

SUPREME COURT OF APPEALS
OF WEST VIRGINIA



ADMINISTRATIVE OFFICE
BUILDING 1, ROOM E-100
1900 KANAWHA BOULEVARD, E.
CHARLESTON, WV 25305-0832
(VOICE) 304/558-0145
(FAX) 304/558-1212
www.courtsww.gov

BARBARA H. ALLEN
INTERIM ADMINISTRATIVE DIRECTOR



July 13, 2018

Hon. John Shott, Chair
House Judiciary
Room 418M, Building 1
State Capitol Complex
Charleston, WV 25305

Dear Delegate Shott:

For the past six months the Supreme Court of Appeals of West Virginia has fully cooperated in parallel state and federal investigations which have resulted in a Judicial Investigation Commission complaint, a federal indictment, and a judicial suspension without pay of Allen H. Loughry II. We have also provided complete cooperation to the Legislative Auditor and the Legislative Committee on Special Investigations. The Court has promptly and fully provided more than 50,000 documents to the United States Attorney and a similar volume of material to the Legislative Auditor, as well as myriad documents to the Legislative Commission on Special Investigations and the Judicial Investigation Commission, and to the media in response to numerous FOIA requests. Additionally, the Court has made its employees available for questioning by state and federal investigators without limitation.

With respect to the legislative proceedings that began yesterday, let me state at the outset that while the Court acknowledges the Legislature's right to conduct an inquiry where a proper legislative purpose exists, we have significant concerns both as to the scope of these impeachment proceedings and the procedures governing them. We believe that the case of *State ex rel. Joint Committee on Government and Finance of West Virginia Legislature, et al. v. Bonar*, 159 W. Va. 416, 419 & 421-22, 230 S.E.2d 629, 631 & 632 (1976) (hereinafter *Bonar*), decided in the context of the propriety of a legislative subpoena for documents from an executive branch agency, is instructive. The sole Syllabus Point in *Bonar* provides:

"When a legislative body invokes the aid of the courts to enforce a legislative subpoena duces tecum, the courts will require a showing that a proper legislative purpose exists; that the subpoenaed documents are relevant and material to the accomplishment of such purpose; and that the information sought is not otherwise practically available; and in the absence of such a showing, the subpoena duces tecum will not be enforced by the courts"

In reviewing factor one, relevance and materiality to a proper legislative purpose, House Resolution 201 empowers the Committee "[t]o investigate, or cause to be investigated, any allegations or charges related to the maladministration, corruption, incompetency, gross immorality, or high crimes or misdemeanors committed by any Justice of the West Virginia Supreme Court of Appeals...." Without

some specificity *as to the alleged impeachable offenses under investigation*, the legislative hearings may result in the conduct of an improper fishing expedition into the business of the judicial branch, raising a serious separation of powers issue under W. Va. Const., art. V, §1. Additionally in that regard, "some of the ... Committee's arguments sound more in prosecutorial than in legislative concerns..." *Bonar* at 421-22, 230 S.E.2d at 632, which further clouds the separation of powers concerns.

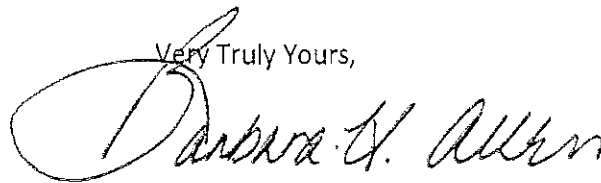
The second factor in *Bonar* raises the question as to whether the evidence sought is relevant and material to the accomplishment of such purpose. Under the Rules of Procedure you have adopted for these proceedings, the rules of evidence will not apply, and the relevance or materiality of any evidence is to be ascertained by each member of the Committee for himself or herself. In short, a full-fledged fishing expedition is now underway before a Committee whose members perform multiple functions: they are prosecutors, making such allegations as they deem appropriate; they are judges, deciding on the relevance and materiality of the evidence for themselves and determining the standard of proof they deem sufficient; and they are jurors, deciding on whether their own charges have been established by their own evidence to their own satisfaction.

The third factor in *Bonar* is whether the information sought through the legislative process is "not otherwise practically available." *Bonar* at 422, 230 S.E.2d at 632. In this regard, the Legislative Auditor and the Commission on Special Investigations have both interviewed numerous Court employees and been provided access to tens of thousands of Court documents, and at least those documents in the possession of the Auditor can be made available to your Committee.¹ For this reason, we question the Committee's need to acquire additional information from the Court, unless it is information not previously provided to other entities and obtainable from them. This includes further questioning of Court employees who have been questioned by your Auditor and Commission, some on more than one occasion. None of these employees are alleged to have committed any wrongdoing, and several have expressed nervousness and reluctance at the prospect of undergoing additional questioning by your members about anything and everything, all while being live-streamed to the world.

The purpose of this letter is to see if we can find common ground that will enable us to assist the Legislature in fulfilling its proper duties while also protecting the judicial branch of government from any improper incursion, interference or interruption in its duties.

Thank you for your consideration of these matters, all of which I would be happy to discuss with you at your convenience.

Very Truly Yours,



Barbara H. Allen
Interim Administrative Director

¹ It is our understanding that the Commission on Special Investigations cannot share information, inasmuch as that information was gathered in conjunction and cooperation with the federal investigation that led to Justice Loughry's indictment.