

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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September 5, 2019

Mr. James C. Duff  
Director  
Administrative Office of the U.S. Courts  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, D.C. 20002

Dear Director Duff:

We are writing to raise several oversight matters that we believe would benefit from the establishment of an Inspector General of the Administrative Office of the United States Courts (AOUSC). We also request your cooperation in providing information relating to a variety of other reforms that are currently in progress or necessitate action.

### **Federal Judiciary Workplace Conduct Working Group**

Pursuant to direction from Chief Justice John G. Roberts in his 2017 Year-End Report on the Federal Judiciary, you established the Federal Judiciary Workplace Conduct Working Group to perform “a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure exemplary workplace conduct for every judge and every court employee.”<sup>1</sup> Chief Justice Roberts stated in his report that, “events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune.”<sup>2</sup> Among the events the Chief Justice was referencing were more than 12 allegations of sexual misconduct against Judge Alex Kozinski, a federal appeals court judge.<sup>3</sup>

On June 1, 2018, the Working Group issued a final report with recommendations for the Judicial Conference, AOUSC, and the Federal Judicial Center. The recommendations included

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<sup>1</sup> Administrative Office of the United States Courts, *Federal Judiciary Workplace Conduct Working Group Formed* (Jan. 12, 2018) (online at [www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed](http://www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed)).

<sup>2</sup> Chief Justice of the United States John G. Roberts, Jr., *2017 Year End Report on the Federal Judiciary* (Dec. 31, 2017) (online at [www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf](http://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf)).

<sup>3</sup> *Federal Judge Kozinski Retires Following Sexual Harassment Allegations*, National Public Radio (Dec. 18, 2017) (online at [www.npr.org/sections/thetwo-way/2017/12/18/571677955/federal-judge-retires-in-the-wake-of-sexual-harassment-allegations](http://www.npr.org/sections/thetwo-way/2017/12/18/571677955/federal-judge-retires-in-the-wake-of-sexual-harassment-allegations)).

publication of clear standards on appropriate workplace behavior, improved procedures for reporting and addressing misconduct, and additional education and training on how to prevent harassment.<sup>4</sup>

On June 13, 2018, the Senate Judiciary Committee held a hearing on the matter entitled, “Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary.” In Chairman Chuck Grassley’s opening statement, he criticized the report stating:

[T]his vague report kicks the can down the road. It leaves to other part-time advisory committees the key task of formulating specific policy changes. It appears victims could be left wondering to whom they can report, with little instruction or transparency in the process or resolution.<sup>5</sup>

The value of an Inspector General in uncovering problems with sexual harassment and workplace misconduct is well-documented. For example, the Inspector General for the Department of Justice (DOJ) issued a Management Advisory Memorandum on the handling of sexual misconduct and harassment. DOJ Inspector General Michael E. Horowitz notified the Department that systemic issues with the mishandling of sexual harassment complaints demanded “high level action.”<sup>6</sup>

The Working Group did not recommend the establishment of an Inspector General for AOUSC. However, an Inspector General could have provided ongoing oversight for AOUSC and the courts and preempted the need for such an acute solution as a working group. An Inspector General also could help monitor progress on the Working Group’s recommendations. The most important component of the Working Group’s report is going to be implementation. If these recommendations do not produce actionable change within the Judiciary, the effort will be all for naught, and victims of workplace misconduct will continue to suffer.

The recent appointment of a judicial integrity officer by AOUSC demonstrates that the agency sees value in additional oversight of workplace conduct in the Judiciary. However, if this new position reports only to the Director, it will lack the independence of an Inspector General. The establishment of a judicial integrity officer is a welcome step, but more can be done to improve workplace relations in the Judiciary.

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<sup>4</sup> Administrative Office of the United States Courts, *Report of the Federal Judiciary Workplace Conduct Working Group* (June 1, 2018) (online at [www.uscourts.gov/sites/default/files/workplace\\_conduct\\_working\\_group\\_final\\_report\\_0.pdf](http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf)).

<sup>5</sup> Senate Committee on the Judiciary, *Hearing on Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary*, 115th Cong. (June 13, 2018) (online at [www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary](http://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary)).

<sup>6</sup> Department of Justice, Office of Inspector General, *The Handling of Sexual Misconduct and Harassment Allegations by Department of Justice Components* (June 5, 2017) (online at <https://oig.justice.gov/reports/2017/1705-v2.pdf>).

### **Doubling of Contract Workforce**

Our office requested information from AOUSC on the breakdown of its workforce between AOUSC full time equivalent (FTE) positions and contractor FTEs. Over the past five years, the contracting workforce has doubled, while AOUSC workforce has remained roughly constant. The chart below that was provided by your office illustrates this trend.

Fiscal Year	AOUSC FTE*	Contractor FTE+
2013	1,048	881
2014	1,000	911
2015	980	1,287
2016	1,007	1,519
2017	1,034	1,558

*\* AOUSC FTE is a calculated figure estimating the "full time equivalent" of staff resources at AOUSC. It is calculated by dividing the total hours worked by all AOUSC employees by the number of compensable hours in that fiscal year.*

*+ Contractor FTE is based on the end of year count of contractors on board.*

Please provide our offices with a description of how AOUSC is utilizing this increase in contract workers, the costs of the positions above the FY2013 contract staffing level, and the process the AOUSC uses to ensure that contractors are not carrying out inherently government functions.

### **Information Technology Contracts**

Our office is requesting information from AOUSC on the breakdown of major information technology (IT) initiatives over the over the past six years. AOUSC regularly presents these major IT initiatives to the Judiciary Committee with information on anticipated costs and timelines. However, we are concerned that once these projects are approved, there are limited mechanisms in place to provide the checks and balances necessary to ensure that projects are on time, within prescribed budgets, and meet the requirements presented to the Judiciary Committee. Please provide the data necessary to complete the table below, which highlights seven major IT projects at AOUSC.

Major Project	Initial Projected Cost	Initial Projected Completion Date	Actual Cost or Current Projected Cost	Actual or Current Projected Completion Date
Unify Project				
NextGen CM/ECF				
JIFMS				
Cloud and View Services				
Microsoft SharePoint Online				
PACTS Replacement				
API Gateway and OpenShift				

Please also provide our office with information regarding reviews of software licensing conducted over the last five years in which the review determined that AOUSC failed to properly account for software licensing and that AOUSC was required to pay a settlement to the vendor.

### **Inability to Track Contracts**

Our office has raised additional concerns about AOUSC's contracting practices. When our office asked for a breakdown in percentages and absolute dollar amounts of judiciary consultant services by contract types for the past five fiscal years, AOUSC responded that it could not provide such data. We welcome your office's acknowledgement that this information would be useful, as well as assurances that efforts are underway to begin collecting such information for 2018. However, AOUSC's prior inability or disinterest in tracking information essential to contract oversight is unacceptable.

A significant portion of AOUSC contracts for services, valued at approximately \$225 million per year in 2017, are time and materials contracts. Time and materials contracts provide little incentive for cost control or labor efficiency and allow consultants to function in a manner nearly identical to AOUSC employees. According to the Guide to Judiciary Policy, this type of contract is to be used when "no other type of contract will meet the judiciary's needs."<sup>7</sup>

This contracting practice, which appears to contradict existing AOUSC policy, combined with the increase in contract staffing levels discussed above, raises serious concerns about AOUSC personnel and contract management. Please provide our office with a full accounting of AOUSC's time and materials contracts for services and a description of any efforts to limit the use of such contracts. Please also provide our office with a list of ratification actions or quantum merit claims that have required the approval of the Director pursuant to Volume 7, Chapter 8 of the AOUSC Manual for the last five years.

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<sup>7</sup> Administrative Office of the United States Courts, *Guide to Judiciary Policy* (Apr. 4, 2011) (online at [www.uscourts.gov/sites/default/files/guide\\_transmittal\\_14-003.pdf](http://www.uscourts.gov/sites/default/files/guide_transmittal_14-003.pdf)).



An Inspector General for AOUSC could help the agency identify and address these perceived deficiencies in contract and workforce management.<sup>8</sup>

### **PACER**

Recently, a federal court ruled that the Judiciary's use of fees collected under PACER violates the E-Government Act of 2002 since those fees are being used to pay for more than just IT within the Judiciary. Although the ruling is being appealed to the Federal Circuit, which is likely to hear arguments in late summer, we believe that an Inspector General for the Administrative Office could have helped determine whether the PACER fee collection schedule, and its use as a catch-all fund for other unrelated judiciary programs, was reasonable and in accordance with the law.

### **Amendments to the Fair Employment Practices Complaint Process**

Our correspondence with your office over the past year has resulted in at least one improvement in AOUSC personnel practices. AOUSC employees utilizing the Fair Employment Practices Complaint Process used to have no right to appeal a final decision by the Director of AOUSC. As the AOUSC Manual stated, "The Director's decision is final. No further appeal or review is available."<sup>9</sup> AOUSC has now amended this policy to allow employees to appeal a decision by the Director to an Article III judge.<sup>10</sup> This is a welcome remedy, and we encourage AOUSC to seek out additional reforms that provide AOUSC employees with sufficient due process and worker protections.

### **Investigators of Complaints Against AOUSC Sourced Without Competition**

In accordance with the existing Fair Employment Practices Complaint Process, upon receipt of a formal complaint, the Fair Employment Practices Office "must initiate, plan, and coordinate an independent, lawful investigation." It is our understanding that for the purposes of such investigations, AOUSC uses a single outside firm. According to your office, rather than subject such contract services to full and open competition, "the AOUSC exercised its authority to contract without competition for specialized professional services under the expert/consultant services authority of 5 U.S.C. § 3109."<sup>11</sup>

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<sup>8</sup> General Services Administration, Office of Inspector General, *Audit of the Public Builds Service's Use of Contract Employees in the New England and Northeast and Caribbean Regions* (Dec. 12, 2018) (online at [www.gsaig.gov/sites/default/files/audit-reports/A160134\\_1.pdf](http://www.gsaig.gov/sites/default/files/audit-reports/A160134_1.pdf)).

<sup>9</sup> Administrative Office of the United States Courts, *Administrative Office Manual*, § 330.50 Final Determination and Remedy (July 18, 2016) (online at [www.uscourts.gov/sites/default/files/feps-1c.pdf](http://www.uscourts.gov/sites/default/files/feps-1c.pdf)).

<sup>10</sup> Administrative Office of the United States Courts, *Administrative Office Manual, Volume 4 (Human Resources), Chapter 3 (Fair Employment Practices), Last substantive revision (Transmittal 04-004) June 8, 2018, Last revised (minor technical changes) Aug. 15, 2018.* § 330.70 Appeal(f)(1).

<sup>11</sup> Email from Peter Owen, Administrative Office of the United States Courts, to Staff, Office of Rep. Gerald E. Connolly, Senate Committee on the Judiciary, Staff, and House Committee on Oversight and Government Reform, Staff (Aug. 14, 2018).

Awarding a contract without competition for the services of a firm tasked with investigating wrongdoing at AOUSC could raise concerns about conflicts of interest. We encourage AOUSC to reconsider this arrangement or subject it to the scrutiny of a third party.

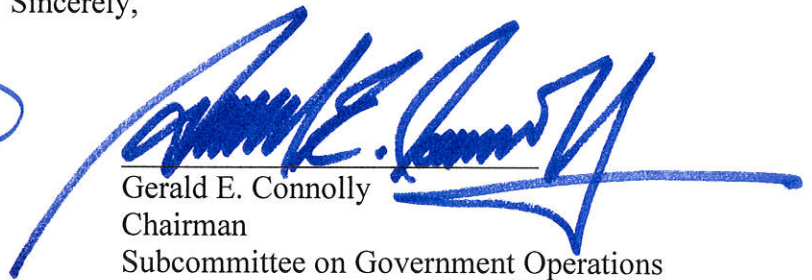
### Conclusion

Considering these and other issues, we believe AOUSC could benefit from the establishment of an Inspector General and other reforms outlined above. Please provide the information requested above by October 4, 2019.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. An attachment to this letter provides additional instructions for responding to the Committee's request.

If you have any questions regarding this request, please contact Collin Davenport at (202) 225-1492 or Mark Stephenson at (202) 225-5051.

Sincerely,

  
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Elijah E. Cummings  
Chairman  
\_\_\_\_\_  
Gerald E. Connolly  
Chairman  
Subcommittee on Government Operations

Enclosure

cc: The Honorable Jim Jordan, Ranking Member  
Committee of Oversight and Reform

The Honorable Mark Meadows, Ranking Member  
Subcommittee on Government Operations

### **Responding to Committee Document Requests**

1. In complying with this request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.
2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Committees.
3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.
4. The Committees' preference is to receive documents in electronic form (i.e., CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions.
5. Documents produced in electronic format should be organized, identified, and indexed electronically.
6. Electronic document productions should be prepared according to the following standards:
  - a. The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - b. Document numbers in the load file should match document Bates numbers and TIF file names.
  - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
  - d. All electronic documents produced to the Committees should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,

INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,  
BEGATTACH.

7. Documents produced to the Committees should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.
8. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.
9. When you produce documents, you should identify the paragraph(s) or request(s) in the Committees' letter to which the documents respond.
10. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.
11. The pendency of or potential for litigation shall not be a basis to withhold any information.
12. In accordance with 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
13. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
14. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
15. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) every privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the privilege(s) asserted.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.



18. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
19. All documents shall be Bates-stamped sequentially and produced sequentially.
20. Two sets of each production shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee on Oversight and Reform, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2105 of the Rayburn House Office Building. When documents are produced to the Committee on Financial Services, production sets shall be delivered to the Majority Staff in Room 2129 of the Rayburn House Office Building and the Minority Staff in Room 4340 of the O'Neill House Office Building. When documents are produced to the Permanent Select Committee on Intelligence, production sets shall be delivered to Majority and Minority Staff in Room HVC-304 of the Capital Visitor Center.
21. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a

part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
4. The term “including” shall be construed broadly to mean “including, but not limited to.”
5. The term “Company” means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.
6. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; (b) the individual’s business or personal address and phone number; and (c) any and all known aliases.
7. The term “related to” or “referring or relating to,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
8. The term “employee” means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
9. The term “individual” means all natural persons and all persons or entities acting on their behalf.