ABA President Wm. T. (Bill) Robinson III vowed last month that the ABA will work diligently with Congress to seek restoration of lost and desperately needed funding for the Legal Services Corporation (LSC) after President Obama signed into law a fiscal year 2012 appropriations package that cut the corporation’s funding by $56 million to $348 million.

The LSC appropriation is part of P.L. 112-55 (H.R. 2112), the fiscal year 2012 “minibus” funding package enacted Nov. 18 that encompasses three of the 12 regular appropriations bill – Agriculture; Commerce, Justice and Science (CJS); and Transportation-Housing and Urban Development.

The LSC appropriation is a compromise between the Senate’s proposed amount of $369 million and the House figure of $300 million.

“Funded provided through the Legal Services Corporation is the only way millions of Americans can bring their civil cases – child support and custody decisions, foreclosures, and veterans’ benefits disputes, for example – to court,” Robinson said. “Congress must weigh the need to shrink our nation’s burgeoning budget deficit against the fundamental needs of low-income citizens to our justice system,” he added.

The CJS portion of the new law provides funding for a number of other programs of interest to the ABA:

- $63 million for offender reentry programs and research authorized under the Second Chance Act of 2007;
- $1.16 billion for state and local law enforcement assistance, including funding for DNA backlog grants and Byrne formula grants;
- $263 million for juvenile justice and delinquency prevention;
- $199 million for Community Oriented Policy Services (COPS) grants;
- $201 million to combat crimes against children;
- $413 million for domestic violence and sexual assault grants, including $41 million for the Legal Assistance for Victims program; and
- $1.9 billion for homelessness assistance grants.

see “Appropriations,” page 3
<table>
<thead>
<tr>
<th>Independence of the Legal Profession</th>
<th>H.R. 3987</th>
<th>S. 3987</th>
<th>S. 3987</th>
<th>H.R. 3987</th>
<th>H.R. 3987</th>
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<tr>
<td>P.L. 111-219 (S. 3987) clarifies that lawyers are not “creditors” under the Fair and Accurate Credit Transactions Act of 2003. The Securities and Exchange Commission issued final whistleblower rules that recognize the importance of protecting the attorney-client privilege and the confidential lawyer-client relationship. The Department of Housing and Urban Development issued a final rule exempting lawyers from the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.</td>
<td>President signed P.L. 111-219 (H.R. 3987) on 12/18/10.</td>
<td>Opposes the application of the FTC’s “Red Flags Rule” to lawyers. Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections.</td>
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<tr>
<th>Health Care Law</th>
<th>H.R. 3590</th>
<th>H.R. 4872</th>
<th>H.R. 3590</th>
<th>H.R. 4872</th>
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<tr>
<td>P.L. 111-148</td>
<td>Senate rejected health care repeal amendment to S. 223 on 2/2/11. S. 218 was referred to the Judiciary Committee on 1/27/11.</td>
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<td>(H.R. 3590), the Patient Protection and Affordable Care Act, and P.L. 111-152 (H.R. 4872), the Health Care and Education Reconciliation Act, overhaul the nation’s health care system. H.R. 2 would repeal health care reform law. An amendment proposed to S. 223, transportation legislation, would have repealed the law. H.R. 5 and S. 218 would preempt state medical liability laws.</td>
<td>H.R. 2 on 1/19/11. Judiciary Committee held a hearing on H.R. 5 on 1/20/11 and approved the bill on 2/16/11.</td>
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<td>House passed H.R. 2 on 1/19/11. Judiciary Committee held a hearing on H.R. 5 on 1/20/11 and approved the bill on 2/16/11.</td>
<td>Senate rejected health care repeal amendment to S. 223 on 2/2/11. S. 218 was referred to the Judiciary Committee on 1/27/11.</td>
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<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11.</td>
<td>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use &quot;health courts&quot; that take away jury trials.</td>
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<td>No cost-of-living adjustment was provided for federal judges in 2010 and 2011. S. 348 and H.R. 727 would establish an inspector general for the federal judiciary. S. 755 and H.R. 1416 would help state courts collect overdue court-ordered financial obligations through interception of federal tax refunds. S. 410 would authorize cameras in federal district and appellate court for civil trials. S. 1925 and H.R. 3572 would authorize televising of Supreme Court open proceedings.</td>
<td>H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11.</td>
<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. S. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11. Judiciary Cmte. held a hearing on 12/6/11.</td>
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<tr>
<td>H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11.</td>
<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. S. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11. Judiciary Cmte. held a hearing on 12/6/11.</td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 6.</td>
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<tr>
<th>Legal Services Corporation</th>
<th>H.R. 2112</th>
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ABA President Wm. T. (Bill) Robinson III urged the Office of Governmental Ethics (OGE) to retain an exception for nonprofit professional associations that is included in proposed amendments to regulations limiting gifts to executive branch employees from registered lobbyists and lobbying organizations.

The proposed amendments, issued Sept. 13, would extend the current lobbyist gift ban that applies only to political appointees to all executive branch employees, but would exclude nonprofit professional associations from the definition of “registered lobbyist or lobbying organization” under new §2635.203(h)(4) of 5 CFR Part 2635. The exclusion would allow government employees to accept certain gifts from such entities when they are made in connection with educational or professional development activities.

“Government lawyers should be encouraged, not discouraged, from taking advantage of the many educational and professional development opportunities provided by the ABA and other bar associations that involve not only attending conferences, programs and other meetings, but also interacting with other lawyers and legal professionals at social events held as an integral part of those meetings,” Robinson wrote in a Nov. 14 comment letter to the OGE.

Although the ABA takes no official position on whether lobbying organizations in general should be precluded from providing gifts and opportunities for interaction with agency employees, he said, the association “would have serious concerns if this blanket prohibition were extended to nonprofit professional associations.”

Under current law, government employees may accept free attendance at widely attended gatherings when it is determined that such attendance “is in the interest of the agency because it will further agency programs and operations.” Robinson emphasized that the government and its employees, the public, and professional associations all benefit from the kind of professional interchange fostered at these gatherings, such as training and professional development.

“More specifically,” he noted, “these kinds of events enable lawyers to fulfill their professional responsibility to stay abreast of important legal developments, maintain and improve their professional competency and skills, and improve the law.”

He said that the substantive work of the ABA and the many state and local bar associations around the country covers almost all areas of interest to government lawyers, including: criminal justice and law enforcement, tax, antitrust, litigation, alternative dispute resolution, banking, securities, consumer protection, energy environment, public contracts, administrative law, disability, civil and equal rights, and constitutional law.

The ABA’s work includes development of reports and publications, continuing legal education programs, and other conferences and events.

The association adopted policy in 1991 opposing proposed limitations and restrictions on the ability of executive branch employees to participate in professional associations; subsequent policy opposed efforts to curb government lawyer participation on professional bar activities. The ABA Task Force on Government Lawyer Participation, created in 1996, issued two reports: a final report released in January 1997 and specific guidance issued in 2001 on ways in which participation by government lawyers in professional bar association activities could be encouraged. Additional policy adopted by the ABA in 1998 emphasized that such participation by government lawyers at all levels – federal, state, territorial, tribal and local, including those in judicial positions – is in both the government’s and the legal profession’s interests and would enhance the work of bar associations.

In addition to Robinson’s comment letter, which represented the views of the ABA, separate comments on the proposed OGE rule were submitted by the ABA Section of Administrative Law and Regulatory Practice that reflect only the view of that section.

The original deadline for submitting comments on the proposed amendments was Nov. 14, but the OGE recently extended the comment period to Dec. 14, 2011.

### Appropriations

continued from front page

The law also includes an appropriation of $2.5 billion for the U.S. Patent and Trademark Office (USPTO), which is the amount of user fees that the USPTO expects to collect. Other provisions provide a mechanism for USPTO use of fee collection in excess of the annual appropriations.

Congress is still grappling with fiscal year 2012 appropriations levels for the federal programs funded by the nine remaining appropriations bills. P.L. 112-55 included a provision to keep the government running through Dec. 16 as negotiations continue.
VAWA reauthorization legislation unveiled in Senate

The ABA commended Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) and Sen. Michael D. Crapo (R-Idaho) for sponsoring legislation last month to reauthorize the Violence Against Women Act (VAWA), which the association emphasized has provided, since its original enactment in 1994, life-saving assistance to hundreds of thousands of women, men and children who are victims of domestic, sexual, stalking and dating violence.

In a Nov. 30 letter, ABA Governmental Affairs Director Thomas M. Susman stressed that the economic crisis has had a disproportionate and devastating effect on these victims, who rely on victim services programs to escape violence and rebuild their lives. These programs are unable to meet the increasing demand for services throughout the country, he said.

“We fully understand the pressures placed by the economic climate on lawmakers to cut federal programs,” Susman wrote, “but in this instance failing to reauthorize VAWA would be more than short-sighted.”

He noted the leadership role the ABA has taken and the important role of the legal profession in addressing domestic violence, sexual assault, dating violence and stalking crimes. Since 1994, the ABA Commission on Domestic & Sexual Violence (formerly the Commission on Domestic Violence) has provided critically necessary training in litigation skills and strategies for domestic and sexual violence attorneys litigating these complex and complicated matters in trial courts across the country with limited resources.

Leahy said that his bill, S. 1925, reflects Congress’s ongoing commitment to end domestic and sexual violence. The legislation, he said, “seeks to expand the law’s focus on sexual assault, to ensure access to services for all victims of domestic and sexual violence, and to address the crisis of domestic and sexual violence in tribal communities, among other important steps.”

The bill also responds to current difficult economic times by consolidating programs, reducing authorization levels, and adding accountability measures to ensure that federal funds are used efficiently and effectively, he added.

The authorization level would drop from $65 million to $57 million for the Legal Assistance for Victims (LAV) program, which currently is funded at $41 million and has expanded the availability of legal assistance for many victims of domestic violence, dating violence, sexual assault and stalking. The provisions also would strengthen the training requirements for those providing legal assistance to such victims and allow grantees to recruit, train and mentor pro bono attorneys and law students to assist victims under the act.

To address the problem of violence against Native women and families, S. 1925 incorporates provisions that were introduced as separate legislation, S. 1763, by Sen. Daniel Akaka (D-Hawaii). S. 1763, the Stand Against Violence and Empower Native Women (SAVE) Act, seeks to ensure that victims have access to support services and to provide tribes with adequate resources for prosecuting those who are committing the violent crimes. The bill, which was approved Dec. 8 by the Senate Committee on Indian Affairs, also would provide Native communities with the resources necessary to develop policy that addresses the needs of victims and to respond to sex trafficking of Indian women.

In a Nov. 23 letter for the record of a Nov. 10 hearing on S. 1763, Susman expressed strong ABA support for legislation and appropriate funding to strengthen protection and assistance for victims of gender-based violence, including American Indian and Alaska Native women. He cited a study by the Department of Justice that revealed that two-fifths of Indian women will experience domestic violence and one-third will be sexually assaulted in their lifetimes. Most of those who commit crimes against Native women are not Native themselves, and the tribes have no ability to prosecute non-Natives for domestic violence and sexual assault in their own communities.

ABA policy adopted in February 2010 urges Congress to reauthorize VAWA and highlights the need for legislation that “provides services, protection, and justice for underserved and vulnerable victims of violence, including children and youth who are victims or witnesses to family violence and victims who are disabled, elderly, immigrant, trafficked, LGBT (lesbian, gay, bisexual and transgender) and/or Indian.”

Sen. Daniel Akaka
The ABA expressed concerns last month about detainee provisions passed by the Senate Dec. 1 as part of its version of H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012.

The detainee provisions in the Senate bill, which prompted a veto threat from President Obama, would, among other things, require the use of military detention rather than civilian arrest for virtually all non-citizen terrorist suspects associated with al Qaeda and other forces involved in hostilities against the United States, regardless of place of capture, and authorize indefinite detention without charge because they maintain that the reality is that the scope of such executive authority is unsettled.

The Obama administration objected to many of the detainee provisions in the Senate bill. The Statement of Administration Policy, released Nov. 17, stated that some of the policies “disrupt the executive branch’s ability to enforce the law and impose unwise and unwarranted restrictions on the U.S. government’s ability to aggressively combat international terrorism; other provisions inject legal uncertainty and ambiguity that may only complicate the military’s operations and detention practices.”

In a Nov. 28 letter to all senators, ABA Governmental Affairs Director Thomas M. Susman urged the Senate to remove some of the detainee provisions before a final vote on the legislation. He highlighted ABA policy adopted in February 2009 that includes the following clause: “All individuals detained at Guantanamo Bay who have been or are expected to be charged with violations of criminal
Hearing revives debate on televising Supreme Court

A Dec. 6 hearing before the Senate Judiciary Subcommittee on Administrative Law and the Courts revived the debate about whether the U.S. Supreme Court’s open proceedings should be televised.

“Supreme Court decisions can have a transformative effect on the lives of Americans,” subcommittee Chair Amy Klobuchar (D-Minn.) said in her opening statement. “Allowing television cameras in the courtroom would increase public confidence in government and help ensure a well-functioning democracy,” she emphasized.

Klobuchar is a cosponsor of S. 1945, the Cameras in the Courtroom Act of 2011, a bipartisan bill introduced by Sens. Richard Durbin (D-Ill.) and Charles E. Grassley (R-Iowa) that would require television coverage of all open sessions of the Supreme Court unless the court decides by a majority vote that doing so would constitute a violation of the due process rights of one or more of the parties involved in the case before the court. Companion legislation, H.R. 3572, was introduced in the House by Rep. Gerald E. Connolly (D-Va.).

Several witnesses at the hearing agreed with Klobuchar, including former Sen. Arlen Specter (R-Pa.), a former chair of the Senate Judiciary Committee who sponsored similar legislation that was reported out of the committee in 2006, 2008 and 2010 but never considered on the Senate floor.

“People need to know what the court is doing to guarantee that the public can let the court know when the public’s values are not being recognized,” Specter testified. He pointed out that the supreme courts of most states, Great Britain and Canada allow their proceedings to be televised. He added that polls reveal that 80 percent of those polled express support for televising the court when they learn that the Supreme Court chamber accommodates only approximately 300 observers and people are permitted to stay only three minutes.

Specter said he believes that Congress has the authority to mandate television coverage because of congressional authority to determine other administrative matters for the court, including the day the court will convene, the number of justices required for a quorum, the timetable on habeas corpus cases, what cases the Supreme Court is required to hear, and the court’s jurisdiction.

Anthony J. Scirica, circuit judge for the U.S. Court of Appeals for the Third Circuit, disagreed, saying that a congressional mandate that the Supreme Court televise its proceedings likely raises significant constitutional issues. “A court that is charged with the duty under our Constitution to ‘say what the law is,’ that has merited the confidence of the American people, and that has made its processes ever more accessible should be afforded defer-

see “Supreme Court,” page 8

Judicial Vacancies/Confirmations — 112th Congress* (as of 12/12/11)

<table>
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<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tr>
<td>US Supreme Court (9 judgeships)</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
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<tr>
<td>US District Courts (678 judgeships)</td>
<td>63</td>
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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>80</strong></td>
<td><strong>44</strong></td>
<td><strong>63</strong></td>
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*Includes territorial judgeships
IRS FUNDING: The ABA expressed opposition last month to proposed fiscal year 2012 funding cuts for the Internal Revenue Service (IRS). The association, recognizing the challenges Congress faces in efforts to reduce federal spending to balance the budget, emphasized that the IRS relies on adequate government funding to perform its mission of administering and enforcing the tax laws, collecting the taxes due under those laws, and providing support to taxpayers who are attempting to meet their obligations. In a Nov. 9 letter to the chairs and ranking members of the House and Senate Appropriations Subcommittees on Financial Services and General Government, ABA Section of Taxation Chair William M. Paul wrote that the proposed IRS reductions would exacerbate the budgetary challenges that Congress is facing and impair the ability of the IRS to achieve its mission. The proposed cuts contained in House and Senate appropriations bills of $650 million and $525 million, respectively, would result in a substantial decline in IRS examinations of individuals and business, including collection actions, according to IRS Commissioner Douglas L. Shulman. In his correspondence to the subcommittees in October, Shulman emphasized that the cuts would lead to a decrease of $4 billion in the annual revenue the IRS would normally collect and would eventually cause a direct increase in the nation’s deficit. Paul echoed Shulman’s concerns in the ABA’s Nov. 9 letter while also noting that members of the ABA Taxation Section already are observing adverse impacts on important programs as the IRS adjusts to expected future funding reductions. The impacts include restrictions on travel and training for IRS audits, appeals and litigation functions. The ABA also expects that additional reductions in program services will soon be felt by American taxpayers of all types if the proposed cuts are adopted, Paul added. The IRS funding is part of the financial services and general government appropriations bill, which is expected to be included in a fiscal year 2012 omnibus spending package or continuing resolution to be passed this month.

SYRINGE EXCHANGE PROGRAMS: The ABA is urging Congress to reject attempts to include provisions in FY 2012 appropriations legislation that would reverse current law by banning the use of federal funds for syringe exchange programs. In an Oct. 19 letter to members of the House and Senate Appropriations Committees, ABA Governmental Affairs Director Thomas M. Susman wrote that the ABA has supported federal funding for needle exchange programs since 1997 as an effective public health strategy in reducing the transmission of HIV/AIDS in the United States. P.L. 112-10, fiscal year 2011 appropriations legislation, allows state and local health departments to use federal funds to establish syringe exchange programs, and several states – including California, Connecticut, New Jersey, New Mexico Oregon, Vermont and Washington – are directing a portion of their federal funds to such programs. Three fiscal year 2012 appropriations bills passed by the House, however, include language that would prohibit federal funds from being used to carry out any programs of distributing sterile needles or syringes for the hypodermic injection of any illegal drug. According to Susman, syringe exchange programs enjoy broad support from state and local health departments as well as the communities they serve. He added that voluminous research has established that the programs are cost-effective and vital to protecting public health, reducing HIV transmission, and addressing drug addiction by encouraging and assisting intravenous drug addicts to enroll in substance abuse treatment programs. “Make no mistake: this country is still in the grip of an HIV/AIDS epidemic,” Susman said, and it would be “counterproductive to public health efforts to enact funding restrictions that hamper or eliminated the opportunity for communities to use a tool that has proven effective in reducing HIV/AIDS transmissions.”

Negotiations continue as the House and Senate attempt to craft final language for fiscal year 2012 appropriations legislation that will encompass the three bills that include the funding ban: Labor-HHS; Financial Services; and State/Foreign Operations.
Supreme Court televised coverage is topic of hearing

continued from page 6

ence in its own governance, including the decision whether, when, or how cameras should be present during its oral arguments,” he said.

Washington, D.C., lawyer Tom Goldstein, co-founder and publisher of the SCOTUSblog, testified that the Supreme Court’s recent efforts to increase the public’s access through development of its website, the immediate publishing of transcripts, and timely release of audio of arguments cannot overcome significant obstacles to access to the court’s public proceedings. “Broadcasts of court proceedings will reach segments of the public in a way that transcripts and audio recordings cannot,” he concluded.

Earlier this year the Senate Judiciary Committee approved S. 410, a bill to allow federal trial and appellate judges to permit the photographing, electronic recording, broadcasting or televising to the public of court proceedings over which they preside except when the action might constitute a violation of any party’s due process rights. A similar bill, H.R. 2802, is pending in the House Judiciary Committee.

Since 1996, the Judicial Conference has authorized each court of appeals to determine the circumstances in which cameras may be permitted in their courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice.”

Susman emphasized that the ABA opposes any provision authorizing disposition or trial by military commission that does not expressly foreclose such trials or proceedings for U.S. citizens and lawful residents. He also emphasized that U.S. federal courts, respected around the world, are “well-equipped to handle trials of this magnitude and consequence.”

A conference committee negotiating the differences between the Senate and House versions of H.R. 1540 reached an agreement Dec. 12 that they hope will avoid a veto. The detainee provisions are similar to those in the Senate version, but the conferees added language stating that nothing in the military detention provision may be “construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with regard to a covered person, regardless whether such covered person is held in military custody.” The conferees did not include House language that would have required military commission trials for all foreign nationals accused of terrorist acts.

Detainee provisions draw veto threat

continued from page 5

law should be prosecuted in Article III federal courts unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice.”

Susman emphasized that the ABA opposes any provision authorizing disposition or trial by military commission that does not expressly foreclose such trials or proceedings for U.S. citizens and lawful residents. He also emphasized that U.S. federal courts, respected around the world, are “well-equipped to handle trials of this magnitude and consequence.”

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