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IN THE WEST VIRGINIA SENATE

***IN THE MATTER OF IMPEACHMENT PROCEEDINGS AGAINST
RESPONDENT CHIEF JUSTICE MARGARET WORKMAN***

Honorable Paul T. Farrell
Acting Justice of the
Supreme Court of Appeals of West Virginia
Presiding Officer

CHIEF JUSTICE WORKMAN'S MOTION TO DISMISS ARTICLE XIV(E)

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article XIV(E) be dismissed insofar as there was no evidence before the House of Delegates from which that body could charge Respondent with maladministration. Article XIV(E) alleges that Respondent failed “[t]o 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 [j]justice and the indictment of another [j]justice.” Art. XIV(E). But impeachment cannot lie for an honest, non-catastrophic mistake, or for an official act or omission amounting to ordinary lack of care. Assuming, *arguendo*, that Respondent’s official conduct rises to “maladministration,” no evidence has been produced that she specifically intended the alleged misconduct.

As an initial matter, Article XIV(E) is an attempt to hold Respondent accountable for other justices’ personal use of state cars, alleged to have been improper. To be sure, the Court’s records indicate that one justice frequently reserved state cars between January 2013 and September 2016 without providing a destination. *See* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices (“Tr.”) Vol. I 38:4–40:2; *see also* Post Audit Div., Joint Comm. on Gov’t and Fin. W. Va. Office of the Leg. Auditor, Supreme Court of Appeals of West Virginia Report 7 (Apr. 16, 2018) [hereinafter Report].

Evidence indicates that of that justice's total 212 reserved days, 148 days—70 percent—had no destination listed. *See* Tr. Vol. I 38:4–19; *see also* Report at 7.

Relatedly, another former justice, having obtained use of a Court car for commuting purposes, allegedly used it to drive to personal golf outings in Virginia. Report at 3–4. During those trips, that justice allegedly purchased gas with the state's fuel card. *See id.* By its approval of Article XIV(E), the House now seeks to assign to Respondent the other justices' alleged misconduct.

Examination of the evidence (or lack thereof) before the House is mandated in this impeachment by fundamental principles of fairness and due process. The case before the Senate against Respondent is conceptually indistinguishable from that against two county supervisors in *Steiner v. Superior Court*, 58 Cal. Rptr. 2d 668 (Cal. Ct. App. 1996). In *Steiner*, the district attorney instituted removal proceedings before the grand jury, which returned accusations that the supervisors failed to adequately oversee the treasurer and other officials to prevent them from bankrupting the county through speculative investments. Of the accusations, the court remarked that “[i]n a nutshell,” the supervisors were alleged to have done “a shoddy job of minding the store.” *Id.* at 672. The court granted the supervisors' petitions for extraordinary relief and prohibited further proceedings, noting that although the removal threshold of “willful misconduct” required only a volitional act or omission short of criminal intent, a mere neglect of duty was not enough. Rather, removal of either supervisor could only be predicated on “a failure to discharge his duty with knowledge of the facts calling for official action; a failure which was willful, and which evidenced a fixed purpose not to do what *actual knowledge* and the requirements of the law declare he shall do.” *Id.* at 674 (citation and internal quotation marks omitted). The *Steiner* court,

after conducting a thorough review of applicable caselaw, concluded that controlling precedent had “engrafted a knowledge element to the required mental state.” *Id.*

Consequently, “something more than neglect is necessary” to justify removal of a county official in California. *Steiner*, 58 Cal. Rptr. 2d at 675. Surely the same standard, or an even stricter one, applies to removal after impeachment of a member of West Virginia’s highest court. Where a justice has engaged in “conduct that was otherwise criminal, conduct which was corrupt and *malum in se*,” then removal is justified. *Id.* But where the alleged misconduct is instead “premised on something the official **should have known**,” then removal cannot lie: “The procedure must be reserved for serious misconduct . . . that involves criminal behavior or, at least, a **purposeful** failure to carry out **mandatory** duties of office.” *Id.* at 675-76; accord *In re Kline Twp. Sch. Dirs.*, 44 A.2d 377, 379 (Pa. 1945) (“It is not for every breach of duty that directors may be removed from office but only for the breach of those positive duties whose performance is commanded.”). The concept is a familiar one in the context of civil liability, from which ordinary public officers are qualifiedly immune in their individual capacities “for discretionary acts, even if committed negligently.” *W. Va. State Police v. Hughes*, 238 W. Va. 406, 411, 796 S.E.2d 193, 198 (2017) (citation and internal quotation marks omitted). Such immunity extends to all such officials, except those who are “plainly incompetent or those who knowingly violate the law.” *Id.* (citation and internal quotation marks omitted).

The fatal defect here is that **no** evidence before the House remotely suggested that, while the alleged misuse was ongoing, Respondent knew or should have known that two other justices were using state vehicles for personal purposes. Rather, because Respondent’s car use was so minimal, the evidence presented suggests that she had no knowledge of the scope of the fleet’s purpose or use. *See* Tr. Vol. I 64:1–7.

Additionally, in contrast to the mammoth amount of evidence presented during the House Judiciary Committee proceedings focusing on certain other justices' use of state vehicles, no evidence was presented to show Respondent improperly used State cars for personal purposes. In fact, the Legislative Auditor found "no issues" with Respondent's seven total vehicle reservations. *Id.* at Vol. I 64:1-7.

WHEREFORE, Respondent respectfully requests that the Presiding Officer grant this motion and dismiss Article XIV(E).

CHIEF JUSTICE MARGARET WORKMAN

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2018, a true and correct copy of the foregoing **CHIEF JUSTICE WORKMAN'S MOTION TO DISMISS ARTICLE XIV(E)** was served by electronic mail and by depositing a true copy thereof in the United States mail, first class, postage prepaid, in envelopes upon the following:

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