IN THE WEST VIRGINIA SENATE

SECOND EXTRAORDINARY SESSION

2018

IN RE: The Matter of Impeachment Proceedings
Against Respondent Justice Elizabeth Walker

BOARD OF MANAGERS OF THE WEST VIRGINIA HOUSE OF DELEGATES' RESPONSE TO JUSTICE WALKER'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF UNIMPEACHED CONDUCT

Comes Now, the Board of Managers of the West Virginia House of Delegates (hereinafter "Board of Managers") in opposition to the Respondent Justice Elizabeth Walker's (hereinafter "Respondent") Motion in Limine to Preclude Evidence of Unimpeached Conduct and hereby opposes said Motion for the reasons outlined below. In support of its response, the Board of Managers states as follows:

I. ISSUES

The issue complained of by Respondent arises from the undisputed fact that Article XII of the proposed Articles of Impeachment, alleging violations of her oath of office in the mismanagement of the renovation of her personal office at the Court, specifically in the waste of taxpayer funds, was defeated in the House of Delegates. She claims that the House's rejection of this proposed Article is essentially a form of *res judicata*, and no issues or evidence relating to this remodeling of her office can thus be introduced at an impeachment trial supporting another adopted Article of Impeachment.

II. STANDARD OF REVIEW

The policy of the State of West Virginia generally concerning Motions in Limine, as articulated in the Comment to Rule 103 of the *West Virginia Rules of Evidence*, is that "[m]otions

in limine on legal issues presented in a vacuum are often frivolous. Boilerplate, generalized objections in motions in limine are inadequate and tantamount to not making any objection at all and will not preserve error. For example, a motion that simply asks the trial court to prohibit the adverse party from presenting hearsay evidence or mentioning insurance at trial is a waste of judicial resources. Generally, a motion in limine should not be filed (or granted) until the trial court has been given adequate context, and the evidence is sufficient to permit the trial court to make an informed ruling."

Here, in this tribunal, the motion practice is governed by Rule 23 (a) of the *Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature* which states that "All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer, 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 decision on the motion, objection, or procedural question." The Board of Managers argues that there are sundry reasons why the Presiding Officer should not preclude evidence introduced on one rejected Article of Impeachment from supporting proof of the allegations contained in another Article of the Articles of Impeachment, as adopted by the House of Delegates in House Resolution 202.

III. ARGUMENT

With regard to the standard of review to be applied to this proceeding, the Board of Managers confesses that there is little precedent to guide us in this undertaking. Litigation and decisions arising from impeachment proceedings are rare. Further, as our state utilizes a different—and more relaxed—standard for impeachment than the Federal standards, the exact applicability of many of these holdings to this proceeding is in doubt.

Federal impeachment proceedings have been challenged in federal courts on a number of occasions. Significantly, the United States Supreme Court has ruled that procedural actions or decisions of the United States Senate in an impeachment proceeding posed a nonjusticiable political question.

In *Nixon v. United States*, 506 U.S. 224, (1993), Judge Walter L. Nixon had been convicted in a criminal trial on two counts of making false statements before a grand jury and was sent to prison. He refused, however, to resign and continued to receive his salary as a judge while in prison. The judge was thereafter impeached by the House of Representatives and removed from office by vote of the Senate. He subsequently brought a suit arguing, specifically, that the Senate's use of a trial committee to take evidence in his proceeding violated the Constitution's provision that the Senate "try" all impeachments, arguing the Senate as a whole was required to do so.

The United States Senate Supreme Court disagreed, noting that the Constitution grants "the sole Power" to try impeachments "in the Senate and nowhere else"; and the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions." *Nixon* 227-9. This constitutional grant of sole authority, the Court reasoned, meant that the "Senate alone shall have authority to determine whether an individual should be acquitted or convicted" and how that process would therefore be arranged and laid out. In addition, because impeachment functions as the "only check on the Judicial Branch by the Legislature," the Court noted the important separation of powers concerns that would be implicated if the "final reviewing authority with respect to impeachments [was placed] in the hands of the same body that the impeachment process is meant to regulate." *Nixon* 235-6.

With respect, the Board of Managers is uncomfortable with the Presiding Officer determining what evidence may be presented relating to specific Articles of Impeachment given this precedent and given the West Virginia Senate's unique Constitutional duty, analogous to that of its Federal counterpart, as it "shall have the sole power to try impeachments." *W. Va.*

Constitution. Art. IV, §9. To quote the United States Supreme Court in *Nixon,* because impeachment functions as the" only check on the Judicial Branch by the Legislature," it seems to us equally inappropriate for the potential to exist for the "final reviewing authority with respect to impeachments [to be placed] in the hands of the same body that the impeachment process is meant to regulate." *Nixon,* Id. We believe it is better to err on the side of caution and avoid any appearance of impropriety.

Article XIV, the sole Article of Impeachment under which the respondent is charged is again mischaracterized by the Respondent's Counsel as implicating her solely on the grounds of some sort of collective failure to carry out administrative responsibilities. The Article even notes in its plain language that, it pertains to "[t]he failure by the Justices, **individually and collectively**, to carry out these necessary and proper administrative activities". (emphasis added). While Respondent did, and continues to, hold but a single vote on the Court, she did have -some- measure and control of the directions, actions, and inactions of that body. She had, we contend, an individual and personal duty to act to effectuate certain standards, and in some manner, we allege, neglected to fulfill that duty, resulting in maladministration. The trial shall be upon her specific contributions to the action or inaction undertaken by the Court.

To exclude any evidence or examples of wasteful "unnecessary and lavish spending on the part of the Respondent prevents the fulfillment of the mandated duty of the Senate to fully and fairly examine the conduct of the Justices **individually and collectively**, to carry out these necessary and proper administrative activities." (emphasis added). The Presiding Officer should not grant this Motion for this reason alone; as the Senate should have the opportunity to exercise its Constitutional prerogative of trying the evidence fully.

As the Respondent argues that some form of, essentially, *res judicata* rests upon the House's determination of specifying charges in the Articles of Impeachment, it is salutary to consider the law of res judicata in West Virginia. "Before the prosecution of a lawsuit may be

barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

The first provision under the *Blake* test is not met as this is not a prior action; we are constructively discussing whether a charging authority's framing of an indictment necessarily precludes the admission of certain evidence in the same proceeding. Simply because the evidence was rejected to prove one specific point, does not mean that it is not useful or proper to be used as evidence for another claim in the same proceeding.

The second element is not met as there are not two actions. We are still dealing with the same action, and with the same evidence and the same actor: the Respondent. The deliberations in the House to frame the Articles do not constitute a separate action, but are merely a necessary precedent condition to the present trial proceedings, that of formulating the articles of Impeachment.

Finally, "the cause of action identified", as required in the third element, is neither the same as that examined in the House, nor does the action of the House constitute a separate prior proceeding but, rather, as noted, *supra*, the actions of the House are the first and necessary component of the impeachment process generally. Thus, there can be no *res judicata* on this issue under the *Blake* test, as none of the three required elements was in any way satisfied, and all three of them must be satisfied for *res judicata* to apply.

Our Supreme Court has articulated recently that "The doctrines of res judicata and collateral estoppel bar the relitigation of a claim or issue previously resolved in **another suit**. (emphasis added) *Res judicata* (also called "claim preclusion") generally applies if 'the cause of

action identified for resolution in the subsequent proceeding' is 'identical to the cause of action determined in the prior action,' or could have been raised and determined in the prior action. Syllabus Point 4, *Blake*, supra. Collateral estoppel (also called "issue preclusion") applies if the 'issue previously decided is identical to the one presented in the action in question.' Syllabus Point 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)", *In re B.C.* 233 W.Va.130, 135, 755 S.E.2d 664, 669 (2014). In Syllabus Point 1 *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995), the Court outlined a four-part test to determine if a party was collaterally estopped from raising a previously resolved question in a new civil action: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Here, again, the facts will not allow for an application of collateral estoppel in this matter. First, the use of the term the "issue previously decided" is not an apt characterization of any issue now before the Senate as no issue was decided in the House; the Senate has the Constitutional duty to actually decide this matter, and there was no prior action by a court as required for an application of collateral estoppel. Second, there was no final adjudication as the proceedings in the House were not judicial nor do they in any way constitute a prior action, being but the first and necessary portion of the action now before the Senate. We concede that the party is identical, but prong four is not met as there has been no opportunity to actually litigate the issues as only the Senate may Constitutionally try the case upon the Articles of Impeachment. Thus, at best, only one of the four elements required for collateral estoppel will lie in the present instance; three are not met in any manner.

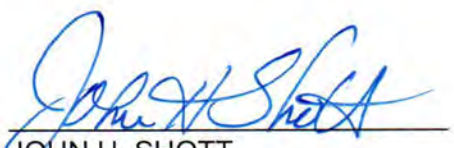
Thus, there can be no application of *res judicata* or collateral estoppel to any issue pending before the Senate in these Articles of Impeachment. Art. IV, §9 of the *W.Va. Constitution* enumerates that "the House of Delegates shall have the sole power of impeachment...[and] the

Senate shall have the sole power to try impeachments." We believe, under the Separation of Powers doctrine, that it is the sole province of those legislative bodies to determine for themselves what are and are not impeachable offenses and to determine the manner in which they shall be presented and what constitutes reliable evidence. As noted, the United States Supreme Court, in *Nixon*, *supra*, agrees with this position.

We do not believe that the Respondent has met her burden of showing how the use of evidence relating to her spending upon her office has "been given adequate context." Nor, is the evidence which has been submitted to the Presiding Officer to indicate what alleged prejudice she is likely to suffer from the presentation of this evidence "sufficient to permit the trial court to make an informed ruling," under the strictures of the commentary to Rule 103 of the *West Virginia Rules of Evidence.* Indeed, Respondent has submitted absolutely nothing in support of the contention that the evidence she seeks to bar is prejudicial in any way, let alone "highly prejudicial". We do believe that as Respondent has not shown, contrary to the Requirements of Rule 403 of the *West Virginia Rules of Evidence,* that the evidence she seeks to bar presents any danger of creating "unfair prejudice, confusing the issues, misleading the jury, [creating] undue delay, wasting time, or needlessly presenting cumulative evidence" that the House should, therefore, suffer no limit to be imposed on the evidence it can produce in support of Article XIV.

For the foregoing reasons, Respondent's Motion in Limine must be denied. The Senate must have the opportunity to exercise its sole jurisdiction over this matter.

Accordingly, Respondent's Motion is without merit and we respectfully request this Presiding Officer to deny the same.



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CERTIFICATE OF SERVICE

I, JOHN H. SHOTT, on behalf of the Board of Managers, do hereby certify that the foregoing "*Board of Managers of the West Virginia House of Delegates' Response to Justice Walker's Motion in Limine*" has been served upon the following individuals this 10th day of September, 2018, by delivering a true and exact copy thereof as follows:

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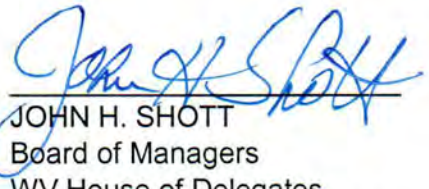

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