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## Legal Summaries

Jamie H. Kim

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**UNITED STATES SUPREME COURT****Ballard v. Comm’r, 125 S. Ct. 1270 (2005).**

**LAW:** The Tax Court must include fact-finding reports in the appellate record that are submitted by Special Trial Judges.

**FACTS:** Petitioners were taxpayers charged with tax fraud and failure to report certain payments on their individual tax returns. They filed petitions for re-determination in the Tax Court, where the Chief Judge assigned the consolidated cases to a Special Trial Judge. After trial, the Special Trial Judge submitted to the Chief Judge a report made pursuant to Tax Court Rule 183(b), which included findings of fact and opinion. The Chief Judge then assigned the case to a Tax Court Judge for review of the trial judge’s report and an ultimate decision. The Tax Court Judge found that the taxpayers acted with intent to deceive the Commissioner, and held them liable for underpaid taxes and substantial fraud penalties. He issued an opinion that adopted the Special Trial Judge’s opinion, but the Rule 183(b) report was withheld from the public and the appellate record. Based on conversations among one of the taxpayers’ attorneys and two Tax Court judges, petitioners believed the decision was not a true reproduction of the trial judge’s report. The taxpayers filed motions seeking access to the initial report, which the Tax Court denied. On two separate appeals, the Eleventh Circuit and Seventh Circuit affirmed the Tax Court’s denials.

**ANALYSIS:** After a 1983 amendment of Rule 183, the Tax Court adopted the practice of treating a trial judge’s report as an in-house draft to be worked over collaboratively by the regular Tax Court Judge and the Special Trial Judge. There is, however, no statutory provision for such a collaborative process. The Tax Court must follow the requirements from Rule 183, which call for a Tax Court Judge to give “due regard” to the trial judge’s opinion and presume the fact-findings to be correct in deciding whether to reject or modify the Rule 183(b) report.

The report should be included as part of the record to allow for a fully informed appellate review. It is well understood that a judge who hears a case at trial has a comprehensive view of the case that cannot be conveyed by a paper record. Further, it is routine in federal judicial and administrative decision-making to disclose a hearing officer’s initial report and to make that report part of the appellate record.

**HOLDING:** The Seventh and Eleventh Circuits' judgments are reversed.

**IMPACT:** The Tax Court must place a trial judge's report in the record. This practice takes away wide discretion from the Tax Court Judge in forming the ultimate decision in a case heard by another judge. However, it will allow for a thorough review to determine whether a Tax Court Judge gave proper deference to a trial judge's findings.

**Castle Rock v. Gonzales**, 125 S. Ct. 2796 (2005).

**LAW:** Enforcement of a restraining order is not a property interest protected by procedural due process.

**FACTS:** Jessica Gonzales had a restraining order against her estranged husband. When she noticed her children were missing one evening, she suspected that her husband had them in violation of the restraining order. Despite her repeated phone calls to the local police department in Colorado, the police took no affirmative action. More than four hours after her first call to the police, Gonzales went to her husband's apartment. Finding no one there, she called the police again and was told that an officer would arrive. When no one came, she went to the police station and submitted an incident report. The officer who took the report, however, allegedly made no effort to enforce the restraining order or to locate the children. Later that night, Gonzales' husband walked into the police station, opened fire, and was shot by police. Inside his car, the police found the children's dead bodies.

On the basis of these allegations, Gonzales brought suit claiming that the town violated her due process rights by failing to respond properly to her complaints. The district court granted defendant's motion to dismiss, concluding that Gonzales' complaint failed to state a claim upon which relief could be granted. The Tenth Circuit reversed, finding that Colorado law entitled her to enforcement of the restraining order.

**ANALYSIS:** To hold a property interest in a benefit, a person must have a legitimate claim of entitlement to that benefit. Such entitlements are created by existing rules from an independent source, such as state law. A benefit is not a protected entitlement if officials have discretion to grant or deny it. The Colorado statute does not appear to mandate enforcement of restraining orders. The statute merely states that officers

must use every reasonable means to enforce a restraining order. The statute directs that officers *may* arrest or seek a warrant, which leaves room for an officer's discretion to determine whether the violation's circumstances or competing duties compel enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this where the suspected violator is not actually present and his whereabouts are unknown. In such circumstances, the statute does not appear to require officers to arrest the suspect, but only to seek a warrant. That, however, would entitle the person only to the warrant procedure, which cannot be the basis for a property interest.

Even if the statute could be said to make enforcement mandatory, that would not necessarily mean that Gonzales has an entitlement to enforcement. Her alleged interest stems from a state statutory scheme. The statute, while giving her power to initiate contempt proceedings, is completely silent about any power to request or demand that an arrest be made.

Further, even if the Court thought Colorado created such an entitlement, it is not clear that an individual entitlement to enforcement of a restraining order could constitute a "property" interest for due process purposes. Such a right would have no ascertainable monetary value and would arise incidentally, not out of a government benefit or service, but out of a function that police officers have always performed: arresting people when they have probable cause.

**HOLDING:** The Tenth Circuit's judgment is reversed.

**IMPACT:** Colorado law enforcement officers maintain their discretion in enforcing restraining orders. Colorado's procedural obligations imposed on state officials with respect to restraining orders do not create property interests for the protected persons.

**Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.**, 125 S. Ct. 2688 (2005).

**LAW:** Where a statute is ambiguous on the point at issue and an agency's corresponding interpretation is reasonable, federal courts must defer to the agency's statutory interpretation.

**FACTS:** The Federal Communications Commission (FCC) issued a declaratory ruling that cable companies providing cable modem services were not telecommunications carriers due to the integrated nature of such access and the high-speed wire used to provide it. Instead, they

were classified as information-service providers that manipulated and stored information. As such, these cable companies were exempt from mandatory regulation under Title II of the Communications Act. Numerous parties petitioned for judicial review. The Ninth Circuit used *stare decisis* as a basis for vacating the rule in part.

**ANALYSIS:** The *Chevron* framework requires that a federal court defer to an agency's statutory interpretation. This applies if the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable. After concluding that the ruling was within the FCC's jurisdiction, the Court examined whether the point at issue was ambiguous and whether the agency's construction was reasonable.

A court's prior construction of a statute trumps an agency's construction that is otherwise entitled to *Chevron* deference only if the prior court decision bases its construction on the unambiguous terms of the statute and leaves no room for agency discretion. The prior interpretation that the Ninth Circuit relied on only held that the *best* reading of the statute was that cable modem service was a telecommunication service, not that this was the only permissible reading or that the Communications Act unambiguously required it.

Where a statute's plain terms could be interpreted as more than one reasonably ordinary usage, the FCC's choice of usage is entitled to deference. In determining whether cable companies providing cable modem service "offer" telecommunications within the meaning of the statute, the FCC used the ordinary meaning of "offering." It is common to describe what a company "offers" to a consumer as what the consumer perceives to be the integrated finished product. Cable companies providing cable modem service "offer" clients finished Internet service, an information service.

The FCC's interpretation is reasonable since it is not overly broad. It does not allow any communications provider to evade common-carrier regulation simply by bundling information service with telecommunications. Rather, the information service must not be separable from the service's data-processing capabilities. Further, the FCC concluded that broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.

Thus, the FCC's conclusion is a lawful construction of the Communications Act under *Chevron* and is not an arbitrary and

capricious deviation from agency policy under the Administrative Procedure Act.

**HOLDING:** The Ninth Circuit's judgment is reversed and remanded.

**IMPACT:** Cable companies that provide cable modem service are exempt from mandatory regulation under Title II of the Communications Act.

**Tenet v. Doe**, 125 S. Ct. 1230 (2005).

**LAW:** Alleged former Central Intelligence Agency (CIA) spies are prohibited from bringing suit against the United States government based on covert espionage agreements.

**FACTS:** Respondents, husband and wife, were former Cold War spies in their home country; at the time, it was an enemy of the United States. In exchange for lifetime financial and personal security, provided by the CIA, the couple agreed to perform espionage services. After years of service, the couple defected and became United States citizens. The husband found a job in the state of Washington; as his salary increased, the CIA decreased his benefits. Eventually, the parties agreed to discontinue the CIA assistance. After a corporate merger, the husband was laid off. The couple sought a return to financial assistance from the CIA, but was denied. The couple brought suit alleging that the CIA violated their equal protection and due process rights. The district court denied the government's motion to dismiss, and the Ninth Circuit affirmed.

**ANALYSIS:** Judicial review is precluded in cases where success depends on the existence of a secret espionage relationship with the government. The longstanding rule announced by the Court in *Totten v. United States* prohibiting suits against the government based on covert espionage agreements categorically bars the alleged spies' claims.

**HOLDING:** The Ninth Circuit's judgment is reversed.

**IMPACT:** Alleged former CIA agents have no cause of action against the government since any suit would risk revealing classified government information. This opinion prevents individual lawsuits brought to induce the CIA to settle a case out of fear that litigation would reveal classified information that might undermine covert



operations. The holding also eliminates the need for the CIA to invoke the “state secrets” privilege on a case-by-case basis, which may risk the perception that it is either confirming or denying a relationship with individual plaintiffs.

**Wilkinson v. Austin**, 125 S. Ct. 2384 (2005).

**LAW:** Inmates have a constitutionally protected liberty interest in avoiding assignment to the state’s highest maximum-security prison. Informal, non-adversary procedures for assignment to these prisons afford adequate due process where the state’s interest outweighs the inmate’s interest, and the risk of an erroneous placement is minimized by the procedures.

**FACTS:** “Supermax” prisons are maximum-security prisons with highly restrictive conditions that house the most dangerous prisoners. In 1998, Ohio opened its first and only Supermax prison, the Ohio State Penitentiary (OSP). Current and former OSP inmates alleged that the informal, non-adversary procedures for assignment to OSP violated their due process rights. The district court found that inmates have a liberty interest in avoiding assignment to OSP, and Ohio had denied the inmates adequate due process. The Sixth Circuit affirmed.

**ANALYSIS:** OSP’s harsh conditions as a whole impose an atypical and significant hardship that is sufficient to create a liberty interest for the inmates in avoiding assignment to OSP. Having established a liberty interest, the Court next determined what due process was due by considering three factors: (1) the affected private interest; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and; (3) the government’s interest. First, an inmate’s interest in avoiding erroneous placement at OSP is less than significant since he or she is already lawfully confined; meanwhile, Ohio’s interest remains significant. Ohio’s first obligation is to ensure the safety of other inmates and prison personnel. Ohio’s interest also addresses the problem of scarce resources. Second, Ohio provides multiple levels of review for any decision recommending OSP placement and a placement review within 30 days of an inmate’s initial assignment to OSP. These procedural safeguards are sufficient protection to comply with due process requirements. Courts must give substantial deference to prison

management, which has more experience with such procedures before mandating additional elaborate procedural safeguards.

**HOLDING:** The Sixth Circuit's judgment is affirmed in part, reversed in part, and remanded.

**IMPACT:** This decision gives state prison officials great deference in prison management decisions when the interests of safety and scarce resources are at stake. Absent a showing that informal, non-adversary procedures for assignment were ignored, it is likely that these procedures will be upheld.

#### UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

**Lin v. Dep't of Justice**, 416 F.3d 184 (2d Cir. 2005).

**LAW:** Statutory construction of the Immigration and Naturalization Act (INA) set forth in a summarily affirmed immigration judge's opinion is not entitled to *Chevron* deference.

**FACTS:** Shi Liang Lin, Xian Zou, and Zhen Hua Dong each sought asylum in the United States under the INA. As a basis for such a grant, Lin and Zou separately claimed that they suffered persecution in China when their girlfriends were forced to have abortions. Dong's claim was similar to Lin's and Zou's, except that Dong sought asylum in connection with the persecution of his fiancée. Dong further claimed that family planning officials threatened to sterilize him if his fiancée became pregnant again. When his fiancée became pregnant a second time, Dong fled, but his fiancée was forced to have another abortion. The immigration judge in each case denied the applications, refusing to expand a 1997 decision which held that forced abortion of one spouse was an act of persecution against the other spouse, to include unmarried couples. The Board of Immigration Appeals (BIA) summarily affirmed the immigration judges' decisions in each case.

**ANALYSIS:** Before reviewing the BIA's decision, the court first addressed the appropriate standard of review. An agency interpretation qualifies for *Chevron* deference if it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was

promulgated in the exercise of that authority. Here, Congress delegated the authority to make immigration rules carrying the force of law to the Attorney General. There are no rules or regulations indicating that the Attorney General ever intended to delegate similar rulemaking authority to the immigration judges. Absent the power to issue binding decisions, immigration judges cannot, themselves, be said to possess the requisite ability to issue, on behalf of the Attorney General, a rule carrying the force of the law. Even so, a summarily affirmed immigration judge's decision is not a rule promulgated by the BIA on behalf of the Attorney General. The fact that the BIA deems an immigration judge's decision to be a final agency determination does not transform the immigration judge's legal construction into a BIA rule carrying the force of law. The BIA's streamlining regulations expressly provide that when the BIA summarily affirms an immigration judge's decision, the BIA approves only the result reached in the decision below without providing any way of knowing that the BIA has, in fact, adopted the immigration judge's particular construction of a statute when the court is asked to assess its reasonableness. In any event, agency practice suggests that neither the BIA, nor the immigration judges, treat summary affirmances as binding. Accordingly, the immigration judge's decision is not entitled to *Chevron* deference.

The court did not consider whether the decisions were entitled to *Skidmore* deference because, in the 1997 decision, the BIA failed to articulate a reasoned basis for making spouses eligible for asylum. The court also did not review *de novo* whether to affirm or reverse the results reached in these cases for the same reason.

**HOLDING:** The cases were remanded so that the BIA could more precisely explain its rationale behind the 1997 interpretation and clarify whether, when, and why boyfriends and fiancés may or may not similarly qualify as refugees. The panel retained jurisdiction to rule on these cases and decide the issues on appeal after the disposition of the remand.

**IMPACT:** Future agency interpretations of the Immigration and Naturalization Act are not entitled to *Chevron* deference, but they might be afforded *Skidmore* deference.

## UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

**Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Dep't of Agric.**, 415 F.3d 1078 (9th Cir. 2005).

**LAW:** A reviewing court must give deference to the agency's findings related to a final rule.

**FACTS:** The United States Department of Agriculture (USDA) bars the importation of beef from countries where Bovine Spongiform Encephalopathy (BSE), more popularly known as mad cow disease, is known to exist. In a final rule, the USDA relaxed this practice by allowing beef imports from Canada although two cases of BSE had been found in Canada at the time. The USDA's basis was that resumption of beef imports from Canada would not significantly increase the risk of BSE to the American population. The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America sued the USDA to block the implementation of the final rule. The district court issued a preliminary injunction finding, among other things, that the rule was arbitrary and capricious under the Administrative Procedure Act (APA).

**ANALYSIS:** An agency's actions violate the APA's arbitrary and capricious standard if the agency did not consider the relevant factors and did not articulate a rational connection between the facts found and the choices made. Rather than evaluating the final rule, the district court repeatedly substituted its judgment for the agency's, even though the record supported the USDA's conclusion.

The district court's lack of deference may have been due to its misreading of the Animal Health Protection Act. The district court appears to have imposed a requirement on the USDA that its final rule present no additional risk to human or animal health. The AHPA's terms, however, indicate congressional intent to give the Secretary of Agriculture wide discretion in dealing with the importation of plant and animal products. The AHPA imposes no requirement on the USDA that all of its actions carry no associated increased risk of disease.

Further, the court's own review concluded that the Secretary had a firm basis for its conclusion. The court then went on to examine the likelihood of success on the merits of other several other claims.

**HOLDING:** The district court's grant of a preliminary injunction is reversed.

**IMPACT:** This decision limits a reviewing court's ability to analyze whether an agency's rule is arbitrary and capricious. Rather than substituting its own judgment for the agency's, reviewing courts must examine the record and defer to the agency's judgment and expertise.

**UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT**

**Schiavo v. Schiavo**, 403 F.3d 1289 (11th Cir. 2005).

**LAW:** A court-appointed guardian and hospital do not violate the Americans with Disabilities Act when they terminate care of an incapacitated patient. A patient's due process rights are not violated if the proper standard of review is applied, and there is no authority to support violation of a substantive due process right.

**FACTS:** As the court-appointed guardian for his incapacitated wife, Michael Schiavo caused the termination of care for Theresa Schiavo. Theresa's parents filed a five-count complaint against Michael and the hospital that terminated care. Based on those claims, the parents brought a motion seeking a temporary restraining order to require Michael to resume Theresa's care. The district court denied the motion, and the Eleventh Circuit affirmed. Theresa's parents amended the initial complaint by adding five more counts. The district court again denied the parents' motion.

**ANALYSIS:** Michael Schiavo does not qualify as a "public entity" or a place of "public accommodation" as required to bring a claim under the Americans with Disabilities Act. The hospital is also not a "public entity." Even assuming that it is a place of "public accommodation," Theresa's parents failed to make a substantial showing that the hospital removed nutrition and hydration and withheld medication from Theresa on the basis of her disability rather than pursuant to a court order.

The parents assert that this is also a procedural due process claim and that the Due Process Clause requires that decisions to terminate care must be supported by clear and convincing evidence that the incapacitated person would have made the same decision. However, the Supreme Court has previously held that states *may* use this clear and convincing evidence standard before termination of care, but are not required to do so. Nonetheless, the state court did apply the clear and convincing evidence standard and found that it was met. Procedural due process does not guarantee a particular result. Additionally, no

procedural due process claim exists because due process has been provided in abundance, as evidenced by the twenty-one different proceedings in this case. There are few cases that have ever been given as much due process.

The parents further assert that this is also a substantive due process claim. The Court has specifically held that the substantive due process component of the Due Process Clause does not require a state to protect its citizens against injury by non-state actors. Neither Michael Schiavo nor the hospital is a state actor for this purpose just as neither is a “public entit[y]” or a place of “public accommodation.”

The court also found that the parents had no claim under the Rehabilitation Act or the Eighth Amendment.

**HOLDING:** The district court’s denial of the temporary restraining order is affirmed.

**IMPACT:** Future claims against a hospital that terminates care and the guardian who causes the termination cannot be brought under the Americans with Disabilities Act or the substantive component of the Due Process Clause. Procedural due process may still be the basis for a valid claim in termination of care cases.

#### CALIFORNIA STATE COURT

**McClung v. Employment Dev. Dep’t**, 99 P.3d 1015 (Cal. 2004).

**LAW:** The California Fair Employment and Housing Act imposes personal liability on non-supervisory co-workers as well as supervisory workers. This provision does not apply retroactively to conduct predating its 2000 enactment.

**FACTS:** In 1999, the California Supreme Court interpreted the California Fair Employment and Housing Act as imposing no personal liability on non-supervisory co-workers. The state legislature amended the provision in 2000 to include non-supervisory co-workers as personally liable. In 1998, Leslie Ann McClung filed a complaint against the Employment Development Department (EDD) and her non-supervisory co-worker Manuel Lopez, alleging claims of hostile work environment and failure to remedy a hostile work environment under the Act. The superior court granted summary judgment for the defendants. The court of appeal affirmed as to the EDD but reversed as to Lopez,

finding that the amendment merely clarified the meaning of the prior statute and legislative intent was to apply the new law retroactively to all existing cases.

**ANALYSIS:** The court's earlier interpretation of the Act was final and conclusive in not imposing personal liability on a non-supervisory co-worker. The legislature enacts laws while the judicial branch interprets those laws. The legislature may define the meaning of statutory language by legislative enactment that it may deem retroactive, but it has no power to say what it meant by the prior language. The amendment here did not state that it declared existing law. Rather than merely clarifying the prior statute, the legislature changed it. Any statements in the legislative history to the effect that the proposed amendment would only clarify the law's original meaning may have been intended only to demonstrate that the clarification was necessary and not as positive assertions that the law always provided for co-worker liability. Accordingly, the 2000 change does not apply retroactively to conduct predating its enactment, such as Lopez's actions. Thus, the Act imposes no personal liability on Lopez.

**HOLDING:** The court of appeals' judgment as to the non-supervisory co-worker is reversed and remanded.

**IMPACT:** There is a strong presumption against statutory retroactivity overcome only by express language of and clear legislative intent for retroactivity. If legislatures intend to clarify a statute rather than change it, they must do so by retroactive legislative enactment. Otherwise, any such interpretation will be deemed non-binding.

**Garamendi v. Golden Eagle Ins. Co.**, 27 Cal. Rptr. 3d 239 (Ct. App. 2005).

**LAW:** A trial court may use evidence that was not before the Insurance Commissioner in ruling on extrinsic issues such as procedural fairness and thoroughness, but in evaluating the Commissioner's ruling on the merits of the claim, the trial court may only consider evidence that was actually before the Commissioner.

**FACTS:** Two former employees of Golden Eagle Insurance Company filed claims against the company during its conservatorship proceedings to recover for a number of torts. After investigation, John Garamendi,

California's Insurance Commissioner, rejected the claims as factually and legally unfounded. The Commissioner issued boilerplate notices to the claimants, which did not explain the bases of the rejections. In an order to show cause proceeding brought in trial court to review the Commissioner's rejections, the claimants submitted a substantial amount of evidence that the Commissioner had not previously considered. The trial court refused to consider this evidence but offered to send the matter back to the Commissioner for consideration in light of the additional evidence. When the claimants declined the opportunity, the trial court ruled that the Commissioner did not abuse his discretion based on the evidence before him at the time the determinations were made.

**ANALYSIS:** The Commissioner's determination of claims resembles an adjudication. The trial court's statutory role is solely one of review. While the trial court may accept and consider evidence that was not before the Commissioner in reviewing the rejection of a claim, the court may consider that evidence solely to rule on issues other than the merits of the claim such as the thoroughness of the Commissioner's investigation or the Commissioner's unjustified failure to consider relevant evidence. Allowing the trial court to second-guess the Commissioner's judgment on the basis of evidence that was not before the Commissioner would undercut the legislature's assignment of primary responsibility for determination of claims since parties would hold critical evidence from the Commissioner in favor of a hearing in the trial court. Allowing the trial court to base its review on extrinsic evidence would be inconsistent with the abuse of discretion standard, since any judgment of the reasonableness of the Commissioner's exercise of discretion in adjudicating a claim necessarily must be based on the evidence on which the Commissioner actually based his decision. After the court determined that the trial court cannot consider evidence not before the Commissioner on his ruling, it examined the merits of each of the claims.

**HOLDING:** The trial court's judgment is affirmed.

**IMPACT:** This was a matter of first impression in this jurisdiction. In matters of reviewing administrative proceedings on the issues of fairness and thoroughness, the trial court may exercise its independent judgment in evaluating extrinsic evidence rather than deferring to the agency's weighing of evidence. In matters of reviewing administrative



proceedings on the merits of the claims, the trial court may not consider supplemental evidence proffered by the claimants.

#### NEW YORK STATE COURT

**New York Times Co. v. N.Y. Fire Dep't**, 829 N.E.2d 266 (N.Y. 2005).

**LAW:** Records requested under the Freedom of Information Law are subject to exceptions such as the privacy, law enforcement, and intra-agency exceptions. Surviving relatives have an interest in keeping private the affairs of the dead.

**FACTS:** Four months after the September 11, 2001 (9/11) attacks on the World Trade Center, a New York Times reporter requested various records from the New York City Fire Department (FDNY). The FDNY denied the majority of those requests. The newspaper and reporter brought suit to compel disclosure of tapes and transcripts of (1) calls made on 9/11 to the FDNY's 911 emergency service, (2) dispatch calls made on 9/11 on the FDNY's internal communications, and (3) oral histories consisting of interviews with firefighters in the days following 9/11. The New York supreme court ordered disclosure restricted by certain redactions. The appellate division affirmed, except that it ordered the personal expression of feelings in the oral histories disclosed. Plaintiffs appealed seeking disclosure of all materials they had originally requested.

**ANALYSIS:** The Freedom of Information Law requires state and municipal agencies to make all records available for public inspection and copying. The FDNY relied on three exceptions to that rule. It contended that (a) the privacy exception applied to the disputed portions of the 911 calls, (b) the intra-agency exception applied to the disputed portions of the dispatch calls, (c) both the privacy and intra-agency exceptions applied to the oral histories, and (d) the law enforcement exception applied to six records that were possible exhibits in the impending federal criminal trial of Zacarias Moussaoui, who was alleged to have had a role in the 9/11 attacks.

Privacy extends to the dead, and their survivors have an interest in keeping private the affairs of the dead. The privacy interests in this case are compelling as many of the calls express the terror and agony the callers felt and their deepest feelings about what their lives and their families meant to them. It is likely that these tapes, if disclosed

publicly, will be replayed and republished endlessly, and in some cases they will be exploited by the media as sensational news. This is the sort of invasion that the privacy exception exists to prevent. While there is a public interest in the disclosure of the 911 calls, it is outweighed by the privacy interests of those family members who wish to keep the callers' words private. Thus, the 911 calls that family members prefer to keep private constitute an unwarranted invasion of personal privacy.

The dispatch calls are communications within the FDNY that are intra-agency materials and are protected from disclosure unless they are statistical or factual tabulations or data and for staff instructions that affect the public. Thus, the dispatch calls should be disclosed to the extent they consist of factual statements or instructions affecting the public, but they should be redacted to eliminate non-factual material.

Oral histories are spoken words recorded for the benefit of posterity, and people interviewed for these histories understood or reasonably should have understood that the words spoken were destined for public disclosure. The record even shows that the FDNY intended them to be publicly disclosed. Thus, the oral histories are not protected from disclosure by either the privacy or the intra-agency exception. All of the oral histories are discloseable except for specifically identifiable portions that can be shown likely to cause serious pain or embarrassment to an interviewee.

The issue as to the six unidentified tapes and/or transcripts that the Department of Justice said it would use in evidence at the Moussaoui trial is whether they were compiled for law enforcement purposes and whether their disclosures would either interfere with law enforcement investigations or judicial proceedings or would deprive a person of a right to a fair trial or impartial adjudication. In terms of an impartial jury, potential jurists in the Moussaoui trial are already exposed to an enormous amount of publicly available information related to 9/11; they will be exposed to the materials at trial whether or not they are made public before the trial. The court is, however, mindful of the enormous importance of public interest of an orderly and fair trial for Massaoui. There may be some good reason not apparent from the record before the court why the disclosure of these materials would create problems in the criminal case. Thus, the Department of Justice must be given a chance to demonstrate that disclosure of the six potential exhibits would interfere with the Moussaoui case.

**HOLDING:** The appellate division's judgment is affirmed as modified.

**IMPACT:** This decision protects vital personal interests while allowing reasonable disclosure to satisfy the public interest.