

memorandum

DATE: June 14, 1993

Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO

ATTN OF:

Paul W. L. for
Bill Burlington, Regional Counsel
Mid-Atlantic Region

SUBJECT: May 1993 Monthly Report

TO: Wallace H. Cheney, General counsel
ATTN: Nancy Redding, Executive Assistant

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

None.

SETTLEMENTS:

None.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

Bryant v. Muth, 91-6672 (4th Circuit) Bivens, FCI, Butner

On May 24, 1993 the 4th Circuit, in a published opinion, reversed and remanded this Bivens action to the District Court (ED/NC) with instructions to dismiss based upon qualified immunity. The magistrate had ruled that Butner staff may have violated Bryant's right of access to the court when they refused to return legal research which inmate Bryant had placed on contraband computer diskettes in violation of BOP regulations. The District Court accepted the MRR and the appeal on qualified immunity followed. It was strongly argued on appeal that staff should be entitled to qualified immunity as they were following BOP regulations which had not been found to be unconstitutional. The Fourth Circuit, however, took the position that Bryant had no right to any materials placed without authority and in violation of BOP regulations on contraband computer disks. To hold otherwise would allow him to benefit from the fruits of his unauthorized activity. There is some good dicta in the decision concerning the need to control inmates' access to computers.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

Taylor v. U.S., FTCA, ND/TX, USP, Terre Haute (AUSA Howard Borg)

This case involves the alleged destruction of 10,000 pages of legal material and other personal property due to rodent damage

and a pipe bursting at USP, Terre Haute in property storage area. BOP had authorized AUSA to make another settlement offer of \$1300. Inmate refuses to settle case. Plaintiff sought \$10,800 administratively but now claims \$155,000. A one day trial on issue of damages is set for the week of June 14-18, 1993. Two offers of settlement have been made under Rule 68, F.R.Civ.P., the first for \$750 and the last for \$1300. If damages awarded is less than offer, U.S. may be able to seek all costs subsequent to either offer.

Moore v. U.S., SD/WVA, 5:92-0463, FPC, Alderson

Marian Callahan attended depositions by plaintiff of BOP employees in the above case on May 5, 1993. This is an employment discrimination case where plaintiff sues under the Rehabilitation Act, claiming handicap discrimination in non-selection, and constructive discharge. Discovery is continuing and trial has been set for July 13, 1993.

Alaouieh v. U.S., 91-CV-73952-DT, ED/MI, FTCA

This case involves alleged misdiagnosis of eye infection at FCI, Milan and alleged continuing substandard treatment at MCC, Chicago and FCI, Sandstone. This is a FTCA case with a sum certain of one million dollars. Plaintiff was examined by his expert opthamologist in April. Plaintiff's expert found unexplained difference between plaintiff's report of no eyesight in one eye and the level of scarring from a herpes infection. Discovery continues and the AUSA and plaintiff's attorney will be agreeing on another expert to send plaintiff to for examination. Trial has been scheduled for August 23, 1993.

Thomas v. Whalen, 92-6988, 4th Circuit, FCI, Petersburg

This case is a complex sentence computation case involving an aggregation of U.S. Code and District of Columbia sentences. The District Court dismissed the petition in August 1992 without prejudice to the petitioner's right to pursue administrative remedies. Petitioner appealed. Oral arguments were held on May 6, 1993 in Richmond, Virginia and Milt Williams, Paralegal attended. The Judges from the bench questioned petitioner's attorney on why they had not pursued an administrative review by the BOP as the district court had suggested. Because of the complexity of the computation, it was suggested by the Court that as a remedy, the Circuit may remand the case to the District Court with instructions to have the BOP, at the highest administrative level, review and brief the District Court on the petitioner's computation in an expedited manner. In anticipation of the remand, this office has retrieved Thomas' complete file and the RISA is re-computing his sentences from day one. He has seven separate periods of incarceration. Thomas is currently in the D.C. Department of Corrections.

U.S. v. Fowler, Criminal, ED/KY, FCI, Ashland

A criminal indictment has been returned against inmate Larry Fowler, Reg. No. 01481-046 for possession of escape paraphernalia and contraband and attempted escape. Fowler has plead not guilty. Discovery conference was held May 27, 1993 and trial is expected to be scheduled for June 29, 1993.

REPRESENTATION NOT RECOMMENDED FOR STAFF: NONE.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Mike Pybas, Assistant Regional Counsel, departed MARO on May 14, 1993 for the sandy shores of his new job as Senior Attorney at the FDC, Miami. Paul Layer, our new Assistant Regional Counsel returned to MARO on May 17, 1993. Paul may be reached at 301-317-3120.

Bill Burlington, Regional Counsel, Paul Layer, Assistant Regional Counsel, Al Munguia, Attorney, LEX, and Teresa Leneave, Paralegal, THA will be attending the Prisoner Litigation Seminar in aurora, Colorado June 7 through 10th.

Bill Burlington, Regional Counsel will be on Annual leave June 11, 1993 and in MARO June 21 through 23.

Marian Callahan, Assistant Regional Counsel is scheduled for annual leave on June 17 through June 18.

Michael Sullivan, Attorney is scheduled for Military Leave June 14, through June 18, 1993.

Teresa Leneave, Paralegal, USP, Terre haute will be on annual leave June 11 through June 18, 1993.

Randy Smith, Paralegal, FCI, Ashland is scheduled for annul leave June 28 through July 5, 1993.

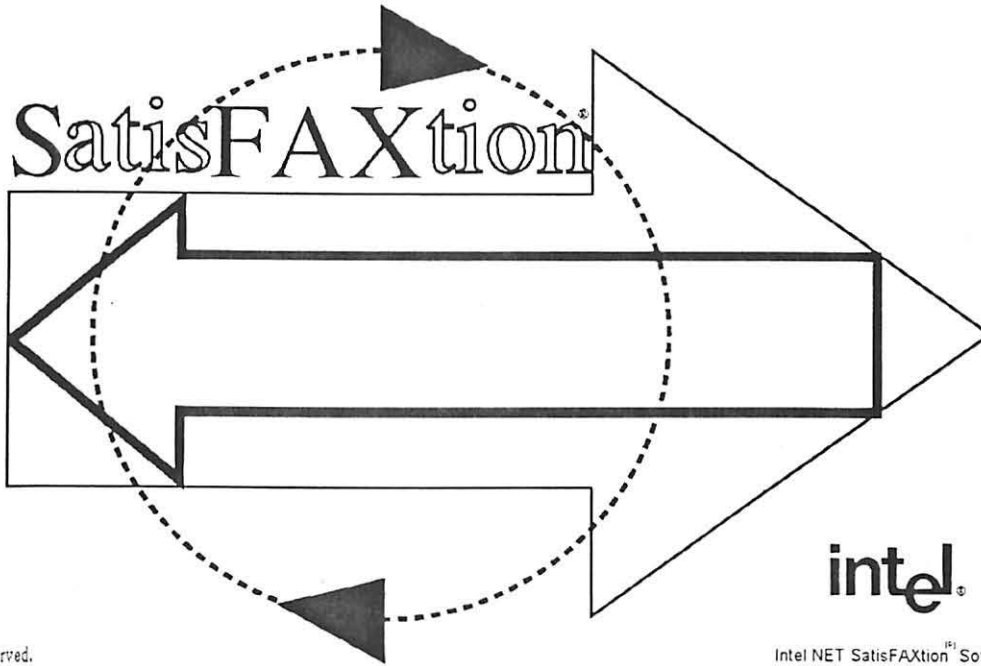
Marian Callahan, Asst. Regional Counsel, Kathy Harris, Paralegal Trainee, and Milt Williams, Paralegal attended the Baltimore Federal Executive Board luncheon on May 14, 1993 where Milt was recognized as Outstanding Supervisor/Grade 12 & below.

SIGNIFICANT FTCA CLAIMS: None.

SIGNIFICANT ADMINISTRATIVE REMEDIES: None.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.: None.

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To: Dolly Ruddy
From: Kathy Harris

Date: 7-13-93
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UNITED STATES GOVERNMENT

memorandum

DATE: July 13, 1993

Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel

ATTN OF: Mid-Atlantic Region

SUBJECT: June 1993 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

None

SETTLEMENTS:Gatti v. Tryon, IP92-1183-C, SD/IN, FTCA, USP, TERRE HAUTE

This case involves an automobile collision on 9-20-89 between civilian Gatti and Correctional Security Officer Tyron from USP Terre Haute. Mr. Tyron stopped at a stop sign and although he looked all directions his view was obstructed and as he crossed the intersection his government vehicle was struck by plaintiff, who had the right of way. The government vehicle was totaled; plaintiff alleges her vehicle was also totaled. Plaintiff's administrative claim requested a sum certain of \$100,000 for personal injury including medical expenses, lost wages, and pain and suffering. Additionally, plaintiff claimed property damage for the vehicle in the amount of \$700.00, for a total claim of \$100,700. An offer of settlement for \$500 was refused and this suit ensued. Since it appeared as though there was government liability, after seeking approval through the appropriate channels, an offer of settlement was made and accepted in the amount of \$10,000. The check has been requested from the Government Accounting Office.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:Warthen v. USA, et al., CA6, FCI, ASHLAND, ED/KY 91-7

Plaintiff brought a suit against three correctional officers, two doctors and one P.A. for alleged assault and deliberate indifference to medical needs at FCI, Ashland in 1986. Plaintiff sought monetary, declaratory, and injunctive relief. The district court dismissed as time barred. On appeal, 6th Cir. held the relevant Kentucky statute of limitations was tolled because plaintiff was incarcerated. The statute had

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been repealed, but the 6th Cir. held that under Kentucky law, plaintiff had a "reasonable period of time" in which to bring suit. Caselaw had already determined one year to be reasonable. Plaintiff had brought his suit within six months of the repeal of the statute, therefore, it should not have been dismissed as being untimely. The case was remanded back to the district court for further proceedings. (Warthen filed an almost identical complaint in 1987 in which the district court dismissed for failure to exhaust.)

Taylor v. U.S., FTCA, ND/TX, USP, Terre Haute

After a one day trial on the issue of damages, a judgment in favor of the plaintiff in the amount of \$313.51 was entered on June 14, 1993. This case involves the alleged destruction of 10,000 pages of legal material and other personal property due to rodent damage and a pipe bursting at USP Terre Haute in property storage area. Plaintiff sought \$10,800 administratively, but in the law suit was seeking \$155,000. An offer of \$376.01 was made to settle tort claim, but plaintiff refused. After the suit was filed, two offers of judgment were made under Rule 68, the first for \$750 and the last for \$1300. (Although the case is reported as adverse, we are pleased with the results as the court awarded less damages than offered administratively.) We anticipate that the plaintiff will appeal.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

Moore v. U.S., S.D. W.V., CA No. 5:92-0463, FPC, Alderson

Plaintiff, a disabled veteran, sues under the Rehabilitation Act, claiming handicap discrimination in non-selection, and constructive discharge. At this time, we are moving for a continuance, and have also worked on motions for summary judgment on a variety of issues.

As previously reported, trial was scheduled for July 13, 1993. However, an order was received directing that the trial be postponed and the case will be placed on the Court's inactive docket pending the resolution of the Supreme Court decision in Landgraf v. USI Film Products, cert. granted, -- U.S. --, 113 S. Ct. 1250, 122 L. Ed. 2d 649 (1993) [retroactivity of Civil Rights Act of 1991]. This case involves the application of changes in the Civil Rights Act which provide for jury trial, and compensatory and punitive damages in Title VII (and Rehab Act) cases.

Alaouieh v. U.S., E.D. MI. CA No. 91-CV-73952-Dt, FCI, Milan

The case involves the alleged misdiagnosis of herpetic infection of a cornea while inmate Alaouieh was at FCI Milan

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and alleged continuing substandard treatment at MCC Chicago and FCI Sandstone. This is a straight FTCA case, with a sum certain of \$1 million. At present trial is scheduled for August, 1993. We have received expert evaluation of the case from a number of ophthalmologists who all confirm there was a delay in providing treatment. There is some indication of cornea scarring. However, objective vision impairment is much less than self reported by plaintiff. The AUSA has proposed and an offer of judgment under Rule 68 in the amount of \$5000 has been made on July 9, 1993.

Rodney K. Bevans v. United States, E.D. Pa. CA No. 93-0295.

This is a straight FTCA case with a sum certain of \$50,000. Plaintiff was released from FCI Morgantown where he was diagnosed with adult onset diabetes. Plaintiff complains of failure to examine and diagnose his medical condition, and failure to provide medical services, during his holdover status at Petersburg, Atlanta and Lewisburg. Plaintiff has been noticed for deposition during the first week in August.

Sharon K. Gray v. U.S., N.D. Okla., CA No. 93-C-400E, FMC, Lexington

Former inmate who was at FMC Lexington on August 3, 1990, allegedly contracted salmonella poisoning from food in the cafeteria. She sustained osteomyelitis of the skull and filed a tort claim for \$1.5 million which was denied. An additional factor involved in the case is that plaintiff suffers from sickle cell anemia. We have just received AFIP report which indicates that some liability may be extant, that is more likely than not that the claimant's salmonella infection developed as a result of food service conditions at the institution.

Wood v. Bogan et al., CA No. 93-CV-72076, E.D. MI, FCI, Milan

Bivens action by inmate who seeks damages for being placed on general telephone restriction following issuance of incident report for placing prohibited third party calls. At a hearing held June 24, 1993, plaintiff's Motion for Temporary Restraining Order to reinstate telephone privileges was denied.

Robert Dickey v. Warden Story et al., CA No. 92-237, E.D. Ky.

Bivens action against several federal officials at FCI, Ashland. Plaintiff alleges denial of his First Amendment rights to freely exercise his religion (the Identify and Creativity religion) because: he is not able to congregate with other white men who share his religious beliefs; rejection of publications pertaining to his faith; and not

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being afforded the same institutional treatment as other religions. Mr. Dickey is seeking \$100,000 against each defendant. On November 12, 1992, the Magistrate Judge identified the defendants, issues, and recommended the complaint be dismissed pursuant to 18 U.S.C. § 1915(d). On January 23, 1993, U.S. District Judge Wilhoit declined to adopt the Magistrate Judge's Report and Recommendation, ordered that summons be issued, and recommitted the case to the Magistrate Judge for further consideration. AUSA has filed a motion for summary judgment.

U.S. v. Fowler, Criminal, ED/KY, FCI Ashland

A criminal indictment was returned against inmate Larry Fowler, Reg. No. 01481-056 for possession of escape paraphernalia and contraband and attempted escape. Prior to trial Fowler plea bargained and pled guilty to possession of a knife. Sentencing is set for September 7 with an anticipated sentence of 27-33 months.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, is scheduled for annual leave July 2, and July 26-30. Bill will be in D.C. July 15-16 to attend a Mental Health Advisory Group Meeting.

Marian Callahan, Assistant Regional Counsel, is scheduled for annual leave July 1, 2, and 6. She will be in Discovery training August 3, 4, and 5 and attending plaintiff's deposition in Philadelphia in the Bevans lawsuit on August 6. Kathryn Simpson, Intern, will accompany Marian for the deposition.

K. Michael Sullivan, Attorney Advisor, is on military leave July 6-14.

Kathy Harris, Paralegal Trainee, is scheduled for annual leave July 1, 2, and 19.

SIGNIFICANT FTCA CLAIMS:

Horbachefsky - Claimant is pursuing poor treatment claim at FCI Morgantown. Claimant was released under 18 USC 3582(c)(1)(A), at Judge's request. Claimant has now filed FTCA claim for sum certain of \$20 million, alleging that claimant, a diabetic, was given too much insulin and that the PA failed to regulate and change insulin level. Claimant went into insulin coma. Allegedly as a result of medical malpractice, claimant's left eye was surgically removed and claimant is blind in his right eye. We have submitted the

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file to AFIP for their opinion. We are awaiting their written opinion, but preliminary indications are not favorable.

Kirk Jones - The Regional Office is currently considering the administrative claim of an inmate at FCI Morgantown who is claiming that he suffered neck and back injuries as a result of a staff assault. The inmate was documented as having pre-existing neck and back problems, and the institution's investigation showed that a staff member poked him in the chest and pulled him by the arm while reprimanding the inmate for looking at a female staff member in an inappropriate manner.

SIGNIFICANT ADMINISTRATIVE REMEDIES: None.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

August 11, 1993--A "test case" video mental health commitment hearing will take place at FCI Butner. One video camera will be located in the mental health seclusion unit, where the patient, the Public Defender and Bureau witnesses will be seated. The second camera will be in the courtroom, where Judge Earl Britt and the Assistant United States Attorney will be located. The Public Defender has vowed to challenge this procedure with an appeal to the Fourth Circuit. The patient has not yet been chosen, but arrangements for the video equipment have been made, with tremendous assistance from Earl Parrish, Office of Technology, and Michael Brooks, Administrative Manager, United States District Court, Eastern District of North Carolina.

memorandum

DATE: September 8, 1993

Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel
ATTN OF: Mid-Atlantic Region

SUBJECT: July 1993 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

Status to Lewis

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

Cameron V. Kindt, IP-93-573-C, S.D. Ind., USP Terre Haute

Motion to dismiss/motion for summary judgment filed in August 1993. Bivens action wherein inmate alleges denial of low-salt diet which was prescribed by USP Terre Haute medical staff. Case has a tumultuous history. Originally filed in District of Columbia; dismissed on qualified immunity grounds; appealed to D.C. Circuit, which vacated ruling and transferred to S.D. Ind.; S.D. Ind. once dismissed suit on same facts based on the D.C. District Court's qualified immunity ruling. Motion to Dismiss/Motion for Summary Judgment focuses again on service of process, personal jurisdiction, statute of limitations, and qualified immunity.

SETTLEMENTS:

Horne V. United States, 90-1505, D.D.C., FCI Petersburg

FTCA claim regarding death of an inmate at FCI Petersburg due to cardiovascular disease. United States (BOP) previously conceded liability and trial was set for damages in August 1993. Prior to trial, plaintiff proffered demand of \$180,000 in settlement. U.S. counter-offered \$105,000 on August 9, 1993. No response has been received. BOP Director/General Counsel have authorized up to \$180,000 settlement.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

Santana v. Keohane, TH-93-110-C, S.D. Ind., USP Terre Haute

Habeas Corpus petition whereby an inmate at USP Terre Haute sought sentence credit for time spent in state custody from date of federal detainer placement in light of fact that state sentence was later vacated. This case is not actually an adverse decision insofar as, upon more thorough consideration, it effectuates current Bureau policy. It is adverse only

insofar as the government urged a different result before the court. The inmate received approximately 10 months credit towards service of his federal sentence. A recommendation against appeal was forwarded to the Office of General Counsel.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

Evans v. Thompson, 89-29-C, S.D. Ind., USP Terre Haute

status
Bivens case against single defendant alleging 8th Amendment violation during forced cell move to allow a search of the cell. Trial is scheduled for September 20, 1993. Inmate is *pro se*; trial is before the bench; and AUSA is Gerald Coraz. BOP will call approximately 10 BOP witnesses/participants in the incident. Teresa Leneave, Paralegal Specialist, USP Terre Haute, will attend on behalf of BOP legal. Judgment in favor of defendant is likely.

status ★
Leavis v. U.S., 89-231-CIV-5-D, E.D. of North Carolina

Trial is set for September 27, 1993, in this personal injury/medical malpractice action by former inmate Leavis. The crux of the suit involves an automobile accident while Mr. Leavis was being transported by the U.S. Marshals Service. Mr. Leavis also alleges he received substandard medical care once he came into the custody of the Bureau of Prisons. The major allegations of medical malpractice focus on FCI Tallahassee. Dan Rouse is providing assistance on this case.

Miguel Angel Batista Collazo, et al. v. U.S., Civil No. 91-0017-C(S) N.D. WV

This case was originally filed in 1990 in D. Puerto Rico and subsequently transferred to the Northern District of West Virginia in late 1990. Plaintiffs were ordered to find local counsel. An Informative Motion was filed by the plaintiffs in June 1992, explaining the delay in pursuing the complaint. A local attorney has now agreed to represent the plaintiffs, and a settlement conference has been scheduled by the court for September 29, 1993, in Clarksburg, WV. The complaint is filed under the Federal Tort Claims Act with a sum certain of \$2.5 million to recover money damages for alleged acts and omissions of FCI Morgantown employees which allegedly caused the suicide death of inmate Hector Alfredo Batista-Hernandez on February 23, 1988. Inmate Batista-Hernandez hanged himself in his cell. Government employees are alleged to have denied the plaintiffs' decedent adequate psychological and/or psychiatric treatment.

Rodney K. Bevans v. U.S., E.D. Pa. CA No. 93-0295

A straight FTCA case with a claim of \$50,000. Plaintiff alleges failure to provide medical services during his pre-

designation status at Petersburg, Atlanta and Lewisburg. Deposition held on August 11, 1993. An arbitration has been set for September 22, 1993 in Philadelphia. We have received an expert's evaluation in the case which is very favorable to the Bureau, indicating that a delay of the type plaintiff sustained in diagnosing adult onset diabetes should not have long term effects.

Osborne v. Rickards, E. D. Va., CA No: 3:92CV702, FCI Petersburg

Status
A hearing has been set for September 30, 1993, in this habeas corpus case. The Plaintiff's sentence was computed pursuant to BOP regulations. He is dissatisfied because he was sent to the Marshals who in turn gave him to the State for state prosecution. When the state alerted BOP he was in their custody, he was then returned to BOP custody. Plaintiff alleges that his federal confinement violates the due process clause of the Fifth Amendment as he alleges he has had to serve his federal sentence "piecemeal."

REPRESENTATION NOT RECOMMENDED FOR STAFF:

Foster v. Bogan, et al., 93-CV-71241-DT, E.D. Mich., FCI Milan

MARO requested representation on behalf of a contract physician. DOJ responded by requesting a copy of the physician's contract and statement from the physician that, in light of contract provisions regarding liability, whether or not he still requests representation. The issue is as yet unresolved. Contract physician has repeatedly been informed by BOP legal staff that it is unlikely he will receive DOJ representation, and that he should retain his own attorney and contact his insurance carrier. It is unknown whether he has taken these precautions.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, on September 1, 1993, will present a recruitment talk at Campbell University School of Law. From September 8-10, he will attend the Sentencing Institute for the 4th and 6th Circuits in Durham. September 16 he will present a recruitment talk at the North Carolina Central University Law School. On September 22 Bill will make a presentation at the orientation for new Bureau physicians and dentists at FMC Lexington.

Paul Layer, Assistant Regional Counsel, will be on annual leave September 10, 23 (1/2 day), 24, and 27.

Marian Callahan, Assistant Regional Counsel, is scheduled to travel to Philadelphia September 22 for the arbitration in the Bevans case; and to Clarksburg, WV on September 29 for the settlement conference in the Batista-Collazo case.

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Kathy Harris, Paralegal Trainee will be in Denver TDY at the NLTC from September 13-October 1 as the final component of her training program.

Randy Everett, Legal Tech, USP Terre Haute will be on annual leave September 7-10 and Sherian Fabo, Paralegal, USP Terre Haute will be on annual leave September 13-17.

On September 7th Michael Sullivan will report to USP Lewisburg. Michael has been with the Mid-Atlantic Regional Office team for approximately one year as an Honors Attorney. Michael has done an excellent job handling a very heavy work load. We all wish Michael the best of luck! On September 8th, Jonathan Cramer reports to MARO as our new Honors Attorney. We look forward to getting Jonathan on board.

SIGNIFICANT FTCA CLAIMS: None

SIGNIFICANT ADMINISTRATIVE REMEDIES: None.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

Conchita Washington v. Reno et al., (E.D. Kentucky - FCI Lexington)

On August 11, 1993, Judge Henry Wilhoit held a hearing to determine whether the BOP had violated an earlier injunction by publishing in the Federal Register on July 21, 1993, a proposed rule on the Inmate Telephone System (ITS). While Judge Wilhoit decided not to find Assistant U. S. Attorney David Bunning in contempt, he did order the period for public comment on the proposed rule extended for 60 days, or until October 20, 1993. The injunction, which prohibits the BOP from implementing the new ITS at Lexington remains in effect. Plaintiff's counsel has asked that this case be certified as a class action, but no decision has been rendered on this aspect of the case.