

IN THE WEST VIRGINIA SENATE

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***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(F)

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article XIV(F) be dismissed insofar as there was no evidence before the House of Delegates from which that body could charge Respondent with maladministration or any other impeachable offense. Article XIV(F) charges Respondent with failing “to provide effective supervision and control over inventories . . . 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.” Art. XIV(F). But impeachment cannot lie for an honest, non-catastrophic mistake, or for an official act or omission amounting to ordinary lack of care. No evidence has been produced that Respondent specifically intended the alleged misconduct.

As an initial matter, while this article superficially targets maladministration, another justice’s conduct is its true focus—specifically, the alleged removal of the Cass Gilbert desk and retention of a Court-owned computer. Nevertheless, Article XIV(F) widens the penumbra of blame by concluding that “effective supervision and control over inventories” would have prevented that justice’s conduct. The evidence presented does not support that conclusion. Indeed, even the Court’s former administrative director testified that maintaining an effective inventory system would not have prevented the “undetected absence,” Art. XIV(F), of the Cass Gilbert desk because the justice who allegedly took possession of the desk allowed Court staff to believe that the desk

was in storage. *See* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices (“Tr.”) Vol. V 1493:10–14 (“I think that Fletch Adkins believed that it was either in the storeroom or in one of the warehouses, so I think that, you know, it would have been perhaps mislabeled as to where it was.”).

The justice who allegedly obtained possession of the Cass Gilbert desk also allegedly possessed a computer that was missing from inventory. Like the desk, however, the allegedly missing computer is not a product of ineffective inventory procedures. Scott Harvey, the court’s Director of IT from 2011 to 2017, oversaw the installation of the second computer in a justice’s home and accordingly knew its whereabouts. *See id.* at Vol. II 397:11–398:1, 400–409, 479:5–11. It was not until the court attempted to retrieve the computer that they discovered it missing. *See id.* at Vol. III 797:14–19. Any effective inventory system would have reflected that the computer was located at that justice’s home.

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 Respondent knew or should have known that inventories were not adequately maintained. The justices were not directly responsible for maintaining an inventory system, so any problems regarding inventories would have and should have been brought to Respondent's attention by the court's administrative directory. Yet no evidence exists showing that the administrative director ever reported improper inventory management.

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

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(F)** 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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