

WASHINGTON LETTER

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Presidential signing statement policy adopted

House of Delegates has productive session during the Annual Meeting

The ABA House of Delegates, meeting in Honolulu Aug. 7 and 8 during the association's 129th Annual Meeting, approved numerous new policies, including a resolution opposing the misuse of presidential signing statements.

The resolution, brought to the delegates by the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, addressed concerns raised over President Bush's recent use of signing statements to declare his intention to disregard and not enforce more than 800 provisions of laws he has signed.

Presidents issue signing statements to explain their positions on the bills that they enact into law, but task force Chair Neal R. Sonnett maintained that a president should veto a bill if he or she believes it is unconstitutional.

"We're not trying to declare signing statements unconstitutional," Sonnett said. "We believe only the misuse of signing statements must be condemned."

Also adopted by the delegates were two resolutions to protect the attorney-client privilege and work-product doctrine, new policy opposing the creation of any statutory inspector general with close ties to Congress and broad investigative powers over judges and the judiciary, and policy reinforcing the association's support for ensuring that poor people have access to legal counsel in civil cases as a matter of right.

Highlights of the meeting included the Opening Assembly keynote address on the rule of law by Supreme Court Justice Anthony M. Kennedy, a panel discussion presented to the House of Delegates on "Liberty v. Security," the ABA Medal presented to former ABA President Jerome Shestack, and the passing of the presidential gavel from Michael S. Greco to Karen J. Mathis (see article, page 5).

The following is a summary of the House of Delegates action.

Antitrust Law

Sherman Act. Urges that Rule 12(b)(6) of the *Federal Rules of Civil Procedure* be interpreted to require that a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act must allege facts constituting more than mere parallel conduct and ordinary business behavior.

Attorney-Client Privilege

Disclosure of Materials. Urges federal and state courts to adopt consistent rules to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or work-product doctrine.

Audit Process. Supports the preservation of the attorney-client privilege and work-product doctrine in connection with audits of company financial



LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Independence of the Bar. The U.S. Court of Appeals for the D.C. Circuit issued a ruling 12/6/05 in a case filed by the ABA that the Federal Trade Commission (FTC) went beyond its statutory authority by including lawyers under Title V privacy provisions of the Gramm-Leach-Bliley Act of 1999 (GLBA). The FTC did not appeal.</p>				<p>Opposes any federal laws or regulations that would preempt or interfere with state rules protecting the confidential attorney-client relationship, including the FTC rules applying the privacy protection provisions of Title V of the GLBA.</p>
<p>Federal Tort Laws. S. 5 and H.R. 516 would expand jurisdiction of federal courts over certain class action cases. S. 354, S. 22, S. 23, H.R. 5 and H.R. 534 would cap pain and suffering and punitive damage awards in medical liability cases. S. 1337 would authorize funding for states to develop alternatives to medical tort litigation. S. 397 and H.R. 800 would protect gun manufacturers, sellers and traders from almost all ordinary civil liability. S. 852 and S. 3274 would create an asbestos trust fund as an alternative administrative remedy for compensating workers exposed to asbestos.</p>	<p>H.R. 516 and H.R. 534 were referred to the Judiciary Cmte. on 2/3/05. House passed S. 5 on 2/17/05. Judiciary Cmte. approved H.R. 800 on 5/25/05. House passed H.R. 5 on 7/28/05. House passed S. 397 on 10/20/05. Energy and Commerce subc. held a hearing on medical liability litigation on 7/13/06.</p>	<p>Senate passed S. 5 on 2/10/05. Senate passed S. 397 on 7/29/05. Senate began consideration of S. 852 on 2/6/06, but the bill stalled 2/14/06. Senate failed to invoke cloture on S. 22 and S. 23 on 5/8/06. Health, Education, Labor and Pensions Committee held a hearing on medical liability litigation on 6/22/06.</p>	<p>President signed P.L. 109-2 (S. 5) on 2/18/05. President signed P.L. 109-92 (S. 397) on 10/26/05.</p>	<p>Supports amending ERISA to allow causes of action to be brought in state and territorial courts against employer-sponsored health plans under state and territorial laws; establishing the use of ADR procedures for resolving disputes between patients and group health plans; and federal legislation addressing asbestos litigation issues and class actions. Opposes creating a special tort standard for the gun industry.</p>
<p>Immigration. S. 119 and H.R. 1172 would ensure that unaccompanied alien children have counsel to represent them in immigration proceedings. S. 1033, S. 1438, S. 2611 and H.R. 2330 seek better enforcement of border security and would reform the nation's immigration system. S. 2454 and H.R. 4437, among other things, would eliminate judicial review in an array of situations.</p>	<p>H.R. 1172 was referred to the Judiciary Committee on 3/8/05. House passed H.R. 4437 on 12/8/05.</p>	<p>Judiciary Committee approved S. 119 on 4/14/05. Senate passed S. 2611 on 5/25/06.</p>		<p>Supports the appointment of counsel at government expense to assist unaccompanied children in immigration proceedings. Supports the humane treatment and legalization of unlawful aliens living in the United States.</p>
<p>Judicial Independence. H.R. 5576, fiscal year 2007 appropriations legislation as approved by the Senate Appropriations Committee, would waive Section 140 of P.L. 97-92 to allow federal judges to receive a cost-of-living adjustment (COLA).</p>	<p>House passed H.R. 5576 on 6/14/06.</p>	<p>Appropriations Committee approved H.R. 5576 on 7/20/06.</p>		<p>Opposes initiatives that infringe upon the separation of powers between Congress and the courts. Supports increased judicial pay. Opposes any legislation to change constitutional law by limiting federal court jurisdiction in specific areas.</p>
<p>Legal Services Corporation. The House version of H.R. 5672 includes \$338 million for the LSC in fiscal year 2007; the Senate committee version, \$358 million.</p>	<p>House passed H.R. 5672 on 6/27/06.</p>	<p>Appropriations Committee approved H.R. 5672 on 7/13/06.</p>		<p>Supports an independent, well-funded LSC.</p>

Senate panel approves elder abuse bill

The Senate Finance Committee unanimously amended and approved legislation Aug. 3 to establish new federal programs in an effort to reduce abuse, neglect and exploitation of the elderly.

S. 2010 – a bipartisan bill introduced by Sen. Orrin G. Hatch (R-Utah) and 21 cosponsors, including seven members of the Finance Committee – would authorize \$858.5 million for programs and research. The bill, as amended, would establish an Elder Justice Coordinating Council and Advisory Board on Elder Abuse, Neglect and Exploitation. The council would coordinate federal actions relating to the issue of elder abuse within the Department of Health and Human Services, Department of Justice and other agencies.

Also included in the bill are provisions to provide grants for programs to establish mobile forensic centers related to elder abuse, improve training on how to prevent elder abuse for staff in institutions and residential care facilities, prevent financial exploitation, and strengthen personnel benefits for individuals seeking employment in long-term care facilities.

Similar legislation was reported out of committee in the 108th Congress, but final agreement was never reached. There has been no action in this Congress on H.R. 4993, elder abuse legislation that was introduced by Rep. Peter King (R-N.Y.). Some elder abuse provisions were included, however, in H.R. 5293, Older Americans Act reauthorization legislation passed by the House in June.

In an Aug. 2 letter to the Finance Committee supporting S. 2010, ABA Governmental Affairs Director Robert D. Evans wrote: “No current Federal law adequately and comprehensively addresses issues of elder abuse, neglect, and exploitation, and there are very limited

resources available to those in the field directly dealing with these issues. The ‘Elder Justice Act’ would create infrastructure, and provide resources needed to develop and implement a nationally coordinated strategy in collaboration with the states to make elder justice a reality.”

ABA policy relating to elder abuse was adopted in August 2002 in an effort to improve the response of governments and of the criminal and civil justice systems to elder abuse, neglect, and exploitation.

The policy, based upon recommendations adopted by the National Policy Summit on Elder Abuse in December 2001, calls for the creation of a nationwide structure to increase public awareness, development of specialized training, and federal leadership to ensure sufficient quality of elder programs. The policy also recommends the establishment of broad-based, multidisciplinary task forces or coalitions in each state to examine and develop systemic approaches to elder abuse interventions. ■

Henry F. White Jr. named ABA executive director

The ABA announced Aug. 4 that Henry F. White Jr., the president of the Institute of International Container Lessors and a retired rear admiral in the U.S. Naval Reserve, will become the association’s executive director in October.

White is assuming the position following the departure of Robert A. Stein, who announced in June 2005 that he planned to leave the association after a 12-year tenure as executive director.

“I look forward to serving as the executive director of this great professional association whose work, so important to the legal profession and to our democracy, touches all Americans each and every day,” White said. “The ABA’s commitment to professionalism and public service is the embodiment of the ideals found in the members of the legal profession with whom I have had the opportunity to serve almost three decades.”

White, who was selected following a year-long search, will oversee a staff of more than 900 employees and will have overall management responsibility for staff operations at the ABA headquarters in Chicago, at the association’s Washington, D.C., office, and at program sites in more than 40 countries.

A graduate of the U.S. Naval Academy and the Fordham University School of Law, White practiced law with the New York firm of Hill Betts & Nash and served as a deputy commissioner of transportation for New York City and as counsel to the mayor of New York City. He also opened and managed the New York City office of the Los Angeles-based law firm of Barger & Wolen.

When he retired in 2004 from the Navy Reserve after over 40 years of active and reserve naval service, White was vice commander of the U.S. Fleet Forces Command, the Navy’s major operational command overseeing the Atlantic and Pacific Fleets as well as Naval Forces in Europe.



Henry F. White Jr.

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statements, and urges the Securities and Exchange Commission and other relevant organizations to adopt standards, policies, practices and procedures, and to take other appropriate steps to ensure that attorney-client privilege and work-product protections are preserved throughout the audit process.

Employee Protection. Opposes government policies, practices and procedures that have the effect of eroding the constitutional and other legal rights of current or former officers, directors or agents (employees) by requiring, encouraging or permitting prosecutors or

context of a government investigation.

Business Law

Bankruptcy. Supports the proposed Attorney Discipline Amendments to the *Federal Rules of Bankruptcy Procedure* that would clarify the authority of bankruptcy courts to discipline attorneys engaging in a pattern of misconduct, and require district or bankruptcy courts to adopt and enforce local disciplinary rules and procedures with respect to attorneys practicing before bankruptcy courts, and supports compliance with the *ABA Model Federal Rules of Disciplinary Enforcement* and the *ABA Standards for Imposing Lawyer Sanctions*.

made readily available to at-risk youth and their caretakers and that they receive timely and effective services through public child welfare agencies, youth services, mental health agencies, schools, and other agencies.

Domestic Violence. Urges federal, state, territorial, local and tribal governments to enact or amend domestic violence civil protection order statutes to provide protection to victims who are in a romantic or intimate relationship with the perpetrator of domestic violence or have been in a romantic or intimate relationship with the perpetrator, but do not necessarily have a child with, live with, or are married to the perpetrator of the violence.

Child Abuse. Adopts the *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, dated August 2006.

Civil Rights/Constitutional Law

Civic Education. Encourages all lawyers and judges to be personally and actively engaged in civic education in their communities and schools and to work to increase Americans' understanding of the role of separation of powers in our constitutional democracy, and urges policymakers at all levels of government to ensure that all students experience high-quality civic learning.

Discrimination. Urges federal, state, local and territorial governments to enact legislation prohibiting discrimination, on the basis of actual or perceived gender identity or expression, in employment, housing and public accommodations.

Signing Statements. Opposes a president's misuse of presidential signing statements by claiming the authority or stating the intention to disregard or decline to enforce all

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"Liberty v. Security" was the topic of a panel discussion presented Aug. 7 before the House of Delegates. Those on the panel were (from left): John Yoo, professor of law at the University of California at Berkeley and a former deputy assistant attorney general; Elizabeth Rindskopf Parker, dean of the University of the Pacific McGeorge School of Law and former general counsel of the Central Intelligence Agency; Neal R. Sonnett, former U.S. attorney and chief of the Criminal Division for the Southern District of Florida; and moderator Catherine Crier, Court TV anchor, writer and former Texas judge.

other enforcement authorities to take into consideration certain specified factors in making a determination of whether an organization has been cooperative in the

Children/Families

At-Risk Youth. Urges federal, state, territorial, tribal and local governments to assure that adequate and appropriate services are

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or part of a law he or she has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.

Courts/Judiciary

Rent. Supports legislation to require that the rent charged to the federal judiciary for courthouse and other judicial facilities not exceed the General Services Administration's actual costs of operating and maintaining the facilities and to prohibit the inclusion by GSA of any capital costs, real estate taxes or administrative fees.

Courts-Martial. Urges Congress to amend 28 U.S.C. §1259 (3) and (4) to permit discretionary review by the Supreme Court of decisions rendered by the U.S. Court of Appeals for the Armed Forces that deny petitions for review of court-martial convictions or deny extraordinary relief.

Inspector General. Opposes legislation that would establish a statutory Office of Inspector General for the Judicial Branch for the purpose of conducting investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges and judicial proceedings.

Criminal Justice

DNA Evidence. Adopts the black letter *ABA Criminal Justice Standards on DNA Evidence*, dated August 2006.

Death Penalty. Without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement specific policies and procedures as it relates to mental illness.

Health Law

Healthcare Practitioners. Approves the Uniform Emergency Volunteer Healthcare Practitioners

Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2006 to provide for the interstate recognition of

licenses held by professionals responding to disasters and emergencies.

see "Annual Meeting," page 6

Mathis assumes ABA presidency

Karen J. Mathis, who assumed the ABA presidency Aug. 8, launched an ambitious agenda last month, announcing the establishment of a Commission on Youth at Risk, a Commission on Second Season of Service, and a Task Force on Rule of Law Symposia.



Karen J. Mathis

"Our youth are our most important asset. Our future is in their hands," she said at a news conference during the association's Annual Meeting. Her youth-at-risk initiative, she explained, will help connect the dots among schools, courts, policymakers, social service agencies, and youth organizations. Programs that work will be showcased to help other communities develop their own efforts. In addition, Mathis already is working with the Judge Advocate

General's Corps to reach out to children in the military community whose parents have been deployed overseas.

The centerpiece of her "Second Season of Service" priority will be creation of a web-based program to pair retired lawyers with volunteer and pro bono projects and encourage them to volunteer at least 50 hours per year. Mathis estimated that as many as 400,000 lawyers in the "baby boom" generation will retire in the next 10 to 15 years.

The Task Force on Rule of Law Symposia is responsible for planning two international rule of law conferences, with the first scheduled for Sept. 16-17 in Chicago. Several working groups drawn from ABA entities will continue to examine the issues and develop white papers as a prelude to a second conference in New York City in Spring 2007.

Mathis is a partner in the Denver office of McElroy, Deutsch, Mulvaney & Carpenter, LLP, and has been a business commercial and estate planning lawyer for more than 30 years. The third woman president of the association, she has been a member of the ABA House of Delegates since 1982 and chaired that body from 2000 to 2002. She also chaired the General Practice, Solo and Small Firm Section, the Commission on Women in the Profession, and the Standing Committee on Membership.

Mathis, who earned her law degree from the University of Colorado School of Law, has been honored as an outstanding lawyer by the Denver and Colorado Bar Associations, the University of Colorado, and the University of Albany School of Law.

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Homelessness

Homeless Courts. Adopts principles for Homeless Court Programs, recognizing that administration of the programs will differ depending on the particular needs, goals and challenges of each jurisdiction.

Definition of Homeless Person. Urges federal agencies to include within the definition of “homeless person” individuals who lack a fixed, regular, and adequate nighttime residence, including those who, due to loss of housing, economic hardship or similar reasons, are sharing the housing of others living in motels, hotels or camping grounds.

Intellectual Property Law

Patents. Supports the retention of a test used to determine when a claimed invention that consists of combining or modifying previous inventions is obvious and therefore not eligible for a patent.

Law Practice

Multijurisdictional Practice. Amend Rules 1 and 10 of the *Model Rules for Lawyers’ Funds for Client Protection*, dated August 2006, to address issues arising primarily from the multijurisdictional practice of law.

Expert Witnesses. Urges federal and state courts to adopt consistent rules to govern the scope of required disclosures for discovery of testifying experts and their reports and that draft expert reports and attorney-expert

communications relating to the expert’s report be protected from discovery in accordance with the proposed resolution.

Legal Education

Diversity. Urges all state, territorial and local bar associations to work with national, state and territorial bar examiners, law schools, universities, and elementary and secondary schools to address significant problems facing minorities within the pipeline to the profession.

Approval of Law Schools. Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting revisions to Chapter 2 (Organization and Administration), Chapter 5 (Admissions and Student Services), and Chapter 8 (Council Authority, Variances and Amendments) of the *Standards for Approval of Law Schools and the Interpretations*, dated August 2006.

Legal Services

Civil Legal Aid. Adopts revised *Standards for the Provision of Civil Legal Aid*, dated August 2006, and recommends implementation of the standards by entities providing civil legal aid to the poor.

Right to Counsel. Urges federal, state and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those

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Judicial Vacancies/Confirmations — 109th Congress (as of 8/31/06)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	2
US Courts of Appeals (179 judgeships)	14	6	14
US District Courts (678 judgeships)	31	19	35
Court of International Trade (9 judgeships)	0	0	1
<hr/>			
Totals	45	25	52

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categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody as determined by each jurisdiction.

State Systems. Adopts the *Principles for a State System for the Delivery of Civil Legal Aid*, dated August 2006, which describe a system for the delivery of civil legal aid that provides a full range of high-quality, coordinated and uniformly available civil law-related services to the state's or territory's low-income and vulnerable populations in sufficient quantity to meet their civil legal needs.

Retired Lawyers. Encourages state and territorial bar associations and other attorney licensing entities to adopt practice rules that establish guidelines to allow pro bono legal services by qualified retired or otherwise inactive lawyers under the auspices of qualified legal services or other non-profit programs.

Pro Bono Policies. Urges solo and small firm attorneys, larger law firms, corporate law departments and government and military law offices to encourage their lawyers, partners as well as associates, to serve their communities through pro bono and public services activities consistent with applicable rules of professional conduct, and adopts *Pro Bono Policies and Procedures*, dated August 2006, to provide lawyers with opportunities to do pro bono work and to adopt specific internal policies and procedures to support such work.

Law School Recruiters. Urges law schools to require legal employers that recruit on campus to disclose, and to make available to the school's students and alumni, specific information regarding the employer's pro bono policies, practices and activities, and urges law schools to adopt the *Pro Bono Disclosure Requirements for Law School Recruiters*, dated August 2006.

Representation in Civil Cases. Urges all federal, state, local and territorial courts to develop programs, in collaboration with state, local and territorial bar associations and pro bono programs and legal services offices, to encourage, facilitate and recognize pro bono representation of indigent parties in civil cases.

Lobbying

Grassroots. Urges Congress to amend the Lobbying Disclosure Act of 1995 to extend the registration and reporting obligations with respect to lobbying coalition membership and grassroots lobbying.

Substance Abuse

Insurance. Urges all federal, state, territorial and local legislative bodies and governmental agencies to

adopt laws and policies that require health and disability insurers who provide coverage for the treatment of both abuse and dependence on drugs and alcohol to do so in a manner that is based on the most current scientific protocols and standards of care.

Tax Law

Tax Tribunals. Adopts the Model State Administrative Tax Tribunal Act, dated August 2006, and recommends to state and territorial legislatures the adoption of the act. ■

ABA expresses concerns about military commission system

The ABA recently reiterated its view that the military commission system developed by the Bush administration to try "enemy combatants" detained at Guantanamo Bay is "inherently flawed" and applauded the holding of congressional hearings to explore the issues in light of the Supreme Court decision in *Hamdan v. Rumsfeld*, 548 U.S. __ (2006).

The 5-3 Supreme Court decision, issued June 29, ruled that the military commissions are "illegal" and "lack the power to proceed," rejecting the administration's claim that it had the authority to create the commissions under the president's executive powers established in the Constitution and under P.L. 107-40, the Authorization for Use of Force in Response to the 9/11 Attacks.

In July 11 letters to the House and Senate Armed Services Committees and the Senate Judiciary Committee, then ABA President Michael S. Greco urged that the president and Congress ensure that any military commissions be required to comply, to the greatest extent possible, with the rules of the Uniform Code of Military Justice (UCMJ), to provide the rights afforded in courts-martial, and to fully comply with the nation's international treaty obligations. All three committees held hearings on the issue in July.

Greco pointed out in his letters that the ABA endorses certain basic principles for the conduct of military commission trials, including that the "government should not monitor privileged conversations, or interfere with confidential communications, between any defense counsel and client."

He also said that the association is "deeply troubled" by revelations in a July 7 Department of Justice filing in Guantanamo habeas cases pending in

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DoD studies impact of predatory lending

The ABA conveyed its concerns earlier this summer that predatory lending practices continue to ensnare military members in debt and that Congress should act to prevent such abuse.

"The ABA believes that the ample record adduced to date with respect to the destructive impact of these practices on our servicemembers and their families speaks powerfully to an urgent need for remedial congressional action, not limited to so-called payday loans but extending to other unfair consumer credit practices, such as deceptive auto financing, auto title pawn practices, and abusive installment loans," according to Retired Marine Gen. Earl E. Anderson, chair of the ABA Standing Committee on Legal Assistance for Military Personnel.

Anderson submitted the ABA comments June 1 to Leslye Arsht, deputy undersecretary for defense for military community and family policy.

Arsht led a Department of Defense study of predatory lending practices directed at members of the Armed Forces and their families and the negative effect of such practices. The report of the study, required under Section 579 of the 2006 Defense Authorization Act (P.L. 109-163), was submitted to Congress Aug. 9.

In his comments, Anderson highlighted the fact that the study staff gathered empirical and anecdotal information from military lawyers and counselors with first-hand knowledge of the effects of predatory credit practices on their

servicemember clients, and he urged the staff to draw on this resource in a way that preserves and underscores the personal dimension of this problem in the final report to Congress.

"It must not be lost on those charged with addressing these issues that the greatest harm caused by predatory lending practices is damage done to the lives and dreams of servicemembers and their families by unremitting, unjust consumer debt," he concluded.

The final report, "Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents," incorporated the ABA letter in an appendix and made several recommendations consistent with the ABA's requests, including several provisions to enhance and strengthen existing rights of servicemembers similar to the rights protected under the Servicemembers Civil Relief Act.

Anti-predatory lending provisions are in both the Senate and House versions of fiscal year 2007 defense authorization legislation, S. 2766 and H.R. 5122, as well as similar stand-alone legislation targeting abusive lending practices. The stand-alone bills include H.R. 97, H.R. 458 and H.R. 5350 – sponsored, respectively, by Reps. Sam Graves (R-Mo.), Geoff Davis (R-Ky.) and Tom Udall (D-N.M.) – and S. 1878, sponsored by Sen. Daniel Akaka (D-Hawaii). ■

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the U.S. District Court for the District of Columbia. The filing indicated that military investigators, in the course of investigating the deaths of three Guantanamo detainees in June, seized from detainees more than a half-ton of documents, including a large number of highly privileged attorney-client communications.

"While we respect the right of the military to conduct its investigation, it appears that this seizure of privileges documents was conducted without advance judicial approval or supervision and without any opportunity for counsel to be heard, and indeed was not even disclosed to a court or counsel until a month after the fact," Greco wrote. He added that almost all of the civilian lawyers involved in the Guantanamo military commission and habeas cases have appeared pro bono and many have complained to the ABA that their efforts to provide effective assistance of counsel have been hampered by rules, policies and tactics of the Departments of Defense and Justice.

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