

Court Ruling Places Name Leakers, BALCO Investigation in the Crosshairs

Written by Maury Brown
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In some alternate universe, Alex Rodriguez, Sammy Sosa, Manny Ramirez, and David Ortiz, were never publicly linked to testing positive for steroids in 2003. Selena Roberts and Michael S. Schmidt never ran their stories because there were never any crooked lawyers with access to information that was forever to remain confidential. There was also never any story about how the MLBPA dropped the ball on destroying the Survey Test results from 2003, because they would have had time to do so. Countless blogs would have never published a leaked "list" of 104 players that reportedly tested positive as part of the testing in 2003. Instead, there was dull talk about how the joint MLB/MLBPA test in 2003 got us mandatory drug testing starting in 2004, albeit a weak start in the right direction.

In reality, the [United States Court of Appeals for the Ninth Circuit ruled yesterday](#) that federal investigators, led by Jeff Novitzky, illegally seized those 2003 test results as part of the BALCO investigation from Comprehensive Drug Testing (CDT) in California, where the information was stored on computer. As the majority ruled, "This was an obvious case of deliberate overreaching by the government in an effort to seize data as to which it lacked probable cause." It was that illegal seizure that set into motion all of the above, most notably the stories by Roberts and Schmidt.

As Chief Judge Alex Kozinski wrote for the majority in yesterday's ruling, the leaking of names from documents that were under court seal, has done harm to baseball's drug testing policy.

"The risk to the players associated with disclosure, and with that the ability of the Players Association to obtain voluntary compliance with drug testing from its members in the future, is very high. Indeed, some players appear to have already suffered this very harm as a result of the government's seizure."

The ruling then points a direct finger at The New York Times, citing examples:

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See, e.g., Michael S. Schmidt, *Ortiz and Ramirez Said to Be on 2003 Doping List*, N.Y. Times, July 31, 2009, at A1; Michael S. Schmidt, *Sosa Is Said to Have Tested Positive in 2003*, N.Y. Times, June 17, 2009, at B11; Michael S. Schmidt, *Rodriguez Said to Test Positive in 2003*, N.Y. Times, February 8, 2009...

At the heart of Schmidt and Roberts' stories are one or more individuals (Schmidt cited unnamed lawyers) that had access to the "list" created by a federal investigator [believed to be Novitzky](#) (the list was created from an illegally seized spreadsheet in a mountain of other documents in what has been labeled the "Tracey" directory). Those individuals will now become the focus, as opposed to the players. As Donald Fehr and Michael Weiner said in a joint statement after the Ninth's ruling, "Anyone who leaks information purporting to contain those 2003 test results is committing a crime."

Indeed, the MLBPA had begun pressing for an investigation into the leaks before yesterday's ruling, and it seems a near certainty that there will be. Regardless of the ruling, leaking of information from sealed court documents is a crime, it's just that now, the court's ruling makes what has been leaked, information that government investigators should have never had access to in the first place. As the ruling for the majority reads in part, "the Players Association is aggrieved by the seizure as the removal of the specimens and documents breaches its negotiated agreement for confidentiality, violates its members' privacy interests and interferes with the operation of its business."

The ruling will place incredible pressure on Schmidt and Roberts (as well as The New York Times and Sports Illustrated) to come forward and reveal the sources that leaked the player names. The court ruling places into focus the very reason the names were to remain under court seal.

Now, the hunted will become the hunted, and rightfully so. Civil cases by Rodriguez, Sosa, Ramirez, and Ortiz against the federal government, and anyone that leaked information to Schmidt and Roberts becomes a real possibility as they look to some form of monetary damages for what has been incurred.

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That may be the least of the worries for those that have leaked information. Jail time seems a very real possibility.

There is also considerable damage to the BALCO investigation. There have been reports that as much as \$60 million has now been spent by the federal government as part of the investigation into steroid use in Major League Baseball. Critics have said that the investigation has moved into the realm of “trophy hunting” – going after star players, most notably Barry Bonds – due to their high public profile. Novitzky, and other investigators overstepped their boundaries by not properly issuing a search warrant and seizing computer files that had no relationship to the BALCO investigation. While the government could appeal the Ninth’s ruling to the Supreme Court, chances are exceptionally thin. As [noted by Jonthan Littman of Yahoo! Sports](#), “There may be technical hurdles. The government didn’t follow standard court rules. It failed to appeal lower court rulings. And the necessary political momentum may have evaporated from the last stages of a steroids probe running out of testosterone.”

So, the light at the end of the tunnel, for those involved in the federal investigation that began with BALCO, and then illegally overstepped into baseball’s joint drug testing program in 2003, is not a victory, but rather an oncoming train of investigations into the manner in which it gathered information, and those that leaked confidential information that should have never seen the light of day. The names within the reported “list” will surely never be released. As noted within the ruling.

“[B]y forcing the government to return property that it had not properly seized, CDT is preserving the integrity of its business and the Players Association is protecting the privacy and economic well-being of its clients, which could easily be impaired if the government were to release the test results swept up in the dragnet.”

For more, read the States Court of Appeals for the Ninth Circuit ruling in [US vs Comprehensive Drug Testing](#)

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Maury Brown is the Founder and President of the [Business of Sports Network](#) , which includes The Biz of Baseball, The Biz of Football, The Biz of Basketball and The Biz of Hockey. He is available for hire or freelance

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