

*Joyce*

UNITED STATES GOVERNMENT

# memorandum

DATE: March 3, 1995

Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

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

SUBJECT: February 1995 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

*RFRA suit*

**ADMINISTRATIVE REMEDIES**      JAN    FEB    MAR    APR    MAY    JUN    JUL    AUG    SEP    OCT    NOV    DEC

Received                              106    91  
 Answered                              106    85

**TORT CLAIMS**                      JAN    FEB    MAR    APR    MAY    JUN    JUL    AUG    SEP    OCT    NOV    DEC

# Pending                              161    178  
 # Received                              72    73  
 # Answered                              54    47  
 # Pending                              178    200  
 # Over Six Month                      4    1

**FOI/PRIVACY**                      JAN    FEB    MAR    APR    MAY    JUN    JUL    AUG    SEP    OCT    NOV    DEC

# Pending                              63    60  
 # Received                              36    53  
 # Answered                              40    44  
 # Pending                              60    72  
 # Over 30 Days                      36    34

**LITIGATION**                      JAN    FEB    MAR    APR    MAY    JUN    JUL    AUG    SEP    OCT    NOV    DEC

Case Pending                              293    291  
 New Cases Received                      8    12  
 Habeas Corpus                              1    3  
 Bivens                                      4    8  
 FTCA                                        1    1  
 Other                                        2    0  
 Cases Closed                              12    28  
 Cases Pending                              291    282  
 Lit Reports Completed                      14    15  
 Cases/Hearing or Trials                      3    1  
 Settlements/Awards                      0    1  
 Settlements/Awards                      \$0    \$55

(\$ in Thousands)

OPTIONAL FORM 92 (7-90)

**FAX TRANSMITTAL**

# of pages **6**

To: <i>Nancy Redding</i>	From: <i>Kathy Harris</i>
Dept: <i>Exec. Asst</i>	Phone: <i>301-317-3122</i>
Fax: <i>301-317-3995</i>	Fax: <i></i>

Page 2  
MXR Monthly Report

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

Bill Burlington, Regional Counsel, will travel to the Regional Office to plan the National Legal Meeting with Sherree Sturgis on March 23-24.

Wanda Hunt, Deputy Regional Counsel, will be in Morgantown on March 7 attending oral arguments on a Motion for Summary Judgment in the Jones v. USA case out of FCI Morgantown. This case is a FTCA action in which the inmate alleges that he was physically assaulted by a staff member.

Cheryl Behymer, Honors Attorney, will be attending a LEI class on Introduction to FOIA on March 8. On the afternoon of March 9 and all day March 10, Cheryl will be attending a mandatory professionalism course for the Virginia Bar.

Marian Callahan, Assistant Regional Counsel, will be on annual leave March 27-31.

Rick Shott, Attorney Advisor, USP Terre Haute, will be duty officer March 14-20.

Teresa Marvel, Paralegal Specialist, USP, Terre Haute, will be in annual training March 7-10.

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

FMC Lexington and FCI Ashland - Visitors - Jane Graham, Chief Civil Division, Eastern District of Kentucky, and newly assigned AUSA Shelley Chatfield were provided a tour of Lexington by Joe Tang, Attorney, on February 28, and a tour of Ashland by Randy Smith, Paralegal Specialist on March 1. Also joining them for the tours was Mr. Satoh, a prosecutor from Japan who is spending four weeks in the U.S. Attorney's Office.

FPC Alderson - Salmonella Outbreak Report - The West Virginia Bureau for Public Health's final report of the September 1994 salmonella outbreak at FPC Alderson has been completed. The report identified seven confirmed and 31 probable cases of salmonella. The report could not identify the cause of the initial infection, but noted egg pooling and inadequate dishwasher temperature as violations. The report included 15 recommendations and focused on the need to educate inmates and staff about preventive measures.

**SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):** None

**SETTLEMENTS:** None

Page 3  
MXR Monthly Report

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

Castor v. U.S., 94-74-C (S.D. Ind.) USP Terre Haute

In an excellent decision, Judge McKinney ruled that the discretionary function exemption to the FTCA precludes inmates from challenging the way an institution manages asbestos. This decision should help us successfully conclude a series of 20 or more cases that had alleged inmates were intentionally and negligently exposed to friable asbestos at Terre Haute. The broad reasoning of this opinion would also apply to the way our institutions manage any major hazard, such as toxic wastes, salmonella, HIV etc. We have asked to have the opinion published.

Goggin v. U.S., 91-2735-MI/A, (W.D. Tenn.), FCI Memphis

On February 14, 1995, the court granted the inmate plaintiff \$55,000 in this FTCA medical malpractice case. The plaintiff had a pre-existing serious injury to his right ankle wherein a pin was surgically placed in the bone prior to entering the BOP. At FCI Memphis he twisted the same ankle playing softball on October 22, 1989. He first sought medical treatment on October 24, 1989, where he was diagnosed with a sprained ankle and told to return on October 27. Plaintiff returned to HSU on October 26 complaining of pain, more swelling, fever and sweats. The PA examining the plaintiff refused to allow him to see a physician and sent him back to his housing unit. On October 29, 1989, the plaintiff was transferred to a community hospital with a high fever and he was delirious due to osteomyelitis. The community hospital staff recommended amputation of the foot, but plaintiff refused. Plaintiff remained in the community hospital for approximately two months. During the trial plaintiff presented evidence that the government medical records had been altered. Based on this, the government had to concede a breach in the standard of care. However, the government medical experts testified the plaintiff would be in the same physical condition today regardless of the treatment received at FCI Memphis due to the gravity of the initial injury. The court chose to give more weight to the plaintiff's experts and inmate witnesses than to staff testimony. The plaintiff demanded \$1 million for loss of future earnings as an aerobatic pilot and for pain and suffering. The AUSA involved in the case and the FCI staff attorney Tom Read, felt before the judgment that \$40,000 to \$50,000 award would be a victory. The recommendation not to appeal should be considered as the altered medical records were not mentioned in the opinion, and one witness for the defense has been killed since the trial. Office of Internal Affairs was notified as soon as the altered medical records were introduced at trial and the investigation is ongoing.

Page 4  
MXR Monthly Report

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

Davidow v. U.S., 95-14 (E.D. Ky.) FCI Ashland

RFRA

(RFRA) suit challenges disciplinary action that was taken against inmate Davidow by FPC Eglin. Inmate Davidow, a Lubavitch Jew, refused to work for seven days following the death last June of Rabbi Schneerson ("The Rebbe"). The inmate was given an incident report for refusing to work. He was found to have committed the prohibited act, and was transferred to Ashland. An attorney has filed suit claiming that our disciplinary action violates his right to practice his religion under RFRA. We have been in contact with Central Office Chaplaincy Services, as they were involved with this matter when it first arose. We will contend that our action was justified by legitimate security concerns, that our action did not significantly burden his exercise of his religion, and that there was no least restrictive means to achieve our goal.

Wood v. Hahn, et al., 3:95-CV-133, E.D. Va., FCI Petersburg

Plaintiff, seeking TRO to reinstate telephone privileges, alleges that his telephone privileges were restricted for unauthorized use of the telephone (in conducting a business) by the UDC without due process. He asserts this sanction violates his rights to protect his property and unlawfully curtailed his access to his attorneys; and that his attorney's request for telephone calls were denied by unit staff. Plaintiff is represented by attorney from the local law firm of El-Amin & Crawford and an Ohio attorney. On Thursday, February 23, a hearing was held on the TRO before Judge Spenser in Richmond. Plaintiff was represented at the hearing by El-Amin. The United States was represented by Bob Jaspen, AUSA. The AUSA did an outstanding job arguing that essentially plaintiff seeks to challenge a UDC action without first using administrative remedies available within the BOP; the UDC was a minor disciplinary action; and if the court was to rule on it, the standard enumerated in Hill of some fact was the standard. AUSA Jaspen clearly distinguished to the court that plaintiff's telephone restrictions were social telephone calls only and did not restrict privileged attorney/client calls, which are not made through the ITS, but by the inmate requesting such a call through staff. He pointed out that plaintiff had not made such a request to staff, and that plaintiff had alternative means of communicating with his attorney through correspondence and visiting. The Judge, after hearing the arguments, denied the request for the TRO and indicated he would issue a written opinion in the future. Milt Williams, Paralegal, and James Bridgeforth, Correctional Counselor, attended the hearing and briefed the AUSA prior to the hearing.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

Page 5  
MXR Monthly Report

SIGNIFICANT FTCA CLAIMS: None

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

New Litigation Cases by Institution and Type  
Received During the Month of February 1995

	ALD	ASH	BUT	CUM	LEX	MAN	MRG	MIL	MEM	MLL	PET	SEY	THA	MXR	TOT
BIV	0	0	0	0	1	2	1	2	0	0	2	0	0	0	8
FTCA	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1
HC	0	2	0	0	0	0	0	1	0	0	0	0	0	0	3
OTH	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOT	0	2	0	0	2	2	1	3	0	0	2	0	0	0	12

New Litigation Cases by Institution and Type  
Received Calendar Year to Date

8698

	ALD	ASH	BUT	CUM	LEX	MAN	MRG	MIL	MEM	MLL	PET	SEY	THA	MXR	TOT
BIV	0	0	0	0	1	3	1	5	0	0	2	0	0	0	12
FTCA	0	0	0	0	1	0	0	0	1	0	0	0	0	0	2
HC	0	2	0	0	0	0	1	1	0	0	0	0	0	0	4
OTH	0	0	0	0	0	0	1	1	0	0	0	0	0	0	2
TOT	0	2	0	0	2	3	3	7	1	0	2	0	0	0	20