



ABA Washington Letter



Volume 54, No. 5
May 2018

A Legislative Analysis Service of
the Governmental Affairs Office

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House committee approves \$410 million

ABA urges House and Senate to appropriate \$482 million for the Legal Services Corporation

The House Appropriations Committee included \$410 million for the Legal Services Corporation (LSC) in the fiscal year 2019 appropriations bill the panel approved May 17.

The funding package maintains the LSC funding level at its fiscal year 2018 amount, which reflected a \$25 million increase for the corporation.

The ABA, however, is urging Congress to approve \$482 million for the Legal Services Corporation (LSC) in fiscal year 2019, which would restore the corporation’s funding to its fiscal year 2010 level adjusted for inflation and help narrow America’s “justice gap.”

“The ABA has long been committed to the realization of ‘Equal Justice Under Law’ in our country,” President Hilarie Bass wrote in [testimony](#) recently submitted to the House and Senate Appropriations Subcommittees on Commerce, Justice, Science and Related Agencies. In her letters, she emphasized that the 2017 Justice Gap Report conducted by the University of Chicago revealed that 86 percent of the civil legal problems faced by low-income American each year receive inadequate or no legal help. Because of this lack of resources, the World Justice Project’s 2017-18 Rule of Law Index ranked the United States 26th out of 102 countries for civil justice access.

While LSC, which supports nearly 900 legal aid offices across the country in every congressional district, received a \$25 million increase to \$410 million for fiscal year 2018, the program’s funding is still 15 percent lower than it was in fiscal year 2010 even as the number of people qualifying for assistance is about 25 percent higher than in 2007.

Several factors are contributing to the increased need for legal services, Bass said, pointing out that disasters have a severe and disproportionate impact on the poor. Disaster-related legal issues include survivors’ need to obtain important documents to apply for or restore benefits and the need to secure housing. “With families experiencing even more stressors than before, there is also an increase in the need for more legal information on public benefits, domestic violence prevention, consumer law, and fraud prevention,” Bass explained.

Another area causing concern is the opioid epidemic, which increases the need for legal services to handle custody, guardianship, and adoptions for family members who are caring for children who have been placed in their care because of neglect by addicted parents.

Bass pointed out that LSC has formed both a Disaster Task Force and an Opioid Task Force to address these issues.

The ABA president highlighted proposals by the White House and the House Budget Committee to eliminate LSC funding, emphasizing that the

see “Legal Services Corporation,” page 3

LEGISLATIVE BOXSCORE

LEGISLATIVE ISSUE	HOUSE	SENATE	FINAL	ABA POSITION
<p>Criminal Justice. H.R. 1809 and S. 860 would reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDP). H.R. 2480, H.R. 2473, S. 1311 and S. 1312 are aimed at combating human trafficking. H.R. 510 and S. 139 would establish a system for the use of Rapid DNA. S.1917 would reform sentencing and corrections practices. S. 1994, S. 2795 and H.R. 5682 would implement corrections reforms. H.R. 2899 would reauthorize the Second Chance Act. HR. 1795 would reform asset forfeiture laws. H.R. 38 and S. 446 would mandate concealed-carry reciprocity.</p>	<p>House passed H.R. 1809 on 5/23/17. House passed H.R. 2473 on 5/23/17. Judiciary Cmte. approved H.R. 2480 on 6/28/17. House passed H.R. 510 on 5/16/17. House passed H.R. 38 on 12/6/17. House passed H.R. 5682 on 5/22/18.</p>	<p>Senate passed S. 860 and H.R. 510 on 8/1/17. Senate passed S. 1311 and S. 1312 on 9/11/17. S. 1917 was referred to Judiciary Cmte. on 10/4/17; S. 1994, on 10/19/17. Judiciary Cmte. approved S. 1917 on 2/15/18. Judiciary Cmte. held a hearing on gun violence on 3/14/18.</p>	<p>President signed P.L. 115-50 (H.R. 510) on 8/18/17.</p>	<p>Supports sentencing and correction reform. Supports JJDP and Second Chance Act reauthorization. Supports funding for federal and state indigent defense programs. Supports certain civil asset forfeiture reforms. Supports bills to combat human trafficking. Supports prompt collection and testing of DNA evidence. See page 4.</p>
<p>Immigration. The president announced a new travel ban restricting entry into the country from eight countries. Federal judges temporarily blocked the ban for those seeking entry from six of the eight countries. The Supreme Court has allowed some of the restrictions to go into effect. The president announced he is phasing out the Deferred Action on Childhood Arrivals (DACA) program by March 5, 2018. Federal courts have blocked the president's order.</p>		<p>Senate failed to pass several proposals to address the DACA program. Judiciary subc. held a hearing on the immigration court system on 4/18/18.</p>		<p>Supports improvements in the immigration court and adjudication system. Opposes mandatory detention and supports alternatives to detention. Supports access to counsel and due process safeguards. Supports legislation that includes a path to citizenship for certain undocumented persons who enter the country as minors and have significant ties to the United States. See page 4.</p>
<p>Legal Services Corporation (LSC). The president's FY 2018 and 2019 budgets included phaseout funding for LSC. P.L. 115-141 (H.R. 1625) includes a \$25 million increase to \$410 million for FY 2018.</p>	<p>House passed H.R. 1625 on 3/22/18. Apps. Cmte. approved \$410 million for LSC for FY 2019 on 5/17/18.</p>	<p>Senate passed H.R. 1625 on 3/23/18.</p>	<p>President signed P.L. 115-141 (H.R. 1625) on 3/23/18.</p>	<p>Supports an independent, well-funded LSC. See front page.</p>
<p>Tort Reform. H.R. 1215 would preempt state medical liability laws to impose caps on non-economic damages H.R. 985 would class action lawsuits. H.R. 720 would require mandatory monetary sanctions against lawyers who file non-meritorious lawsuits.</p>	<p>House passed H.R. 1215 on 6/28/17. House passed H.R. 985 on 3/9/17. House passed H.R. 720 on 3/10/17.</p>			<p>Opposes the bills. Opposes preemption of state medical liability laws and the bypassing of the Rules Enabling Act to amend the Federal Rules of Civil Procedure.</p>

ABA is concerned about proposed CMS work requirements

The ABA, tribal leaders, and members of Congress are opposing a Centers for Medicare and Medicaid Services (CMS) decision that the agency will not require states to exempt American Indians and Alaska Natives (AI/AN) from Medicaid work and community engagement requirements announced by CMS in January.

“Failure to approve exemptions threatens the health of U.S. citizens and ignores the federal trust relationship between the federal government and tribal nations,” ABA Governmental Affairs Director Thomas M. Susman [wrote May 4](#) to CMS Administrator Seema Verma. The decision, he said, is “counter to well-established doctrine and ABA policy.”

The work and community engagement requirements for Medicaid benefits are part of a CMS policy guidance to help states design demonstration projects under Section 1115 of the Social Security Act for improving Medicaid. The new requirements would apply to working-age, non-pregnant Medicaid beneficiaries who are eligible for Medicaid on a basis other than disability. Tribal leaders requested that states be required to exempt American Indians and Alaska Natives because of the particularly damaging effects on these groups because they are often residents of rural communities and tribal reservations that have staggering unemployment rates.

In a Jan. 17 letter responding to the tribal leaders’ request, Brian Neale, then director of the Center for Medicaid and CHIP Services, maintained that CMS is constrained by statute and that requiring states to exempt AI/ANs from the work and community engagement requirements raises civil rights concerns.

Disagreeing with the CMS decision, Susman wrote, “CMS’s posi-

tion conflicts with tribal requests for exemptions and is against the statutory intent of Section 1911 of the Social Security Act, the federal government’s trust responsibility to tribal nations, and Department of Health and Human Services (HHS) and CMS’s past approval of Indian-specific provisions and administration of the trust responsibility.” He explained that there is longstanding legal precedent that tribes are sovereign entities, and the Constitution recognizes this underlying political relationship in creation of the Indian affairs powers. Thus, allowing these exemptions does not constitute a racial preference, he emphasized.

Susman said that access to quality health care calls for the elimination of barriers through expansion and improvement. Work and com-

munity engagement requirements for AI/ANs, he said, would “limit rather than expand and improve coverage and are counter to congressional intent.”

A bipartisan group of senators – including Senate Minority Leader Chuck Schumer (D-N.Y.) and Sen. Tom Udall (D-N.M.), vice chairman of the Senate Committee on Indian Affairs – also expressed concerns and requested additional information about the CMS views on AI/AN Medicaid enrollment protections. The senators noted that Medicaid participation now ensures that more than 50 percent of patients at some tribally operated health systems, 40 percent of patients at federally operated Indian Health Service facilities, and 25 percent of all AI/ANs nationwide have access to vital medical care. ■

Legal Services Corporation

continued from front page

federal role in equal justice is necessary because legal aid clients secure their rights through federal law as well as state and local law.

“Elimination of federal funding for equal justice would necessarily foist unfunded mandates on states, tribes, and localities. Day in and day out, LSC-funded attorneys work with these federal laws to secure the federal rights of individuals unable to secure their rights for themselves.” Bass said. The federal government “should contribute its fair share,” which she said “can only be accomplished through funding LSC.”

Bass also pointed out that dozens of statewide studies show the positive cost-benefit impact of legal aid and that polling by the Voice for Civil Justice showed that 82 percent of those surveyed believe that it is important to ensure that everyone has access to civil legal help.

In related action, 251 corporate legal department leaders from across the country sent a letter April 17 to all members of Congress urging increased LSC funding.

“When improperly addressed, civil legal problems can result in life-altering consequences as significant as the loss of income or a home, lack of access to physical safety, or denial of benefits earned by serving our military,” the letter stated, adding that “LSC grantees help families gain a foothold in the middle class, strengthening our local workforce and economy.”

House passes legislation focusing on prison reforms

The House passed a bill May 22 that focuses on prison reforms aimed at reducing recidivism by providing rehabilitation programs to inmates.

H.R. 5682, known as the FIRST STEP Act and cosponsored May 7 by Reps. Doug Collins (R-Ga.) and Hakeem Jeffries (D-N.Y.), is a companion bill to S. 2795, legislation introduced the same day by Sens. John Cornyn (R-Texas) and Sheldon Whitehouse (D-R.I.).

The bill, which is reportedly supported by the White House, passed by a 360-59 vote. It is uncertain, however, whether the Senate will consider the legislation, which is

much narrower than the bipartisan comprehensive Sentencing Reform and Corrections Act, S. 1917, that cleared the Senate Judiciary Committee in February.

Many of the provisions in the FIRST STEP Act are based on successful prison reform efforts at the state level.

Under the legislation, the Bureau of Prisons would implement programs that provide incentives for prisoner participation so that eligible prisoners could earn credits toward alternative custody arrangements as they approach the end of their sentences. This would include halfway houses or home confine-

ment. Programs would include vocational training, educational support, substance abuse treatment, mental health care, anger management courses, faith-based initiatives and other resources to help prevent recidivism. In addition, prisoners would have more employment opportunities available to them in prison as well as training programs for youth mentorship and the training and therapy of rescue dogs.

The legislation also includes provisions to increase the use and transparency of compassionate release for elderly and terminally ill prisoners.

“H.R. 5682 places a new focus on rehabilitation,” House Judiciary Committee Chairman Bob Goodlatte (R-Va.) said during the May 9 committee markup of the bill. “While we recognize criminal behavior needs to be punished and criminals need to be incarcerated, we must also acknowledge that our prison population needs to be rehabilitated to the greatest extent practicable.”

Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa), a sponsor of S. 1917, continues to support the comprehensive approach to criminal justice reform even though there are no immediate plans to bring the Senate bill to the floor for a vote.

While S. 1917 includes some of the corrections provisions included in the FIRST STEP Act, the Senate bill also includes sentencing reforms that would narrow the scope of mandatory minimum sentences to focus on the most serious drug offenders and violent criminals and broaden the existing “safety valve” that allows judges to use discretion in sentencing lower level nonviolent offenders.

The ABA has policy supporting corrections provisions in both the House and Senate legislation. ■

Evaluating the Immigration Courts System



The [ABA Commission on Immigration](#) hosted a panel of immigration experts May 4 to address the problems that are plaguing the immigration court system, which is housed within the Executive Office for Immigration Review (EOIR) in the Department of Justice (DOJ). EOIR is responding to the backlog of over 650,000 cases by establishing new case priority and court performance measures. EOIR Director James McHenry told the audience that the office is in the process of hiring 150 additional immigration judges. He also said that a new e-filing system would be in place next year. The other three panelists agreed the system is in crisis and spoke in favor of removing the immigration courts from DOJ and creating a new Article I court. The panel, moderated by Karen Grisez (left), special advisor to the commission, featured (from left): Heidi Altman, policy director, National Immigration Justice Center; Judge Denise Lavin, president emeritus, National Association of Immigration Judges; Paul Schmidt, a retired immigration judge and adjunct professor of law, Georgetown University Law Center, and McHenry.

ABA supports public access to criminal court proceedings, including military commissions

The ABA expressed strong support last month for public access and availability to all criminal court proceedings, including those conducted by military commissions, and stated that the association is committed to the belief that all courts should experiment with electronic media coverage of their proceedings.

“The ABA recognizes that there may be times when the military judge determines that the proceedings must be closed for security, privacy, or other limited reasons, but when they are not closed for these reasons, the ABA supports public access and encourages the use of electronic media coverage to protect the integrity of the process and to advance the public interests,” ABA Governmental Affairs Principal Deputy Director Holly O’Grady Cook conveyed in an [April 23 letter](#) to the Government Accountability Office (GAO).

P.L. 115-91, the National Defense Authorization Act (NDAA) for Fiscal Year 2018, directs the Comptroller General of the United States to conduct a study “on the feasibility and advisability of expanding the public availability of military commissions proceedings that are made open to the public.” A final report and recommendations based on the study will be submitted to the Senate and House Armed Services Committees.

The conference report accompanying the NDAA legislation states that the Comptroller General is expected to collect views from a wide variety of sources that include the ABA as well as the Judicial Conference of the United States, victims of terrorism and their families, victim advocacy groups, jurists, legal counsel, national security policy experts, and relevant offices within the Department of De-

fense and other federal departments and agencies.

In her letter, Cook highlighted the ABA’s involvement with the military commissions process since establishment of the commissions was first discussed in 2001 for cases following the 9/11 attacks. In addition to addressing the legal issues of military commissions, the ABA began sending observers to commission proceedings in 2004 and remains one of the original five nongovernmental organizations guaranteed a seat at future proceedings.

Cook provided GAO with the following ABA policies and documents that address the importance of public access to criminal proceedings whenever possible:

- ABA Standards for Criminal Justice, Fair Trial and Public Discourse;

- ABA Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions (Jan. 4, 2002);

- association policy adopted by the ABA House of Delegates in February 2002 regarding President Bush’s military order on detention, treatment and trial of certain non-citizens in the war against terrorism;

- amici curiae brief filed by the ABA and three other organizations opposing Protective Order 007, issued Jan. 14, 2009, by a military judge limiting public and press access to specific military commission proceedings and evidence; and

- ABA policy on the use of electronic media coverage of judicial proceedings and a relevant letter submitted for the record of a House Judiciary Committee hearing in December 2014. ■

Report on military commissions sent to Capitol Hill

The ABA sent the House and Senate Armed Services Committees a new report on May 22 that resulted from a one-day workshop held in December 2017 where experts gathered to discuss the diverse legal issues facing the U.S. military commissions.

The nonpartisan report, [“The U.S. Military Commissions: Looking Forward.”](#) describes possible paths forward in the interests of U.S. national security, law, and justice.

The workshop, which was cosponsored by the [ABA Standing Committee on Law and National Security](#) and The George Washington University Law School, featured four sessions on the following topics: an overview of the military commissions at Guantanamo; legal questions related to existing detainees not charged before the commissions; legal issues that could arise if new detainees were brought to Guantanamo; and implications for the commissions posed by a new authorization to use military force.

In a [letter](#) accompanying the report, ABA Governmental Affairs Director Thomas M. Susman emphasized that the views expressed in the report do not represent policy of the ABA and others who participated in the workshop but are intended to help members of the Armed Services Committees as they “consider and make important policy decisions on the continued or future use of military commissions to try non-U.S. citizens for acts of international terrorism.”

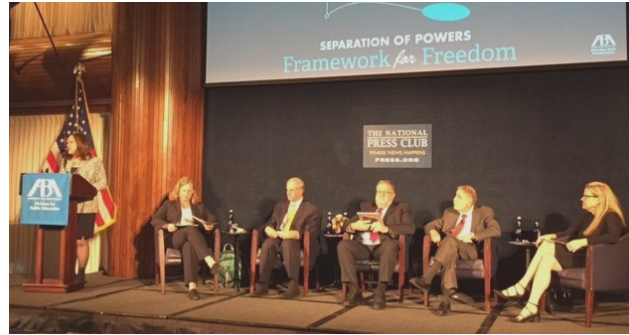
Law Day 2018 highlights “Separation of Powers”

“Separation of Powers: Framework for Freedom” is the theme of this year’s [Law Day](#), which has grown from one day (May 1) when it was envisioned in 1957 by then ABA President Charles S. Rhyne to weeks of events conducted by bar associations, courts, schools, and other organizations to celebrate the rule of law.

In her Law Day message, ABA President Hilarie Bass emphasized that even though the phrase “separation of powers” does not appear anywhere in the text of the U.S. Constitution, it is likely “one of the most important concepts in understanding how the U.S. government is designed to defend the liberties that Americans had fought the Revolutionary War to achieve.”

The framers, she explained, created a national government consisting of three branches – executive, legislative, and judicial – that were to be separate from each other and retain distinct powers without any branch having too much power. She emphasized, however, that a workable structure for the government alone is not sufficient to protect the rights and liberties of the people. “For that to occur requires an engaged citizenry,” she said, urging individuals to become informed and involved.

Programs celebrating Law Day in Washington, D.C., included a



ABA President Hilarie Bass (at podium) introduced the panelists participating in a debate on the separation of powers at the annual Leon Jaworski Public Program on May 1. Those on the panel were (from left): Laura Donohue, Georgetown University Law Center; Edwin L. Rubin, Vanderbilt University Law School; moderator Stephen J. Wermiel, American University Washington College of Law; former Rep. Mickey Edwards, Aspen Institute; and Victoria Nourse, Georgetown University Law Center.

dialogue with high school students, a discussion with the law librarian of Congress, and the 16th annual Leon Jaworski Public Program, which featured a debate about whether separation of powers is essential to the preservation of political liberty. ■



Judicial Vacancies/Confirmations—115th Congress* (as of 5/22/18)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	1
US Courts of Appeals (179 judgeships)	14	10	21
US District Courts (678 judgeships)	124	72	17
Court of International Trade (9 judgeships)	2	0	0
Totals	140	82	39

*Includes territorial judgeships

WASHINGTON NEWS BRIEFS

LEGAL REPRESENTATION IN DEPORTATION PROCEEDINGS: The ABA expressed support May 1 for funding in two Maryland counties to provide legal representation to immigrant residents who have been detained and are facing deportation. A proposal pending before the Montgomery County Council would provide a special appropriation of \$373,957 to fund legal representation for detainees, and the Prince George's County Council is weighing continued funding for the Immigrant Services and Language Access Initiative to provide access to legal representation. In letters to [Montgomery County Council](#) President Hans Riemer and [Prince George's County Council](#) Chair Dannielle M. Glaros, ABA Governmental Affairs Director Thomas M. Susman wrote that a lawyer's assistance during removal proceedings is essential for noncitizens to fully understand and effectively navigate the complexities of the U.S. immigration system. "The presence of competent counsel helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication," Susman said. He noted that one recent study found that detained immigrants and asylum-seekers with representation, when compared to their unrepresented counterparts, were ten-and-a-half times more likely to succeed. Recent statistics also show, however, that only about 37 percent of those in removal proceedings and 14 percent of those detained are represented by counsel. Susman said the ABA has long supported the right to counsel for vulnerable populations such as unaccompanied children and the mentally disabled, and the association expanded its policy in 2017 to include support for appointed counsel at government expense for all indigent persons in removal proceedings. "In our view, the fair and efficient operation of the immigration court system is fundamentally linked to the issue of access to counsel and legal information," he emphasized.

LOUISIANA JURY LEGISLATION: ABA President Hilarie Bass expressed the association's opposition May 11 to legislation pending in Louisiana that would effectively remove jury polling results in criminal cases from timely public access. In a [letter](#) to Louisiana Gov. John Bel Edwards, Bass explained that while the legislation, HB699, would continue the practice of allowing the court clerk to poll the jury after a verdict is rendered if requested to do so, the bill would eliminate oral polling and relegate polling records to being sealed on court order and not released to the public without a subsequent order of the court. In ad-

dition, the names of jurors would be redacted. "The presumption, therefore, becomes secrecy, not transparency, for jury polling in criminal cases," Bass wrote. She cited the *ABA Principles for Juries and Jury Trials* and *ABA Criminal Justice Standards on Trial by Jury*, which both call for polling of jurors individually and provide that if the poll discloses that there is not the level of concurrence required by applicable law, the jury may be directed to retire for further deliberations or may be discharged. The Commentary on the *Principles* and *Standards* explains that the purpose of the poll is "to determine, before it is too late, whether the jury's verdict reflects the conscience of each of the jurors" She said that HB699 is inconsistent with transparency and timeliness, which are important criteria that are "essential elements of a fair and open criminal trial." The Louisiana Legislature also passed a bill of interest to the ABA that would allow voters to decide in the upcoming Nov. 6 elections whether to amend the state constitution to require unanimous verdicts for all criminal convictions for crimes occurring on or after Jan. 1, 2019. The current constitution allows conviction with a 10-2 jury decision. The association's jury *Principles* and *Standards* state that jury decisions should be unanimous. In addition, ABA policy also opposes less-than-unanimous verdicts in federal criminal cases, and urges all federal, state, and territorial governments that impose capital punishment, and the military, to require that a jury must unanimously recommend or vote to impose a sentence of death. Both bills were approved by the state legislature. HB699 is on the governor's desk, and SB243, which has been signed by the speakers of the House and Senate, is expected to reach the governor shortly.



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House Appropriations Committee approves FY 2019 CJS funding bill

The House Appropriations Committee approved a bill May 17 that, in addition to funding the Legal Services Corporation (LSC) at \$410 million, would increase or continue funding for numerous other programs of interest to the ABA.

The \$62.5 billion bill provides appropriations for the Departments of Commerce and Justice, Science, and Related Agencies. Under the bill, the Department of Justice would receive an increase of \$793 million for a total of \$30.7 billion.

The bill would increase funding for the Executive Office of Immigration Review (EOIR) by \$126 million for a total of \$630 million to add 100 new judges and support staff. At the same time, the committee report directs EOIR to continue to build on its recent setting of new prioritization standards and court-based performance measures and to work with the Department of Homeland Security to develop metrics, practices and pilot programs to institute rapid court proceedings at holding facilities along the Southwest border.

Violence Against Women Act programs would receive \$493 million, including \$45 million for civil legal assistance, \$5 million

for the Elder Abuse Grant Program, \$35.5 million for transitional housing assistance, \$40 million for rural domestic violence and child abuse enforcement, and \$4 million for tribal special domestic violence efforts.

Overall funding for juvenile justice programs would be reduced by \$83 million to \$199 million, but funding would increase for youth mentoring grants by \$6 million for a total of \$100 million.

Funding amounts for other ABA-supported programs in the legislation include:

- a \$38 million increase to \$7.15 billion for the Bureau of Prisons;
- a \$28 million increase to \$85 million for Second Chance Act grants to help prisoners successfully re-enter their communities;
- \$12 million for the court-appointed advocate program;
- \$130 million for DNA analysis;
- \$100 million for services for victims of human trafficking;
- \$75 million for grants to upgrade criminal and mental health records in the National Instant Criminal Background Check System;
- \$2.5 million for improving juvenile indigent defense;

• \$50 million to reduce gun crimes and gang violence; and

• \$3 million for the Capital Litigation Improvement Fund.

Work also continued this month on other fiscal year 2019 appropriations bills moving through Congress. A bill to fund the legislative branch was approved May 8 by the House Appropriations Committee. That bill includes an increase of \$40 million for the Library of Congress, bringing its funding to \$709.8 million. The increase, according to the committee report, will allow for enhancements to the public exhibits and visitor services, which will improve the Library's ability to bring the nation's collections and history out of the vaults into public spaces, and provide for information technology modernization within the library, including the Law Library of Congress.

The ABA, which has a long history of working with the library through its Standing Committee on the Law Library of Congress, wrote letters to both the [House](#) and [Senate](#) urging support for increased funding. ■

**ABA Annual Meeting
Chicago, Illinois**

Aug. 2-7, 2018

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association's legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html. ©2018

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