IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018

IN RE: The Matter of Impeachment Proceedings
Against Respondent Chief Justice Margaret Workman

BOARD OF MANAGERS OF THE WEST VIRGINIA HOUSE OF DELEGATES' RESPONSE TO RESPONDENT CHIEF JUSTICE MARGARET WORKMAN'S MOTION TO DISMISS ON GROUNDS STATED IN PETITION FOR WRIT OF MANDAMUS

Comes Now, the Board of Managers of the West Virginia House of Delegates (hereinafter "Board of Managers") and request the Court to reject the Motion to Dismiss on Grounds Stated in the Petition for Writ of Mandamus of the Respondent Chief Justice Margaret Workman.

In support of its Response, the Board of Managers states as follows:

We confess ourselves stunned by the invective and hostility displayed toward the Legislative branch and by the aspersions cast upon us as members of the bar of this State, as representatives elected by the people of this State, and as individuals bound by oaths to obey the Constitution and laws of our state. We are shocked to find ourselves accused in the harshest terms as lawbreakers. We find ourselves—and the majority of our colleagues who adopted the articles under which Respondent is charged—as characterized as acting with malice and a disregard for the law because Respondent was merely attempting to discharge her proper duties. We are accused of denying her due process, and using corrupt procedures in an attempt to bring her to justice. We deny all this, wholeheartedly.

The actions of the House Delegates are, we believe, proper and Constitutional. The Respondent's position, to the contrary, is simply an attempt to evade responsibility for having allegedly failed to comply with the duties of her office. Respondent's Memorandum seems to us, if taken to its logical conclusions, to argue that there is essentially no power reposed in the

Legislature by which the actions of a corrupt or rogue Judiciary branch could be brought to heel. This is unconscionable; and well beyond the intentions of the Framers.

The Framers of our Constitutions, both Federal and State[1], wisely realized that the power to oversee the actions of the Judiciary branch needed to be vested in the Legislative branch. To vest the power to discipline Judicial wrongdoers in the Executive was an invitation to tyranny, placing unbridled power to remove uncooperative jurists whose integrity or dissent might stifle the ambitions of the powerful. Rather, this power could only be trusted when diffused amongst the representatives of the people, and even then, it was safe only when divided between the several Houses of the Legislative branch, so that neither had the sole authority to remove a judge without well-founded cause.

We state, without reservation, that we believe all issues surrounding impeachment are essentially political questions. The enumerated offenses which the framers of our state Constitution sought to punish are, we contend, substantially the same as those Hamilton noted when he wrote as Publius in *Federalist* 65: "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

The United States Supreme Court has held that a case or controversy is a nonjusticiable political question-where there is "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 ...." *Baker* v. *Carr,* 369 U. S. 186, 217 (1962). Here, the application of that test is clear. The Constitution of the State of West Virginia, specifically provides in Article IV, Section Nine that "The House of Delegates shall have the sole power of impeachment. The

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1 Including those of our mother Commonwealth, Virginia, from whose 1830 Constitution our language on impeachment is lifted, nearly verbatim.

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."

This is the view of the United States Supreme Court as well. In *Nixon v. United States*, 506 U.S. 224,231 (1993) that Court held that

> The commonsense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. "Sole" is defined as "having no companion," "solitary," "being the only one," and "functioning ... independently and without assistance or interference." Webster's Third New International Dictionary 2168 (1971). If the courts may review the actions of the Senate in order to determine whether that body "tried" an impeached official, it is difficult to see how the Senate would be "functioning ... independently and without assistance or interference."

The United States Supreme Court went on to note in *Nixon* at p. 235 that "In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges."* The Federalist No. 79, (emphasis added).

Moreover, the Court held, "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. See The Federalist, No. 81, at 545. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Nixon v. United States*, 506 U.S. at 235.

Other jurisdictions have adhered to this same view of their own state constitutions in the face of challenges to impeachment. In *Larsen v. Senate of Pennsylvania,* 166 Pa. Cmwlth. 472, 491 (1994), a very similar case, the Pennsylvania Court refused to enjoin an ongoing impeachment proceeding against a former state supreme court justice because the issues

raised were "within the exclusive power of the Senate ... and cannot be invaded by the courts"). In *In re Judicial Conduct Committee*, 145 N.H. 108, 113 (2000) New Hampshire's Court found that specific issues raised by the New Hampshire Supreme Court's Committee on Judicial Conduct were nonjusticiable given the state House of Representatives' "extensive"... authority "to conduct impeachment proceedings without interference from the judicial branch"). In *Mecham v. Gordon*, 156 Ariz. 297, 302 (1988) The Arizona Court refused to intervene in the case of disgraced Governor Evan Mecham, as, given the separation of powers doctrine, they were barred from an intervention in the legislative process.

We concur in this view. To request dismissal is permissible, but this case should proceed, so long as the legislative will to continue exists.

Respondent raises four alleged assignments of error on the part of the House. Any one of these, she contends, should result in a dismissal of proceedings against her. For convenience, we answer these in order. We will not concern ourselves with a response to every point raised by Respondent, as we are not the Respondents in this matter, but rather, shall confine ourselves to answering the Respondent's points wherein we believe that the privileges, rights and Constitutional responsibilities enjoined upon our House and the Legislative branch as a whole are at issue.

I. The Articles of Impeachment do not violate the Separation of Powers doctrine.

A. Respondent's role and the Judiciary's budget

Respondent alleges that she is impeached for her role in spending the Judiciary's budget and that "the legislature's efforts are an attempt to use punitive measures to police the Judiciary's budget." (Respondent's Memorandum, p. 15) This is a gross mischaracterization.

The fact that our state Constitution contains provisions concerning the Court's full power to regulate its own budgetary needs is not disputed by us. We do, however, vigorously dispute that the House had and has no role in determining how the Court expends its funds; we note, the undisputed historical fact that the Court has in the past often revised its budget to

accommodate the exigent fiscal circumstances of the State, upon Legislative request. The budget of the state as a whole must be enacted by the Legislature, and signed by the Governor and if either of these believes that the Judicial appropriations are excessive, can delay completion of the budgetary process until an amount can be voluntarily agreed upon by the Judiciary. Thus, there is no power of compulsion over the Judiciary, but there is a power of moral suasion. In budgeting, we would argue, the Court has historically recognized that it is a branch of the government of the whole state, and not a world unto itself.

Moreover, we note the fact that impeachment is the explicitly prescribed Constitutional remedy if the Court or a member thereof is guilty of violating the proper bounds set forth for their conduct in that document. Article IV, Section 9 of our state Constitution provides that: "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." There is no exemption contained within this provisions for officers of the Judicial branch, not even for members of this august Court. Any officer of the State, from highest to lowest, must abide by and be subject to this same standard.

Let us examine the counts upon which an officer of the state may be impeached. Foremost among these is maladministration, defined in *Black's* as "Poor management or regulation, esp. in an official capacity". p. 976, *Black's Law Dictionary, 8th Ed.*, (Thomson West, St. Paul MN 2011) The Respondent criticizes the legislature for impeachment upon these grounds; characterizing this as "punishing Justices for using duly procured funds". (Respondent's Memorandum, p. 17) Respondent contends, apparently, that so long as funds are duly procured by the Judiciary from the Legislative branch, that the ends to which those fund are put are essentially unreviewable.

This, we argue, is untenable, both logically and legally: logically, because the Legislature cannot act prior to such procurement as the funds have not yet been given to or expended by the Judiciary, and, thus, the proof of the "poor management or regulation" of those funds entrusted to the use of the Judicial branch could not be obtained, because it would not have yet taken place. Only once the members of the Judiciary have acted in a manner inconsistent with their obligations can they be cited for and brought to trial for any acts of maladministration. This is true for the Constitutionally permissible counts of corruption, incompetency, neglect of duty, and indeed, for any other high crime or misdemeanor involving the expenditure of state funds, as well. An act showing one of these counts has occurred is the necessary condition precedent, and only then can such acts be investigated and punished.

Legally, it is untenable because, we believe, the reviewability of the propriety of Court disbursements by the Legislature is a proper ground for considering impeachment. By taking Respondent's comments literally, at their absurd extreme, the question arises, at what point would Respondent admit that the Legislature would have the right to act if "duly procured funds" were used improperly? Would use of the "duly procured" funds for an unethical purpose be sufficient? Would actual illegality be sufficient? Or, would the Respondent's position be that once funds were "duly procured" that a Justice could not be impeached even if they used those "duly procured funds" as part of a criminal enterprise? Based upon the absolutist position taken by Respondent we can only conclude that the latter is her contention, and we argue, that it is reasonably certain that this outcome was not the outcome intended by the Framers.

The kinds of offenses which the framers of our state Constitution sought to punish are, we reiterate, the same as those Hamilton noted in *Federalist* 65, "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust." Again, as the United States Supreme Court noted in *Nixon v. United States*, 506 U.S. 224, 235 (1993) that "In our constitutional system, impeachment was designed to be the

only check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges." The Federalist* No. 79. (emphasis added).

The 1830 Virginia Constitutional Convention is the ultimate source of our language concerning the impeachment of officers.[2] This language was slightly amended in the 1851 Virginia Constitution and again revised, in some part, in the 1863 West Virginia Constitution, from whence time it has remained unchanged. The Convention which authored it included such men as John Marshall, James Monroe, John Tyler, John Randolph of Roanoke, and one man who had authored our Federal Constitutional language on impeachment—James Madison. It is clear that the Framers of the 1830 Virginia Constitution took a similar high view of the value of impeachment as the Framers of our Constitution did, or as we do. President Monroe stated there that:

> I have thought it proper to state my view. I know that there are strong arguments both for and against each plan; but my idea is, that the more you confine the people within the limit stated, the safer will the Government be. If they are confined to the election of their Representatives they will sustain their dignity, and their judgment will be enlightened by the competition of the candidates, whose mutual rivalry will expose their errors to public view. It is on this that the security of the whole system turns. **My opinion is, that the Legislature**

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2 Article III, Section of the document reads as follows:

> The Governor, the Judges of the Court of Appeals and Superior Courts, and all others offending against the State, either by maladministration, corruption, neglect of duty, or any other high crime or misdemeanor, shall be impeachable by the House of Delegates; such impeachment to be prosecuted before the Senate, which shall have the sole power to try all impeachments. When sitting for that purpose, the Senate shall be on oath or affirmation: 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 honour, trust or profit, under the Commonwealth; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

The similarities to our own current language are striking.

> **supplies the place of the people as a Representative body: they occupy that ground which the people themselves would occupy. If the Legislature has the power of impeachment, and the Senate power to try the persons impeached, they will watch over every other branch of the Government and keep it in order. It is my opinion, that through the Legislature, as occupying the place of the people, the whole movement will be controlled,** and every branch made subservient to their will.

James Monroe, p. 482, *Proceedings and Debates of the Virginia State Convention of 1829-30,* (Samuel Shepherd & Co. Richmond: 1830) (emphasis added).

We concur with President Monroe; this is the Constitutional mechanism by which the people are empowered to guard their government against error. This power, dedicated to the people and exercised by their representatives, must not be infringed upon. "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 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." *W. Va. Constitution.* Article V, Section 1.

B. Respondent's Arguments and the Code of Judicial Conduct

Respondent then proceeds to argue that the Legislature has no right to punish Judges for violations of the relevant canons of the Code of Judicial Conduct. We agree.

That, however, is not what has happened in the instant proceedings. Rather, we contend the Legislature used—and may use—evidence that Judges and Justices have violated provisions of the Code of Judicial Conduct by their actions. By utilizing these standards, we may examine whether or not the conduct of Justices in their official capacity has given rise to "maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor." The Legislature, by this process, infringes upon no function of the Court in any of the forms of authority cited by Respondent; the cases cited by Respondent being completely impotent to prove such.

This body is not infringing on any provisions of Judicial discipline proscribed by the Court or the "Judicial [Hearing] Board in disciplinary proceedings," per *In re Dostert*, 174 W. Va. 258, 324 S.E.2d 402, (1984) and its progeny, has made no decision relating to "public reprimands, suspensions or annulments of attorney's licenses to practice law" as per Syllabus Point 3 of *Committee on Legal Ethics v. Blair,* 174 W. Va. 494, 327 S.E.2d 671 (1984), and, finally is not acting "to control the political activities of [any] judicial officers" as per *Carenbauer v. Hechler*, 208 W.Va. 584, 542 S.E.2d 405 (2000). What this body is doing by discharging the duty required of it by the Constitution to exercise its "sole power of impeachment" and pronounce upon whether or not the conduct of Justices in their official capacity has given rise to "maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor."

Let us suppose that there arose an inconceivable situation in which a Justice of our Supreme Court was convicted in Circuit Court of the theft of state property in the form of office furniture. Whether or not our Supreme Court acted to sanction this Justice or not, it seems clear that this hypothetical Justice would have committed a breach of Rule 1.1 of the Code of Judicial Conduct requiring that "A judge shall comply with the law, including the West Virginia Code of Judicial Conduct." It seems peculiar to us that Respondent argues that the body tasked with the sole power of impeachment over any officer of the state could not cite to the very Code of Conduct which that officer had agreed to be governed by as part of his or her official duties when determining whether or not that officer had engaged in, in this instance, "maladministration, corruption...or any high crime or misdemeanor." Such a violation, would, we believe, be illustrative of the degree to which that individual had been engaged in the kind of conduct which trangressed Constitutional norms.

Respondent claims that violations of the Code of Judicial Conduct are not sanctionable by the Legislature because "the Judicial branch—not the Legislature—is vested with the sole authority to regulate judicial conduct under the West Virginia Constitution". We disagree.

We have been given "the sole power of impeachment" over "any state officer". That power is all the power that exists to rein in a corrupt jurist. Respondent surely does not mean to suggest that only Judges should or could sit in judgment of a corrupt, incompetent, or neglectful jurist; the Constitutional provisions provided for by the Framers indicate that there is some role, in extreme instances, available to the Legislative branch in the removal of such persons from office, just as law enforcement under the Executive could in certain circumstances investigate and arrest, and upon conviction, incarcerate, a judge for violations of criminal law.

The Supreme Court of Texas agreed with this position in *Ferguson v. Maddox*, 114 Tex. 85, 94 (1924), when it held that:

> In the matter of impeachment the House acts somewhat in the capacity of a grand jury. It investigates, hears witnesses, and determines whether or not there is sufficient ground to justify the presentment of charges, and, if so, it adopts appropriate articles and prefers them before the Senate ... During the trial the Senate sits 'as a court of impeachment,' and at its conclusion renders a 'judgment?... The Senate sitting in an impeachment trial is just as truly a court as is this court.

This seems in harmony with the Framers intent as stated by President Monroe that the Legislature occupies "that ground which the people themselves would occupy. If the Legislature has the power of impeachment, and the Senate power to try the persons impeached, they will watch over every other branch of the Government and keep it in order." Monroe, *supra.* As the Texas Court noted in *Ferguson,* the jurisdiction of the Senate, sitting as the Court of Impeachment, "is very limited, but such as it has is of the highest. It is original, exclusive, and final. Within the scope of its constitutional authority, no one may gainsay its judgment." *Ferguson, supra, at* 94

Thus, we act in conformity with this maxim that the people through their representatives have a role in evaluating the conduct of their officers. We conclude that whether the conduct which gives rise to a probable violation of the Code of Judicial Conduct, regardless of whether such probable violation is pronounced upon officially by the Court or not to be such, is available

for us to use as evidence in determining whether that conduct is the kind of Constitutionally impermissible wrong-doing which gives rise to a removable offense. The Legislature, in cases of impeachment is Constitutionally empowered to define its own standards, and can adopt theirs as a reference if desired.

The Supreme Court of this State has recently held that under our Separation of Powers Clause in 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." Syl. Pt. 3, *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010). In fact, the principle of separation of powers is held so highly that the Court further noted, in Holmes, that"[o]ne branch of the government cannot encroach on the domain of another without danger. **The safety of our institutions depends in no small degree on a strict observance of this salutary rule.**" See *Id.* at 485, 702 S.E.2d at 617 (quoting *Union Pac. R. Co. v. U.S.*, 99 U.S. 700, 718 (1878)) (emphasis added).

For these foregoing reasons, we believe that the Respondent's points advanced hereunder, are a gross violation of the separation of powers doctrine. West Virginia's Separation of Powers doctrine "is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 1, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981) Accordingly, they should be rejected by this tribunal.

II. The Articles of Impeachment do not violate Constitutional Precedent regarding the appointment of senior status judges.

Respondent has alleged that the House violated Constitutional norms by finding that the willful violation of statutory prohibitions on the payment of senior status judges by the Court constituted grounds for impeachment of the persons serving as Chief Justice and who were directly responsible for approving such overpayments. Respondent does so, apparently, on the grounds that the Court has oversight over the appointment of senior status judges under the

terms of the Judicial Reorganization Amendment and relevant precedent thereunder, none of which is in dispute.

A. The compensation of judges is not the sole province of the Court

What is in dispute is that the Respondent utilizes this authority to somehow construct an argument that the pay of Judges is entirely the purview of the Court. This is not the case. The pay of Judicial officers is in the hands of the Legislature, and is wisely placed there. Paragraph two of Article VIII, section seven of our Constitution begins: "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 shall not be diminished during their term of office, and they shall receive expenses **as provided by law**." (emphasis added)

Given our Constitution's unique grant of budget making authority to the Judicial branch, it was necessary that the Legislature, having the power of the purse, retain the ability to fix Judicial branch salaries; else, the natural tendency of human frailty would have been for the Judicial officer to set their own salaries at high rates, which would have been unreviewable by any authority. Thus, the Constitution provided the legislature this one piece of fiscal oversight to curb any excesses on the part of Judicial officers.

W.Va. Code §51-9-10, contrary to Respondent, does not "purport to prohibit paying senior status judges more than a sitting judge's salary. (Respondent's Memorandum at p. 22) It **does** effectively prohibit such action, just as W. Va. Code §61-3-20 does not merely purport to define the crime of embezzlement, but in fact does define that crime. We agree with Respondent that Constitutional provisions cannot be superseded by statute; but the statutory provision at issue here is made under the clear Constitutional authority of Article VIII, section seven of our Constitution that "Justices, judges and magistrates shall receive the salaries fixed by law[.]" We argue that violation of a statutorily prohibited mandate with regard to the expenditure of taxpayer funds does, arguably, constitute one or more of the Constitutional

grounds for impeachment such as "maladministration, corruption...or any high crime or misdemeanor."

B. Administrative Orders are distinct from Administrative Rules

Respondent proceeds to make an argument which we believe to be misleading, which, however, is premised upon an undisputed fact. Specifically, that on May 19, 2017, Justice Loughry, then-Chief Justice, issued an Administrative Order of the Court. This Order purported to confer upon the Court the authority to exceed payments made to senior status judges in violation of W.Va. Code §51-9-10 under "certain exigent circumstances involving protracted illnesses, lengthy suspensions due to ethical violations, or other extraordinary circumstances."

We believe this argument to be misleading for several reasons. First, even if we were to accept the validity and efficacy of this Administrative Order, it does not bear upon the conduct Respondent has been cited for, as the violations of the provisions of W.Va. Code §51-9-10 which she stands accused of took place two years prior to the execution of that document, during the period she was last Chief Justice in 2015. Thus, it cannot be cited to provide any grounds for her action or inaction. Had she herself promulgated rules, her argument that rulemaking may trump the statute may have had some effect, but here it is purely speculative that rulemaking by the Court has any bearing upon her culpability.

Respondent does not, significantly, mention that her actions may constitute a violation of W.Va. Code §61-3-22, which provides in pertinent part that "If any officer, clerk or agent of this state...make, alter or omit to make any entry in any book of account of, or in any account kept by such state...with intent to enable or assist any person to obtain money to which he was not entitled, such officer...shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years." The promulgation of the Administrative Order by Justice Loughry, may, if we accept her interpretation of events, be a curative measure, but it cannot insulate her from an act of criminal wrongdoing anymore than the decriminalization

of a drug would void a contemporaneous pending indictment of a person who was trafficking in such substance while it was still illegal. Her violation of the statutory prohibition remains.

Moreover, even if we accept the validity of Justice Loughry's action, we would be puzzled by why, during her prior tenure as Chief Justice, knowing that such questionable actions were being undertaken, that the Respondent did not avail herself of the same remedy and promulgate that Administrative Order, or an identical or similar one, during her term. We can only conclude that she exhibited either an ignorance of the illegality of her actions or a lack of concern as to their legality.

Additionally, we do not concede the position of the Respondent—that the Administrative Order of the Court promulgated by Justice Loughry is one of the Rules of the Court having the force and effect of general law. Those specific Rules are strictly limited by the Constitution to those in Article VIII, Section three comprising "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."

We believe quite obviously, that these include our West Virginia *Rules of Evidence,* West Virginia *Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Procedures of the West Virginia Supreme Court of Appeals, Rules of Practice and Procedure for Family Court, Trial Court Rules*, among others. Additionally, we believe that these also include those required by Article VIII, Section eight of the Constitution "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" as embodied, for example, in our *Code of Judicial Conduct.*

These Rules are promulgated by the Court, subject to an intense scrutiny by other jurists, the public and the bar, and then and only then take effect. Most of them are based upon longstanding precedent of our state and other jurisdictions, evolved from common law practice, and, in many cases, rely upon national models and Federal analogues for inspiration, and

revised with the experience of changing times. They are, thus, part of the organic structure of our legal system and have a generally accepted validity as they usually depend, again, upon prior Rules or precedent for inspiration. Moreover, they are clearly and specifically denoted as rules of general application.

The Administrative Order promulgated by Justice Loughry is in no way like these; it is much more akin to an Executive Order in that Branch, as it relates to an act of administrative governance of the inner workings of the Judiciary's payment of judges. It is not a rule of general application, but an ad hoc mechanism to address a very specific fact pattern and like many executive orders, represents an attempt to circumvent a legislative prerogative and fiat in the name of expediency. Article VIII, Section seven of our Constitution proclaims "Justices, judges and magistrates shall receive the salaries fixed by law." It is not the Court's duty, either by Rule or by the dubious fiat of an Administrative Order to intrude upon the one safeguard the Framers left the West Virginia Legislature in maintaining some power of the purse over the Judiciary. If Administrative Orders can set judicial salaries in the name of expediency, there is, literally, no check on what level at which the Chief Justice could set those salaries, all the while claiming such expenditure was needed for the efficient operation of the Courts. This is an intolerable intrusion of the Legislative branch's only check upon the expenditures of the Judiciary, short of invocation of the impeachment power, and should be shunned as the pernicious innovation that it is.

For these foregoing reasons, we believe that the Respondent's points advanced hereunder, are a distortion of the Constitutional relations and responsibilities of the applicable branches of state government. Accordingly, they should be rejected by this tribunal.

III. The Articles of Impeachment do not violate the Respondent's right to due process

The Fourteenth Amendment to the United States Constitution prohibits state governments from depriving an individual of a property interest without due process of law. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This right is, as

Respondent correctly notes, explicitly reaffirmed in our state Constitution Article III, Section 10 "No person shall be deprived of life, liberty, or property, without due process of law," and confirmed by precedent, e.g. *Fraley v. Civil Service Comm'n*, 177 W.Va. 729, 356 S.E.2d 483 (1977). Moreover, we acknowledge that conceptually, an individual may have a property interest in continued employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Importantly, however, not every form of employment creates an expectation which rises to the level of a property interest that would be protected by the Due Process Clause of either Constitution. "A public office is not property, within the meaning of the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers.' It is a mere public agency, revocable according to the will and appointment of the people, as expressed in the constitution and the laws enacted in conformity therewith." Syl. Pt. 2, *Moore v. Strickling, 46 W. Va. 515*, 33 S. E. 274.(1899)[3] A long line of cases from both Federal case law and from the courts of other jurisdictions explicitly note that an individual has no property interest in a public office.[4] Representative of these supportive findings by other courts is the holding in *Attorney General v. Jochim,* 99 Mich. 358, 58 N. W.

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3 This case involved the drunken and debauched prosecutor of Tyler County, the Hon. James H. Strickling, who was removed from office for gross immorality, specifically for living in a house of ill fame. Perhaps ironically, he later represented that county in the House of Delegates, and, later still, was elected as that body's Speaker.

4 The majority rule is that elected offices are not "property." See *Slawik v. State*, 480 A2d 636, 644 (DE 1984). Both Federal and state courts have followed this view, or, at least, thoroughly questioned the merits of the opposing view. See *Rabkin v Dean*, 856 F Supp 543 (N D Cal 1994); *Roth v Cuevas*, 603 NYS2d 962 (NY Sup Ct 1993); *Bartow v Harbal*, 1991 WL 127565 (Ohio App); *Burrage v New Hampshire Police Standards and Training Council*, 127 NH 742, 506 A2d 342 (1986); *Sweeney v Tucker*, 473 Pa 493, 375 A2d 698 (1977), *Moore v. Watson*, 429 So.2d 1036 (Ala., 1983), *People v. Lindsey*, 80 Colo. 465, 253 P. 465, cert. denied, 274 U.S. 757, 47 S.Ct. 767, 71 L.Ed. 1336 (1927), *Board of Regents of State Colleges v. Roth* 8212 162, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), *D'agostino v. Delgadillo*, 111 F. App'x 885, 886 (9th Cir. 2004) *Burks v. Perk*, 6th Cir., 470 F.2d 163 (1972), *Katz v. Brandon*, Conn.Supr., 156 Conn. 521, 245 A.2d 579 (1968), *Kirkpatrick v. King, Ind.Supr.*, 228 Ind. 236, 91 N.E.2d 785, 788-89 (1950), *State ex rel. Hall v. Vaughn*, Mo.Supr., 483 S.W.2d 396, 397 (1972) (en banc), *Isola v. Borough of Belmar*, N.J.Super., App.Div., 34 N.J. Super. 544, 112 A.2d 738 (1955), *Lanza v. Wagner*, N.Y.Ct.App., 11 N.Y.2d 317, 229 N.Y.S.2d 380, 384, 183 N.E.2d 670, 673 (1962); *Simmons v. Elizabeth City*, N.C.Supr., 197 N.C. 404, 149 S.E. 375, 376 (1929); *Wright v. City of Florence*, S.C.Supr., 93 S.E.2d 215, 220 (1956), *Keenan v. Perry*, 24 Tex. 253 (1859), *State v. Frazier*, 48 Ga. 137 (1873); *Patton v. Vaughan*, 39 Ark. 211 (1882); *Rankin v. Jauman* (Idaho) 36 P. 502 (1894) and most recently reaffirmed in *People v. Smith* (Mich. #156353, 2018).

611, (1894) in which the supreme court of Michigan held: "A public office cannot be called 'property,' within the meaning of section 1 of the fourteenth amendment to the Constitution of the United States and section 32 of article 6 of the Constitution of Michigan, which provide that no person shall be deprived of life, liberty, or property without due process of law."

In West Virginia, this Court has held that a public office is defined as "a position created by law with duties cast on the incumbent which involve an exercise of some portion of sovereign power and in which the public is concerned." Syl. Pt. 1, *State ex. rel. Key v. Bond*, 94 W. Va. 255, 118 S. E. 276 (1923).[5] "Among the criteria to be considered in determining whether a position is an office or a mere employment are whether the position was created by law; whether the position was designated an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign." Syllabus Point 5, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). Here, the Respondent can in no way to be construed as a mere employee as she satisfies all of these criteria; we cannot view her as anything but an officer of state, nor would we believe that she would contest this characterization. Thus, based upon the weight of precedent, we can authoritatively state the Respondent has no property right in her office.

Having no property right in her office, we are of the opinion that the holding in *Smith v. Thompson*, Iowa Supr., 219 Iowa 888, 258 N.W. 190, 193 (1934), provides guidance as to the treatment of the existence of a conceptual property right in Respondent's pension. In that case, the Iowa Court held "it must be conceded, as a general rule, that the relation between a public office and the people is not in the nature of a contract, and that such office has in it no element of property. It is a public trust, created for the benefit of the state, and not for the benefit of the individual citizens thereof, **and the prospective emoluments of a public office are not**

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[5] Other jurisdictions have adopted similar tests, see, as an example Maryland's construction of this issue in *D'Aoust v. Diamond*, 424 Md. 549 (2012)

property in any sense." *Id.* at 193. (emphasis added) As Respondent has no inherent property right in her office, so, we argue, she can have no inherent property right in the prospective emolument of a pension. One may as well argue they have a right to the fruit of a tree which they do not own.

Under West Virginia precedent, we do not dispute that there are certain "conditions under which public employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system." Syllabus Point 5, *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (W. Va., 1995) cited in *Board of Trustees of Police v. Carenbauer*, 567 S.E.2d 612, 617, 211 W.Va. 602 (W. Va., 2002). However, Respondent is not a public employee. She is, as noted *supra*, an officer of state. As part of her duties she superintends and oversees the workings of public employees and cannot and should not be confounded with them. There is as much difference between these two classes as there is between labor and management in the private sector, and, the distinction between the treatment of their pension rights is, thus, one which was not made for arbitrary reasons. Public employees earn less money, have less prestige, and face a greater risk of being deprived of employment at any time; many are at-will employees, and some face the vagaries of political fortune, and can be turned out with a mere change in electoral fortunes. For these reasons, they and their pension rights are afforded a heightened level of protection. A public officer can only be removed from office for some form of Constitutionally enumerated wrongdoing, by a vote of the Senate. Thus, there is a sound logical basis as to why they do not have the same level of protection with regard to their pension obligations.

Moreover, even were she to forfeit pension rights by being removed from office, the right to her property in the form of her contributions to the pension system is not in jeopardy. She will receive all of the money which she personally contributed to the system plus a statutory amount of interest upon the same, and cannot be dispossessed of what she contributed, regardless of the level of wrongdoing which would merit her removal. See *W.Va. Code* § 5-10A-6

Respondent alleges that she has not had proper due process as the Senate has failed to notify her of the charges against her. Due process, generally consists of a party having time, notice, and opportunity to be heard upon, or to offer a defense to, a complaint or charges lodged against them. Respondent has had more than ample notice, time, and opportunity to ascertain the charges lying against her and to prepare a defense. Public Impeachment proceedings naming her as a subject of an investigation began in the House of Delegates on June 26, 2018, with the passage of House Resolution 201. The Judiciary Committee of the House of Delegates investigated and publicly collected evidence and testimony for a period of weeks, during which time the Respondent spoke with counsel for the committee who advised her that she could attend the hearings, advised her to retain counsel, and told her, in response to her query that she could testify at the hearings if she so chose. The Respondent had a right to attend and question witnesses before the Judiciary Committee, and other Justices named in the Impeachment Resolution exercised this right by sending Counsel. The Respondent freely chose not to appear or send Counsel on her behalf to question witnesses before the Judiciary Committee. The right to question witnesses during the Judiciary Committee investigation was an extraordinary due process right, but the Respondent chose not to exercise it.

The West Virginia Senate publicly adopted its rules on August 20, 2018, through Senate Resolution 203. Thereafter, the Respondent has had nearly two months to prepare for trial and has been afforded the opportunity to submit many motions to the Senate to influence the outcome of the trial. At trial, she will be afforded all the rights defined in the Senate Rules including the right to present evidence and question witnesses. During this entire time from the first media reports through its conclusion, the Respondent has had and will continue to have ample opportunity to present evidence of good management practices, championed by her during her two decades on the Court and the five terms she has previously served as its Chief Justice. Moreover, she will have been able to watch the public trial of her colleague Justice Walker. It seems odd, given the extremely public nature of the charges, and the public process

utilized to generate them that Respondent can now claim the Senate has given her no notice of the charges against her.

Respondent further claims the House violated its mandate for impeachment as contained in House Resolution 201 by failing to adopt findings of fact. As this theory was advanced by members of the House Judiciary Committee earlier, we are not surprised to see it reiterated here. It remains as fallacious then, as it was now.

House Resolution 201 states in pertinent part:

> **That the House Committee on the Judiciary be,** and it is by this resolution, **empowered:**
> (1) To 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;
> (2) To meet during the adjournment of the House and to hold a hearing or hearings thereon if deemed necessary in the course of its investigation;
> **(3) To make findings of fact based upon such investigation and hearing(s);**
> (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; and
> (5) If the recommendation of the Committee be to impeach any or all of the five members of the West Virginia Supreme Court of Appeals, then to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment; and, be it

The Respondent and the members of the Judiciary Committee of the West Virginia House of Delegates who advanced this argument have failed to understand that the word "empowered" is not synonymous with "required". To have the ability to exercise a power does not compel one to exercise it; it lay within the discretion of the Judiciary Committee to offer findings of fact. While such may have been desired by Respondent, we believe that the Articles speak for themselves as to what facts the Judiciary Committee found to be relevant and to be at issue in the instant matter.

While, we value the rights of the Respondent to due process as highly as anyone, for these foregoing reasons, we do not believe that the Respondent's points advanced hereunder,

present any violation of those rights which is cognizable by this tribunal. Accordingly, her contentions upon this ground should be rejected.

IV. The House did vote upon the Articles of Impeachment; and this trial is legitimate and Constitutional.

Without diving too deeply into West Virginia law, it is clear that there is very little guidance on impeachment in terms of statutes or rules; and, it is a fortunate thing for our state that there is little precedent to guide us in this regard. WV House Rule 135 provides "On any question of order or parliamentary practice where the rules of the House or the joint rules of the House and Senate are silent or inexplicit, *Jefferson's Manual* and the *Digest of the Rules and Practices of the House of Representatives of the United States Congress* shall be considered as authority."

According to *Jefferson's Manual*, and specifically regarding the subject of impeachment, "a resolution setting forth the separate articles of [an] impeachment may be divided among the articles (e.g. Dec. 19, 1998; Mar. 11, 2010, p. H1331)." (See §606a.) The Manual goes on to say "Its committee on investigation having reported, the House may vote the impeachment, and, after having notified the Senate by Message, may direct the impeachment to be presented at the bar of the Senate by a single member, or five, or nine or 13."

In support of this proposition, *Jefferson's Manual* cites the procedural course of action which was followed in the impeachment proceedings held in the United States House of Representatives against President Bill Clinton, which occurred on December 19, 1998, and also those impeachment proceedings held in the United States House of Representatives against U.S. District Judge Thomas Porteous, Jr., that occurred on March 11, 2010. These are two of the more recent Federal impeachment proceedings that have occurred.

With regard to President Clinton's impeachment, House Resolution 611 was divided for a vote by the Speaker pro tempore of the House. (*Journal of the House of Representatives*, December 19, 1998, Page H12040). Each of the four Articles of Impeachment were voted on

separately in Roll Calls Nos. 543 through 546. Articles 1 and 3 of House Resolution 611 were agreed to by the House. No further vote on the resolution, as a whole, occurred. The next item addressed by the House was the adoption of the resolution appointing managers to conduct the impeachment trial against the President.

With reference to the impeachment of U.S. District Court Judge Thomas Porteous, Jr. The *Journal* indicates that the "Mr. Conyers, by direction of the Committee on the Judiciary, rose to a question of the privileges of the House and called up the following privileged resolution, House Resolution 1031." (*Journal of the House of Representatives*, March 11, 2010, ¶28.7) After a quorum of members was established, the Speaker pro tempore announced, as in the impeachment of President Clinton, that the "question was divisible and would be divided among the four articles of impeachment." The House then separately voted on those four articles of impeachment. Following these individual votes, the House did not vote on the resolution as a whole. The next action by the House was to submit a resolution (H. Res. 1165) appointing managers on the part of the House to conduct the trial of the impeachment and to present those articles to the Senate, adopted by voice vote.[6]

Thus, there is clear support and precedent for the process of dividing an impeachment resolution by its articles, and the House voting only on whether each article should pass or fail. In both instances cited, one of these being a vote upon the impeachment of the Chief Magistrate of the United States no additional vote on the resolution was required. This issue was never raised in the United States Senate as a ground for dismissal of that impeachment, even by such a noted Constitutional scholar as our Senator Robert Byrd, then present in that body. Surely if this procedure suffices, and is Constitutionally sound to impeach our President, it ought to be sound, proper, and sufficient to allow for impeachment in this matter.

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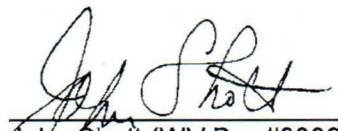
[6] For further confirmation of the facts in this matter, see the report of the Congressional Research Service, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice* following the Porteous matter. https://www.everycrsreport.com/reports/98-186.html

Additionally, the West Virginia House passed House Resolution 205 on August 14, 2018, by voice vote, no negative vote being heard against it, to provide "for the appointment of a committee of five on the part of the House of Delegates to go before the Senate to impeach Robin Davis, Allen Loughry, Elizabeth Walker and Margaret Workman, Justices of the Supreme Court of the State of West Virginia, for maladministration, incompetence, corruption, neglect of duty, and high crimes and misdemeanors, and, as managers on the part of the House of Delegates, to deliver to the Senate articles of impeachment, and to conduct the impeachment against Justices Davis, Loughry, Walker, and Workman." Additionally, that resolution noted that "Pursuant to the authority granted to the House of Delegates in Section 9, Article IV of the Constitution of the State of West Virginia, the House of Delegates has adopted 11 Articles of Impeachment against the various justices of the Supreme Court of Appeals of West Virginia."

It is axiomatic from this that the House considered the Articles it had adopted validly adopted, and intended to transmit them to the Senate. Once transmitted, it provided for the managers to prosecute the same. Had any member opposed this course of action, there could have been vigorous debate upon it. The text of the adopted articles could have been amended in, had any member doubt of its sufficiency. As we have demonstrated, based upon established Federal precedent, there is no need for doubt.

Accordingly, for these and other good and sufficient reasons, we respectfully request this Presiding Officer deny the requested Motion to Quash and provide us with all appropriate and consistent relief.



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IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION

2018

IN RE: The Matter of Impeachment Proceeding

Against Respondent Chief Justice Workman

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 Chief Justice Workman's Motion to Dismiss on Grounds Stated in Petition for Writ of Mandamus*" has been upon the following individuals this 5th day of October 2018, by delivering a true and exact copy thereof as follows:

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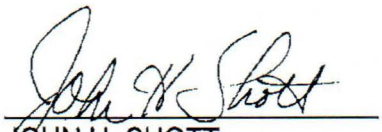

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