle of law was set out in syllabus point 3 of *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995) as follows:

> Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An "amendment of form" which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced.

Consistent with *Adams*, we believe that the Legislature has absolute discretion in seeking to re-impeach the Petitioner on the allegations contained in Article XIV.

In view of the foregoing, we concur in part and dissent in part.

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on November 19, 2018, the following order was made and entered **invacation**:

State of West Virginia ex rel. Margaret L. Workman,
Petitioner

vs.) No. 18-0816

Mitch Carmichael, President
of the West Virginia Senate;
Donna J. Boley, President Pro
Tempore of the West Virginia Senate;
Ryan Ferns, Majority Leader
of the West Virginia Senate;
Lee Cassis, Clerk of the
West Virginia Senate;
and the West Virginia Senate,
Respondents

ORDER

On November 5, 2018, the respondents, J. Mark Adkins, Floyd E. Boone Jr., Richard R. Heath, Jr., and Lara R. Brandfass, Bowles Rice LLP, filed motion to recall the mandate to allow the respondents to file a petition for rehearing. Thereafter, on November 15, 2018, the petitioner, by counsel Marc E. Williams, Melissa Foster Bird, Thomas M. Hancock, and Christopher D. Smith, Nelson Mullins Riley & Scarborough LLP, filed a response in opposition to the motion to recall the mandate.

"Issuance of the mandate terminates jurisdiction of the Supreme Court in an action before this Court, *unless the Court has provided by order* pursuant to Rule 25(a) that a petition for rehearing may be filed after a mandate has issued (emphasis added)." Rule 26(a) of the Rules of Appellate Procedure. No order providing for the filing of a petition for rehearing was entered in this matter.

This Court does not have inherent authority to recall its mandate and there are no extraordinary circumstances that exist that warrant recalling the mandate. The Court no longer has jurisdiction of this matter. Therefore, a petition for rehearing will not be filed or considered in this matter.

Chief Justice Margaret L. Workman and Justice Elizabeth D. Walker disqualified. Justice Tim Armstead and Justice Evan H. Jenkins not participating. Acting Chief Justice James A. Matish, Judge Ronald E. Wilson, Judge Louis H. Bloom, Judge Rudolph J. Murensky II, and Judge Jacob E. Reger sitting by temporary assignment.

A True Copy

Attest: /s/ Edythe Nash Gaiser [LOGO]
Clerk of Court

Article I

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of his personal office, to the sum of approximately $363,000, which sum included the purchase of a $31,924 couch, a $33,750 floor with medallion, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article II

That the said Justice Robin Davis, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did waste state

funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, to the sum of approximately $500,000, which sum included, but is not limited to, the purchase of an oval rug that cost approximately $20,500, a desk chair that cost approximately $8,000 and over $23,000 in design services, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article Ill

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about June 20, 2013, cause a certain desk, of a type colloquially known as a "Cass Gilbert" desk, to be transported from the State Capitol to his home, and did maintain possession of such desk in his home, where it remained throughout his term as Justice for approximately four and one-half years, in violation of the provisions of W.Va. Code §29-1-7(b), prohibiting the removal of original furnishings of the state capitol from the premises;

further, the expenditure of state funds to transport the desk to his home, and refusal to return the desk to the state, constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IV

That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of

Article VIII, §7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article V

That the said Justice Robin Davis, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2014, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of

which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VI

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such

Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VII

That the said Justice Allen Loughry, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at that relevant time individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high offices, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justices, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about May 19, 2017, did in his capacity as Chief Justice, draft an Administrative Order of the Supreme Court of Appeals, bearing his signature, authorizing the Supreme Court of Appeals to overpay certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; his authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining

money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VIII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, and continuing thereafter for a period of years, intentionally acquire and use state government vehicles for personal use; including, but not limited to, using a state vehicle and gasoline purchased utilizing a state issued fuel purchase card to travel to the Greenbrier on one or more occasions for book signings and sales, which such acts enriched his family and which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IX

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, intentionally acquired and used state government computer equipment and hardware for predominately personal use—including a computer not intended to be connected to the court's network, utilized state resources to install computer access services at his home for predominately personal use, and utilized state resources to provide maintenance and repair of computer services for his residence resulting from predominately personal use; all of which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article X

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary

to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, made statements while under oath before the West Virginia House of Delegates Finance Committee, with deliberate intent to deceive, regarding renovations and purchases for his office, asserting that he had no knowledge and involvement in these renovations, where evidence presented clearly demonstrated his in-depth knowledge and participation in those renovations, and, his intentional efforts to deceive members of the Legislature about his participation and knowledge of these acts, while under oath.

Article XIV

That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control

expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets—including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state-owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper

administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

We, John Overington, Speaker Pro Tempore of the House of Delegates of West Virginia, and Stephen J. Harrison, Clerk thereof, do certify that the above and foregoing Articles of Impeachment against Justices of the Supreme Court of Appeals of West Virginia, were adopted by the House of Delegates on the Thirteenth day of August, 2018.

In Testimony Whereof, we have signed our names hereunto this Fourteenth day of August, 2018.

/s/ John Overington

John Overington,

Speaker Pro Tempore of the House of Delegates

/s/ Stephen J. Harrison

Stephen J. Harrison,

Clerk of the House of Delegates

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Margaret L. Workman, Petitioner, v. Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate, Respondents.	No. 18-0816

RESPONDENTS' PETITION FOR REHEARING

J. Mark Adkins (*WVSB #7414*)
Floyd E. Boone Jr. (*WVSB #8784*)
Richard R. Heath, Jr. *(WVSB #9067*)
Lara R. Brandfass (*WVSB #12962*)
Bowles Rice LLP
600 Quarrier Street
Charleston, West Virginia 25301

Counsel for Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia

Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate

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INTRODUCTION

Pursuant to Rule 25 of the West Virginia Rules of Appellate Procedure, Respondents respectfully submit this Petition for Rehearing ("Petition") in response to the Opinion of the Court, delivered by Acting Chief Justice Matish, on October 11, 2018 ("Opinion"), from which Acting Justices Bloom and Reger concurred in part and dissented in part.[1]

A petition for rehearing may be filed within 30 days of release of any decision that passes upon the merits of an action. *See*, W. Va. R. App. P. 25(a). Rehearing is granted "only in exceptional cases." W. Va. R. App. P. 25(b). "[R]ehearing exists expressly for the purpose of ensuring that opinions which are not well-founded due to misapprehension of the issues, the law, or the facts are rectified." *Leggett v. EQT Production Company*, 239 W. Va. 264, 268, 800 S.E.2d 850, 854 (2017). Given the circumstances, this is one of

[1] Given the breadth of the Opinion and the number of issues involved—several of which were neither raised nor argued previously by the parties—this case would merit additional briefing and oral argument under the circumstances, which deal with issues of first impression that fundamentally affect West Virginia's constitutional framework.

those cases. As explained below, the Opinion misapprehended several critical points:

- The Opinion has misapprehended the language of Article IV, Section 9 of the *Constitution of West Virginia* with respect to the "Law and Evidence Clause" and, in doing so, incorrectly found jurisdiction where none actually exists.
- The Opinion also misapprehends the Separation of Powers Doctrine and, in doing so, has infringed upon the exclusive jurisdiction of the West Virginia Senate.
- The Opinion's misapprehension of the distinction between promulgated rules and administrative orders sets a dangerous precedent that threatens our constitutional foundation of checks and balances.
- The Opinion violates the Respondents' right to due process under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.
- The Opinion violates the Guarantee Clause of the U.S. Constitution by undermining the foundational principles of our republican form of government.

[2] As previously noted in *Leggett*, "neither hubris nor sanctimony should give the Court pause in granting rehearing to correct any such error of law or fact." *Id.* at 269, 800 S.E.2d at 855. For the reasons set forth herein, Respondents respectfully request rehearing to

rectify the misapprehension of the issues, law, and facts in the Opinion.

ARGUMENT

I. The Court misapprehended the Impeachment Clause.

The Opinion's most consequential holding is that the Impeachment Clause's "plain language" provides this Court with original jurisdiction to review "the actions or inactions of the Court of Impeachment." *State ex rel. Workman v. Carmichael*, No. 18-0816, 2018 WL 4941057 at *6 (W. Va. Oct. 11, 2018). According to the Opinion:

> The authority for this proposition is contained in the Law and Evidence Clause found in Section 9, which states: "the senators shall . . . do justice according to law and evidence." The Law and Evidence Clause of Section 9 uses the word "shall" in requiring the Court of Impeachment to follow the law. . . . Insofar as the Law and Evidence Clause imposes a mandatory duty on the Court of Impeachment to follow the law, there is an implicit right of an impeached official to have access to the courts to seek redress, if he or she believes actions or inactions by the Court of Impeachment violate his or her rights under the law.

Workman, 2018 WL 4941057, at *6 (first ellipsis in original) (footnote omitted). The entire opinion thus turns on the correctness of the Opinion's

interpretation of what it describes as the "Law and Evidence Clause." The Opinion's "Law and Evidence Clause" holding is, however, incorrect and is not supported by the text of the Impeachment Clause, the history underlying the *Constitution of West Virginia*, or legal precedent.

A. The "Law and Evidence Clause" only refers to the oath each *individual* senator serving on the Court of Impeachment must take.

In its entirety, the "Law and Evidence Clause" states as follows: "***the senators shall be on oath or affirmation***, to do justice according to law and evidence." W. Va. Const. art. IV, § 9 (emphasis added). Viewed in context, the "Law and Evidence Clause" merely mandates that each [3] senator take an oath to do justice according to law and evidence. The Clause in no way subjects the Court of Impeachment—as a body—to judicial oversight. The word "shall" refers only to each senator's duty to take an oath to do justice.

This interpretation is consistent with other court decisions that have evaluated similar oaths. Arizona is cited in the Opinion as having a "Law and Evidence Clause" in its constitution. *See*, *Workman*, 2018 WL 4941057, at *6 n.17. However, in interpreting its impeachment clause, the Arizona Supreme Court did not read the "Law and Evidence Clause" as granting the court original jurisdiction. Rather, the Arizona court noted that "the constitution essentially requires

only . . . that the senators take a prescribed oath." *Mecham v. Arizona House of Representatives*, 782 P.2d 1160, 1161 (Ariz. 1989). Consequently, the Arizona Supreme Court found that it had "***no jurisdiction to review the [impeachment] proceedings in the legislature, to examine for error of fact or law, or to prescribe or reject rules to be followed by the Senate during the trial***."[2] *Id.* (emphasis added). This interpretation is also consistent with U.S. Supreme Court precedent, which has recognized that the purpose of enacting oaths such as the one contained in the "Law and Evidence Clause" "***was not to create specific responsibilities*** but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system." *Cole v. Richardson*, 405 U.S. 676, 684 (1972) (emphasis added). The plain reading of the "Law and Evidence Clause," then, is that it is solely the oath taken by the senators, individually, to commit themselves to do justice according to law and evidence during the impeachment trial, and was not intended to, and does not, confer jurisdiction in this Court during the impeachment process.

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[2] In interpreting nearly identical language in the Illinois State Constitution, the U.S. District Court for the Southern District of Illinois opined that such language merely "provide[s] that the senators shall be upon oath or affirmation to do justice according to law and evidence. The meaning *generally ascribed to such a provision* is that impeachment proceedings generally lie as a rule for treason, bribery or any high crime or misdemeanor." *Palmer v. U.S. Civil Service Commission*, 191 F. Supp. 495, 510 (1961) (emphasis added).

[4] **B. The "Law and Evidence Clause" provides no basis to distinguish the U.S. Constitution.**

The Opinion bolstered its reading of the "Law and Evidence Clause" by noting its absence from the U.S. Constitution, thus, in its view, heightening the significance of its infusion in the *Constitution of West Virginia*, and allowing it to distinguish U.S. Supreme Court precedent contrary to the Opinion's jurisdiction conclusion. But, although the Opinion found that the impeachment provisions within the U.S. Constitution and the *Constitution of West Virginia* differ, a comparison of the provisions and a brief historical review demonstrate that the two constitutions are materially identical:

W. Va. Constitution	**U.S. Constitution**
"The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals . . . shall preside; and ***the senators shall be on oath or affirmation, to do justice according to law and evidence***."	"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, ***they shall be on Oath or Affirmation***. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."

Like the U.S. Senate, the West Virginia Senate has the "sole power to try impeachments." Most significantly, both documents mandate that individual senators, sitting as members of courts of impeachment, "shall be on oath or affirmation." The only difference between the two provisions is that the *Constitution of West Virginia* is more descriptive in identifying the nature of the oath: "senators shall be on oath or affirmation, to do justice according to law and evidence."

It has always been understood that the impeachment oath taken by U.S. senators is effectively the same and equally demanding. Professor Charles L. Black, Jr., has noted that "the senators take a special oath (over and above their oaths of office) to 'do impartial justice according to the Constitution and laws.' Both these circumstances give emphasis to the fact that the Senate . . . is taking on quite a different role from its normal legislative one." Charles L. Black, Jr., Impeachment: [5] A Handbook 9-10 (1974) (1998 reprint). This different role was illustrated in the impeachment trial of President Clinton, in which each senator was required to take the following oath: "I solemnly swear . . . that in all things pertaining to the trial of the impeachment of William Jefferson Clinton, now pending, that ***I will do impartial justice according to the Constitution and laws***: So help me God." *Procedure and Guidelines for Impeachment*

Trials in the United States Senate, 99th Cong. 2d Session 61 (1986) (emphasis added).[3]

Professor Laurence Tribe also noted the significance of the senatorial oath:

> [B]efore consideration of the articles, each senator must swear a special oath: 'I solemnly swear (or affirm) that in all things appertaining to the trial of the impeachment of [the president], now pending, I will do impartial justice according to the Constitution and laws: So help me God.' Although the Constitution provides that senators 'shall be on Oath or Affirmation' when trying impeachments, this language was devised by the Senate itself. . . . It's therefore striking that the Framers added an extra oath here. After being sworn into office, legislators can exercise all their other powers without taking additional oaths. Indeed, House members can debate and vote on articles of impeachment in the ordinary course of business. Only in the Senate, and only for impeachments, is a further oath required. The Constitution thus impresses on each senator the unparalleled gravity of his or her decision in the case at bar.

Laurence Tribe & Joshua Matz, To End a Presidency: The Power of Impeachment 132-133 (2018).

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[3] *See also*, https://www.cbsnews.com/news/impeachment-trial-oath-for-senators/.

Perhaps most notably, the Official Journal of the 1872 Constitutional Convention provides no support for the Opinion's interpretation of the "Law and Evidence Clause." Rather, it appears that "to do justice according to law and evidence" was added as an afterthought, with little debate or discussion. *See*, Official Journal of the West Virginia Constitutional Convention at 170 (January 16, 1872).

In sum, there is no basis to find that the impeachment provisions of the U.S. and West Virginia constitutions are materially different. Senators sitting as members of courts of impeachment both in the United States and West Virginia senates must take an additional oath swear-[6]ing to do justice and follow the law. Senators in both bodies are constitutionally obligated to consider the "law and evidence." For both, the oath is intended to serve as a reminder of each senator's obligations when exercising their exclusive authority as members of the Court of Impeachment. Given the absence of any substantive difference between the federal and West Virginia impeachment provisions, no basis exists to conclude that the "Law and Evidence Clause" in Article IV, § 9 of the *Constitution of West Virginia* was intended to, or does, bestow upon this Court original jurisdiction to review an impeachment mid-process. The Court was incorrect in so holding.

C. The "Law and Evidence Clause" provides no basis for the Court to exercise judicial review of actions taken by the House of Delegates.

Using the "Law and Evidence Clause" from the *Constitution of West Virginia's* oath for senators as the basis for exercising review, the Opinion found the Articles of Impeachment against Petitioner, and the process by which they were adopted, defective. *Workman*, 2018 WL 4941057, at *6. Those actions were, of course, not taken by the Senate, the Court of Impeachment, or by any individual senator. They were exclusively actions of the House of Delegates. The "Law and Evidence Clause" ***does not, however, apply to the House of Delegates***. *See*, W. Va. Const. art. IV § 9. The "Law and Evidence Clause," therefore, cannot serve as the foundation for the Court's exercise of jurisdiction in this case.

In tacit recognition that impeachment is a political process, members of the House of Delegates are not "on oath or affirmation, to do justice according to the law and evidence" in exercising the power of impeachment. To the contrary, that oath is placed ***only*** upon the senators, sitting as the Court of Impeachment. Thus, even if one were to accept for the sake of argument that the "Law and Evidence Clause" affords the Court jurisdiction to review the "actions or inactions by the Court of Impeachment," *Workman*, 2018 WL 4941057, at *6-7, it provides ***no basis to review*** the actions of the House of Delegates.

[7] The Opinion cites *Kinsella v. Jaekle*, 192 Conn. 704, 723 (1984), in support of the proposition that the exercise of jurisdiction is proper where, as is alleged here, the "legislature's action is clearly outside the confines of its constitutional jurisdiction." *Workman*, 2018 WL 4941057, at *6-7. However, the Supreme Court of Connecticut notably ***rejected the contention that jurisdiction existed*** *in Kinsella. See*, *Office of Governor v. Select Committee Inquiry*, 271 Conn. 540, 553-54 (2004). In doing so, the court determined that alleged violations of due process of law "were entirely speculative" and actionable ***only if*** the Senate "failed to define properly the scope of conduct" warranting impeachment because it "refused to speculate that the legislature would conduct itself in a manner inconsistent with constitutional precepts. . . ." *Id.* at 554 (citing *Kinsella*, 192 Conn. at 729). Because the Senate has not had the opportunity to act in the present matter, the foundational jurisdiction for deciding this case is unsound.[4]

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[4] The Opinion additionally argues that the inclusion of a judicial officer to preside over impeachment proceedings during the 1872 Constitution of West Virginia is further evidence of this Court's jurisdiction. *Workman*, 2018 WL 4941057, at *6. However, such an addition simply tracks the constitutional history of similar provisions of the U.S. and 33 other state constitutions, which have the Chief Justice preside in some manner or another. Our Framers specifically noted that while the Supreme Court was "an improper substitute for the Senate" as a court of impeachment, any benefits of a proposed union of the Court and the Senate is "obtained from making the chief justice . . . the president of the courts of impeachment." The Federalist

II. The Court misapprehends the Separation of Powers Doctrine.

The Opinion also misapprehends several points of law with respect to the Separation of Powers Doctrine, resulting in the Court impermissibly exercising powers that belong exclusively to the Legislature. This further warrants a rehearing.

A. The Court's failure to include the House of Delegates as an indispensable party raises Separation of Powers concerns.

The omission of the House of Delegates from these proceedings, in light of the issuance of a writ of prohibition, raises a Separation of Powers issue that warrants rehearing. While the Opinion takes exception with the Respondents' position regarding the merits of this case, *Workman*, [8] 2018 WL 4941057, at *2, it makes clear that the actions of the House of Delegates, and not those of the Senate, prompted action by this Court.[5] As a general matter, this Court has previously held that "all persons who are materially interested in the subject-matter involved in a suit, and who will be affected by the result of the proceedings, should be

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No. 65 at 420-21 (Alexander Hamilton) (Modern Library ed., 2000).

[5] Specifically, the Opinion questioned, among other things, the "unwieldy compilation of allegations" contained in Article XIV. *Workman*, 2018 WL 4941057, at *25, the "viability of all of the alleged violations" in Articles IV and VI, *Id.* at *23, and the "procedural flaws that occurred in the House of Delegates." *Id.* at *30.

made parties thereto."[6] Syl. Pt. 3, *State ex rel. One-Gateway v. Johnson*, 208 W. Va. 731, 542 S.E.2d 894 (2000). By adjudicating the validity of procedures used by the House of Delegates, this Court has clearly affected the House of Delegates' inherent authority to "keep its own house in order" pursuant to the Separation of Powers Doctrine.[7] Without hearing from the House of Delegates, this Court has overruled its prior precedent that "courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." *Workman*, 2018 WL 4941057, at *8 (citing Syl. Pt. 3, *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010)). The House of Delegates is an indispensable party that should have been included in this case, and, in fact, has since sought the opportunity to intervene in this matter to ensure that its rights are protected[8] Such action warrants reconsideration.

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[6] This Court has further held that "when the attention of the court is called to the absence of any such interested persons, it should see that they are made parties before entering a decree affecting their interests." Syl. Pt. 3, *State ex rel. One-Gateway v. Johnson*, 208 W. Va. 731, 542 S.E.2d 894.

[7] In dissent, Acting Justices Bloom and Reger noted that "[i]t is the exclusive province of the Legislature to determine what, if any, consequences should follow from its [alleged] failure to adhere to an impeachment procedure." *Workman*, 2018 WL 4941057 (Bloom, J., & Reger, J., dissenting).

[8] On October 25, 2018, the House of Delegates filed a Motion to Intervene, in which it notes that "the Court has adjudicated the conduct of the House and issued an extraordinary legal writ that could restrict the rights of the House to fulfill its constitutional

[9] **B. The Opinion ignores the *Constitution's* exclusive grant of impeachment power to the Legislature.**

In striking down the Articles of Impeachment against Petitioner on the ground that they violate the Separation of Powers Doctrine, and the Judicial Branch's inherent authority to "keep its own house in order," the Opinion ignores that the judiciary's authority in that regard is explicitly overridden when it comes to the *Constitution's* "specific grant" of impeachment to the Legislature.

The Court quotes *State v. Clark*, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013), for the proposition that the Judicial Branch has the inherent authority to "keep its own house in order," free of any legislative intrusion. *Workman*, 2018 WL 4941057, at *14. The Opinion notes that:

> The separation of powers doctrine implies that each branch of government has inherent power to "keep its own house in order," ***absent a specific grant of power to another branch. . . .*** This theory recognizes that each branch of government must have sufficient power to carry out its assigned tasks and that these constitutionally assigned tasks will be performed properly within the governmental branch itself.

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obligations with respect to impeachment." (Mot. to Intervene at 4.)

Workman, 2018 WL 4941057, at *14 (ellipsis in original) (emphasis added). The Court's recitation of *Clark* is notably incomplete. In *Clark*, this Court observed that: "[t]he separation of powers doctrine implies that each branch of government has inherent powers to 'keep its own house in order,' absent a specific grant of power to another branch, ***such as the power to impeach***." 232 W. Va. at 498, 752 S.E.2d at 925; citing *In re Watkins*, 233 W. Va. 170, 177, 757 S.E.2d 594, 601 (2013) (emphasis added).

By omitting the critical reference to the Legislature's power to impeach, the Court relied upon an incomplete statement of the law on the extent to which it is free to "keep its own house in order." This failure to consider the complete law on the question, and subsequent invalidation of Articles of Impeachment, caused the Court to vitiate the Legislature's constitutional impeachment powers. The power of the Court to "keep its own house in order" lives alongside "***a specific grant of power to another branch, such as the power to impeach***." *Id.*

[10] While the Court acknowledged that "the separation of powers doctrine ***ensures*** that the three branches of government are ***distinct unto themselves***, and that they, ***exclusively***, exercise the rights and responsibilities ***reserved unto them***," it failed to apply those principles correctly to the case at hand. *Workman*, 2018 WL 4941057, at *14 (quoting *Simpson v.* W. *Virginia Office of Ins. Com'r.*, 232 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009)) (emphasis added). In

fact, the Opinion itself is an impermissible intrusion into the rights and responsibilities that are explicitly reserved to the Legislative Branch, and, specifically, the West Virginia Senate, which "shall have the ***sole power to try impeachments***. . . . " W. VA. CONST. art. IV, § 9 (emphasis added). Although courts certainly have a role of judicial review of impeachment proceedings that "transgress[] identifiable textual limits" of power granted by the Impeachment Clause, the role is limited, and no state or federal court has ever gone so far as to rule upon the validity of Articles of Impeachment mid-process.[9] To the contrary, American constitutional history indicates that we have "rejected any proposal that the articles of impeachment adopted by the house of representatives ***would be tried by the judicial branch of government. . . .***" *Mecham v. Gordon*, 156 Ariz. 297, 301 (1988)) (emphasis added). And, yet, that is the effect that the Opinion has in this case. Such a decision warrants rehearing.

[9] A court's limited role of judicial review of impeachment proceedings applies to those textual limits set forth in the Impeachment Clause: "that the House adopt the Articles of Impeachment by a majority vote; that the Senate try the charges; that the chief justice, as presiding officer, preside over the trial in the Senate; that the senators take a prescribed oath; that the conviction be had by a two-thirds vote of the elected senators; and that conviction extend only to removal from office and disqualification from future office." *Mecham*, 782 P.2d at 268.

C. The Court misapprehends its authority to issue a writ of prohibition because the Court of Impeachment is not an "inferior" court of law.

A writ of prohibition issues when an "inferior court" lacks subject matter jurisdiction or "exceeds its legitimate powers." W. Va. Code § 53-1-1. Applying the plain language of the statute, this Court has only issued such writs to ***inferior*** tribunals. *See*, *Moore v. Holt*, 55 W. Va. 507, 47 S.E. 251, 252 (W. Va. 1909) ("Prohibition lies from a superior to an inferior . . . tribunal"). In prac-[11] tice, a writ of prohibition issues against circuit courts and administrative bodies. To that end, this Court has previously held that "***prohibition does not lie to control a legislative body***." *State ex rel. Miller v. Smith*, 168 W. Va. 745, 755, 285 S.E.2d 500, 506 (1981) (citing *Gates v. Council of City of Huntington*, 93 F. Supp. 757 (S.D. W. Va. 1950)) (emphasis added).[10]

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[10] Other states similarly reserve the writ of prohibition for issuance against inferior tribunals. *See*, *Zaabel v. Konetski*, 807 N.E.2d 372, 374 (Ill. 2004) ("For a writ of prohibition to issue . . . the jurisdiction of the tribunal against which the writ issues must be inferior to that of the issuing court"); *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001) ("A writ of prohibition may be issued when . . . an inferior court or tribunal is about to exercise judicial or quasi-judicial power."); *Lowery v. Steel*, 219 S.W.2d 932, 933-34 (Ark. 1949) ("The office of the writ of prohibition is to restrain an inferior tribunal from proceeding."); *Oklahoma ex rel Wester v. Caldwell*, 181 P.2d 843, 844 (1947) ("The remedy under a writ of 'prohibition' is limited to cases where act sought to be prohibited is of a judicial nature . . . and is directed against the encroachment of jurisdiction by inferior courts, for the purpose of

The Opinion notes that the "purpose of the writ is 'to restrain inferior courts from *proceeding in causes over which they have no jurisdiction.*'" *Workman*, 2018 WL 4941057, at *12 (quoting Syl. Pt. 1, in part, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (emphasis in original). That is simply not an accurate assessment of the case at hand. The Senate is not an "inferior" body to the Supreme Court of Appeals—a crucial point that the Opinion misapprehends. Nor does the Senate lack jurisdiction. To the contrary, the Impeachment Clause bestows upon the Senate ***the exclusive jurisdiction*** over trials of impeachment. *See*, W. Va. Const. art. IV, § 9.

In holding that this Court may sit in place of the Court of Impeachment, the Court misapprehended the express language of the Impeachment Clause and the historical record, which demonstrates that constitutionally based courts of impeachment are uniquely legislative in nature rather than inferior judicial bodies.[11] The framers of the U.S. and West

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keeping such courts within the bounds prescribed for them by law."); *Wisner v. Probate Court of Columbiana Cty.*, 61 N.E.2d 889 (1945) ("A Court of *superior* jurisdiction may grant a writ of prohibition to prevent the attempted exercise of ultra vires jurisdiction by a court of *inferior jurisdiction*.") (emphasis added).

[11] The Judicial Branch was eschewed jurisdiction over impeachment proceedings because of their political nature. "There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, at least so far as the jurisdiction and trial are concerned, into its proper elements, ***bringing the political part under the power of the political department of the government***, and retaining the civil part for presentment and trial in the ordinary forum." III Joseph Story, Commentaries

Virginia constitutions in-[12]tended for impeachment to encompass offenses "committed by public men in violation of their public trust and duties," and intended those offenses to be tried in the political branches of government. *See*, *e.g.*, Ronald D. Rotunda & John E. Nowak, 1 Treatise on Const. L. § 8.15(a) ("Because the framers placed the sole power of impeachment in two *political* bodies—the House and the Senate—it would certainly appear that such an issue remains a political question."). Subjecting the Senate to a writ of prohibition plainly reserved for inferior judicial bodies violates the Separation of Powers Doctrine, eliminates the Legislature's only check on the Judicial Branch, and further necessitates a rehearing.

III. The Court erroneously ignores the distinction between rules and administrative orders.

In striking down Articles IV and VI of the Articles of Impeachment, the Opinion relies extensively on the constitutionally prescribed rule-making authority of the Court, noting that "statutory laws that are repugnant to the constitutionally promulgated rules of this Court are void." *Workman*, 2018 WL 4941057, at *23. In doing so, the Opinion disregards the distinction between rules promulgated pursuant to Article VIII, Section 3 of the *Constitution of West Virginia* and administrative orders issued exclusively by the Chief Justice as "the administrative head of all the courts."

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on the Constitution of the United States 273, 281 (1833) (emphasis added).

W. Va. Const. art. VIII, § 3; *see also*, *State ex rel. J.C. v. Mazzone*, 233 W. Va. 457, 472, 759 S.E.2d 200, 215 (2014).

Article VIII, Section 3 of the *Constitution of West Virginia* specifically provides that "***[t]he court*** shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which [13] shall have the force and effect of law." W. Va. Const. art. VIII § 3 (emphasis added).[12] The rules traditionally promulgated by the Court are subjected to a rigorous public comment period, which typically involves input from other jurists, members of the state bar and the public at large. The proposed rules are then revised and approved by a majority of the Court in order to take effect. By contrast, an administrative order is issued unilaterally by the Chief Justice without the express input or approval of a majority of the Court.[13]

Despite the clear distinction between a rule and an administrative order, the Opinion notes that "the statute's limitation on payment to senior-status judges is void and unenforceable, ***because of the administrative order*** promulgated on May 17, 2017." *Workman*, 2018 WL 4941057, at *24 (emphasis added).

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[12] Article VIII, Section 8 further provides that "[u]nder its inherent rule-making power . . . ***the supreme court of appeals shall*** . . . prescribe, adopt, promulgate and amend rules . . . " W. Va. Const. art. VIII, § 8 (emphasis added).

[13] For this reason, an administrative order from the Chief Justice is more akin to an Executive Order issued by the Governor as an act of administrative governance.

By ignoring the difference between a rule promulgated under the Court's inherent rule-making authority and an administrative order issued singularly by a Chief Justice, the Opinion sets in place a precedent in which duly enacted statutes can now be ***invalidated by a single member of the Court*** who disagrees with it. This result is outside the scope of the rule-making authority given to the supreme court ***as a body*** by the *Constitution of West Virginia*, as well as our system of checks and balances and, thus, warrants rehearing.

IV. The Court's decision violates the Respondents' right to due process under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The Opinion's failure to address Respondents' Motion to Disqualify Acting Justice Wilson presents an additional constitutional infirmity that supports rehearing.[14] The U. S. Supreme Court recognizes several specific instances, under the Fourteenth Amendment to the U.S. Constitu-[14] tion, where due process ***requires*** judicial recusal, including when a judge has a conflict arising "from his participation in an earlier proceeding." *See*, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877, 880 (2009). Specifically, due process requires disqualification in such cases where "it is difficult if not impossible for a judge to free himself from the influence of what took

[14] It is worth noting that failure of an adjudicator to "state the reasons for his determination," itself, raises due process concerns. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

place" in the prior proceeding. *In re Murchison*, 349 U.S. 133, 138 (1955). To this end, the U.S. Supreme Court has recently held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). Judicial recusal is warranted due to the "risk that the judge 'would be so psychologically wedded' to his or her previous position . . . that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Id*. at 1906-1907 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)). This Court's failure to even ***address*** the "serious risk" and due process concerns arising from Acting Justice Wilson's involvement in the Judicial Investigation Commission proceedings constitutes a clear basis to reconsider the decision.[15] *Id.* at 1907.

V. The Court's opinion violates the Guarantee Clause of the U.S. Constitution.

The Opinion's footnote disposing of Respondents' Guarantee Clause argument also presents a

[15] Acting Justice Wilson's role in investigating allegations of misconduct against Petitioner, and clearing her of such conduct, raises concerns that "the judge's 'own personal knowledge and impression' of the case, acquired through his or her [prior] role . . . may carry far more weight with the judge than the parties' arguments to the court." *Id.* at 1906-1907 (quoting *Murchison*, 349 U.S. at 128).

misapprehension of the issues and justifies rehearing. Specifically, the Opinion cited *New York v. United States* for the proposition that, "[i]n most cases," the United States Supreme Court has found Guarantee Clause claims "nonjusticiable under the political question doctrine." *Workman*, 2018 WL 4941057, at *11 (quoting 505 U.S. 144, 184 (1992)). But it is important to note that the [15] Court in *New York* ***did*** teach the merits of New York's Guarantee Clause claim.[16] *Id.* And, on those merits, the U.S. Supreme Court's analysis actually ***bolsters*** Respondents' instant argument. While New York's Guarantee Clause claim failed because the challenged statutory provisions "d[id] not pose any realistic risk of altering the form or the method of functioning of New York's government," the instant decision differs substantially because it deactivates the sole mechanism by which the Legislative Branch can hold judicial officers accountable for maladministration, corruption, incompetency, or neglect of duty. *New York*, 505 U.S. at 185-86. Such a misapprehension of law and fact justifies further rehearing on the extent to which the Opinion runs afoul of the United States Constitution's basic guarantee of a republican form of government.

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[16] More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. . . . Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances." *New York*, 505 U.S. at 185 (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964)); also citing L. Tribe, American Constitutional Law 398 (2d ed. 1988).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court grant the Petition and allow the parties the additional opportunity to submit briefs and present oral argument.

Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Margaret L. Workman, Petitioner, v. Mitch Carmichael, President of the West Virginia Senate; Donna J. Boley, President Pro Tempore of the West Virginia Senate; Ryan Ferns, Majority Leader of the West Virginia Senate; Lee Cassis, Clerk of the West Virginia Senate; and the West Virginia Senate, Respondents.	No. 18-0816

CERTIFICATE OF SERVICE

I, J. Mark Adkins, counsel for Respondents do hereby certify that service of the foregoing RESPONDENTS' PETITION FOR REHEARING has been made upon counsel of record by United States mail, postage pre-paid and via e-mail to the following on this 5th day of November, 2018:

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