

**From Dumpster to Dicta:
How the BALCO Investigation Created Incurable Violations of
Players' Rights and How to Prevent Them**

*Bryan T. Ikegami**

TABLE OF CONTENTS

Introduction

I. Baseball's Drug Problem

- A. Recent Use of Performance Enhancing Drugs
- B. The "List"

II. From Dumpster to Dicta: The BALCO Investigation

- A. Origins of the BALCO Investigation
- B. The Search and Seizure
- C. Adjudication
 - 1. District Court Rulings
 - 2. Ninth Circuit Decisions

III. Analysis

- A. Professional Athletes' Right to Privacy
 - 1. Common Law Right to Privacy
 - 2. An Invasion of Privacy: Untraceable Media Leaks
- B. Fourth Amendment Rights
 - 1. The "Plain View" Doctrine
 - 2. Constitutional Right to Privacy
 - 3. Seizure of MLB Players' 2003 Drug Test Results
 - a. Evaluation of the "Plain View" Argument
 - b. Implication for Players' Fourth Amendment Rights
- C. The Fate of the List and the Dicta: A Brief Analysis of CDT II
 - 1. The Precedential Value of CDT III
 - 2. The Rationale for Guidance
 - 3. The Tension the Dicta Seeks to Resolve

* J.D. Candidate 2011, Columbia Law School; B.A. Economics and Government, Claremont McKenna College. Thanks to Professor Robert Kheel for his invaluable guidance and feedback throughout this project. Special thanks to my wife Christine for her patience, love and support throughout this process. Thanks also to my dog Joie for facilitating intellectual inspiration during our many walks. Finally, I dedicate this Note to my son Nathan.

IV. Remedies

A. Existing Remedies

1. Rule 41(g) Motion
2. *Bivens* Action

B. Proposed Remedies

1. Damages Claim Against the Government
2. Clarify Modern Search and Seizure Law

V. Conclusion

Appendix

- A. Northern District of California
- B. Central District of California
- C. District of Nevada

INTRODUCTION

Baseball is widely regarded as America's pastime. With that designation comes certain expectations from the American public about the integrity of the game. Major League Baseball ("MLB") has faced challenges to that integrity in the past, including gambling and drug use, but its response has generally been timely and adequate.¹ To the extent these controversies involved illegal activity, the government has stepped in accordingly.² By and large, the government has not had to police the league itself.

Presently, the sport is mired in a well documented controversy regarding player use of performance enhancing drugs.³ This time, however, MLB's response was slow and insufficient.⁴ As a result, each branch of the government got involved. President George W. Bush directly addressed the issue in his State of the Union Address on January 20, 2004, calling on "team owners, union representatives, coaches and players to take the lead, to send the right signal, to get tough and to get rid of steroids now."⁵ On March 17–18, 2005, six players and four executives testified before the House Committee on Government Reform regarding drug use in

1. The "Black Sox Scandal" involved the Chicago White Sox intentionally losing the 1919 World Series as part of a gambling conspiracy to fix the outcome of the series. *See generally* 1919 BLACK SOX.COM, <http://www.1919blacksox.com> (last visited Feb. 6, 2010). In 1989, Pete Rose, then-manager of the Cincinnati Reds, was accused of placing bets on his own team. *See generally* *Rose Admits to Betting on Reds 'Every Night'*, ESPN.COM (Mar. 16, 2007), <http://sports.espn.go.com/mlb/news/story?id=2798498>.

The drug controversy that is the subject of this Note is not baseball's first bout with illegal substance abuse. In the early to mid 1980s, cocaine use was prevalent among players, particularly in the Pittsburgh area. *See* Alan Schwarz, *Remembering the Pain of the Pittsburgh Drug Trials*, ESPN.COM (July 17, 2002), http://a.espncdn.com/mlb/columns/schwarz_alan/1406651.html.

Following both the Black Sox Scandal and the Pete Rose gambling allegations, MLB issued lifetime bans to the individuals involved. *See generally* *Rose Admits to Betting on Reds 'Every Night'*, *supra* (stating Rose received a lifetime ban in 1989 after an investigation concluded he bet on baseball); *The Trial*, 1919 BLACK SOX.COM, <http://www.1919blacksox.com/trial4.htm> (last visited Nov. 30, 2010) (stating all eight "Black Sox" players were given lifetime bans immediately following trial). MLB offered its own version of a plea deal to players who cooperated with a government investigation into their cocaine use, allowing the players to avoid suspensions of up to one year. James Lincoln Ray, *The Pittsburgh Drug Trials*, SUITE101.COM (July 6, 2008), <http://www.suite101.com/content/the-pittsburgh-baseball-drug-trials-a59057>.

2. The State of Illinois tried seven players and two gamblers on five counts, including conspiracy to defraud the public. *The Trial*, 1919 BLACK SOX.COM, <http://www.1919blacksox.com/trial2.htm> (last visited Feb. 6, 2010). All nine defendants were acquitted. *The Trial*, 1919 BLACK SOX.COM, <http://www.1919blacksox.com/trial3.htm> (last visited Feb. 6, 2010). Several players testified before a Pittsburgh grand jury regarding their cocaine use, which led to the subsequent pleas or convictions of seven drug dealers. Ron Cook, *The Eighties: A Terrible Time of Trial and Error*, PITTSBURGH POST-GAZETTE (Sept. 29, 2000), <http://www.post-gazette.com/pirates/200009291980bucs3.asp>.

3. Entire web sites are dedicated to following this controversy. *See, e.g.*, BASEBALL'S STEROID ERA, <http://www.baseballsteroidera.com> (last visited Feb. 21, 2011). For the purposes of this Note, any reference to "drug use," the "drug problem" or the "drug controversy" in baseball shall refer to the use of steroids and other performance enhancing drugs ("PEDs").

4. *See infra* Part I.

5. *President Bush's 2004 State of the Union Address*, WASH. POST, Jan. 21, 2004, at A19.

baseball.⁶ During that same year, members of Congress introduced at least three bills aimed at curbing the drug problem in professional sports.⁷ Each bill required all players in the four major professional sports leagues to submit to mandatory uniform testing for performance enhancing drugs (“PEDs”).⁸ Meanwhile, federal investigators began targeting an illegal drug ring in Northern California, which subsequently ballooned into protracted litigation.⁹ The origin and resolution of *United States v. Comprehensive Drug Testing, Inc.* is the primary focus of this Note.¹⁰

On April 8, 2004, government agents entered the facilities of Comprehensive Drug Testing (“CDT”) and Quest Diagnostics with warrants pursuant to its investigation of the Bay Area Lab Co-Operative (“BALCO”).¹¹ Both warrants were limited to information related to ten named players with connections to BALCO, yet the government seized an entire directory containing records for hundreds of players and many other people with no connection to baseball.¹² This directory included a listing of all players who tested positive for PEDs under the “2003 Survey Testing.”¹³ After a lengthy judicial process, the Ninth Circuit held the seizure unlawful.¹⁴

At first glance, this seizure is simply “an obvious case of deliberate overreaching by the government in an effort to seize data as to which it lacked probable cause.”¹⁵ However, for the victims of the seizure—MLB players—it is anything but simple. MLB players contractually agreed to the confidentiality of

6. See generally Duff Wilson, *McGwire Offers No Denials at Steroid Hearings*, N.Y. TIMES, Mar. 18, 2005, at A1.

7. The Clean Sports Act of 2005, S. 1114, 109th Cong. (2005); The Drug Free Sports Act, H.R. 3084, 109th Cong. (2005); Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005). The counterpart to the Clean Sports Act of 2005 was also introduced in the House of Representatives. H.R. 2565, 109th Cong. (2005).

8. The major professional sports leagues are MLB, the National Football League (“NFL”), the National Basketball Association (“NBA”) and the National Hockey League (“NHL”). The Drug Free Sports Act, H.R. 1862, 109th Cong. § 3 (2005); S. 1114 § 4(b); S. 1960 § 6(a). Congress ultimately dropped its pursuit of this legislation largely due to MLB’s implementation of a tougher drug testing policy. *Steroid Penalties Much Tougher with Agreement*, ESPN.COM (Nov. 15, 2005), <http://sports.espn.go.com/mlb/news/story?id=2224832> (quoting Sen. Jim Bunning, R-Ky.: “I and my colleagues will be watching very closely, and if things unravel, we still have tough legislation we can move through Congress.”).

9. See *infra* Part II.

10. *United States v. Comprehensive Drug Testing, Inc. (CDT III)*, 621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam).

11. *United States v. Comprehensive Drug Testing, Inc. (CDT I)*, 513 F.3d 1085, 1092–93 (9th Cir. 2008). BALCO was founded by Victor Conte in 1984. Tom Goldman, *BALCO Founder Victor Conte Back at His Lab*, NPR (June 21, 2007), <http://www.npr.org/templates/story/story.php?storyId=11258081>. Presumably due in part to its location in Burlingame, California, a suburb a few miles south of San Francisco, many of BALCO’s clients were professional athletes with connections to the Bay Area (e.g., Barry Bonds, Jason Giambi and multiple players on the Oakland Raiders). Mark Fainaru-Wada & Lance Williams, *How the Doping Scandal Unfolded*, S.F. CHRON., Dec. 21, 2003, at B1.

12. *CDT I*, 513 F.3d at 1091–92; *CDT III*, 621 F.3d at 1166.

13. See *infra* Part I (discussing the “2003 Survey Testing” and the list of positive test results).

14. *CDT III*, 621 F.3d at 1174.

15. *Id.* at 1172.

their test results, only to see them fall into the hands of a federal investigator who allegedly had ulterior motives—including a personal vendetta against a player whom he did not know personally.¹⁶ To further compound the problem, the names of four players who tested positive for PEDs were leaked to the media while those names were under court seal.¹⁷ The source(s) of the leak remains unknown, but it was almost certainly a government attorney or investigator.¹⁸ In both instances, the actions of government personnel resulted in a breach of the players' contractual right of confidentiality.

Professional athletes have a diminished expectation of privacy, not an expectation of diminished rights under contract. Moreover, an individual's fourth amendment rights do not depend on his or her status in the public eye.¹⁹ The BALCO investigation illustrates how the sports world's interaction with the law extends far beyond the worlds of antitrust, contracts and tort into privacy and constitutional law. Unfortunately, it also demonstrates how ill equipped the legal system is to protect professional athletes when those rights are violated.

Part I provides a brief overview of the drug problem in Major League Baseball, exploring the recent use of performance enhancing drugs and the creation of "the List," what ultimately became of the property that the investigators seized.²⁰ Part II explores the federal investigation, which originated in a dumpster and eventually spread to multiple courtrooms.²¹ Part III analyzes the players' legal rights implicated by the government seizure and the subsequent disclosure of certain information to the media.²² Finally, Part IV evaluates the players' existing remedies and, to the extent those remedies are insufficient, proposes new means to protect players' rights during future federal investigations.

I. BASEBALL'S DRUG PROBLEM

Steroids were prevalent in baseball since the 1980s, but little attention was given to the issue.²³ Despite that decade's cocaine scandal, the team owners failed to get any form of drug testing into the 1990 collective bargaining agreement.²⁴ The players' union took the position that drug use warranted treatment, not punishment, and that testing violated the players' privacy rights.²⁵ Four years later, negotiation

16. *Id.* at 1166; *see infra* Part IV.A.2.

17. *See infra* note 73 and accompanying text.

18. *See infra* notes 221–25 and accompanying text.

19. *See infra* Part III.A.1.

20. *See infra* notes 64–65 and accompanying text.

21. *See infra* notes 85–87 and accompanying text.

22. *See infra* Part III.A.2.

23. Peter Gammons, *The High Cost of Doing Nothing*, ESPN.COM (Feb. 28, 2005), <http://sports.espn.go.com/mlb/gammons/story?id=2002123>.

24. *See* Schwarz, *supra* note 1; *see also* Shaun Assael & Peter Keating, *Who Knew?*, ESPN THE MAGAZINE (Nov. 21, 2005), <http://sports.espn.go.com/espn/eticket/story?page=steroids&num=4>.

25. Assael & Keating, *supra* note 24. MLB players, along with managers, coaches and trainers, are represented by a union known as the Major League Baseball Players Association (hereinafter the "MLBPA" or the "Players Association"). *MLBPA Info: Frequently Asked Questions*, MLBPLAYERS.COM, <http://mlbplayers.mlb.com/pa/info/faq.jsp#membership> (last visited Feb. 22, 2011).

of the next labor agreement broke down, leading to the cancellation of nearly 1,000 games over two seasons, including the 1994 World Series.²⁶ Anxious to reach a settlement and begin the 1995 season, team owners acquiesced to the union's resistance to formal drug testing.²⁷ It wasn't until one reporter's chance discovery in a team locker room a few years later that Major League Baseball publicly confronted the steroid issue for the first time.²⁸

A. RECENT USE OF PERFORMANCE ENHANCING DRUGS

In July 1998, an Associated Press ("AP") writer covering the pursuit of the single season home run record noticed a small brown bottle of androstenedione in Mark McGwire's locker.²⁹ After the AP story broke one month later, MLB Commissioner Bud Selig publicly ignored McGwire's andro use despite the fact that the Olympics and the NFL had banned the substance.³⁰ Instead, he made the following remarks: "I think what Mark McGwire has accomplished is so remarkable, and he has handled it all so beautifully, we want to do everything we can to enjoy a great moment in baseball history."³¹ Even at season's end, Selig's tune was unchanged: "None of this should ever diminish from Mark McGwire's extraordinary season."³² The national media also largely ignored the issue, instead heaping praise on McGwire and Sammy Sosa.³³

This discovery was nonetheless a major catalyst in the discussion over steroid use in Major League Baseball.³⁴ Despite his outward lack of concern, Selig began investigating the effects of drug use on player performance.³⁵ At the same time, players and team medical personnel began expressing concern over the prevalence

26. Assael & Keating, *supra* note 24.

27. *Id.*

28. *Id.*

29. *Id.* Androstenedione ("andro") is a steroid precursor that was classified as a controlled substance under the Anabolic Steroid Control Act of 2004, 108 Pub. L. 358, 118 Stat. 1661 (codified as amended at 21 U.S.C. § 802(41)(A)(iv) (2006)) (defining andro as an anabolic steroid); *see also* 21 U.S.C. § 812 (2006) (listing anabolic steroid as a Schedule III controlled substance). In 1961, Roger Maris of the New York Yankees set the then-single-season record with sixty-one home runs. *McGwire Apologizes to La Russa, Selig*, ESPN.COM (Jan. 12, 2010), <http://sports.espn.go.com/mlb/news/story?id=4816607>. During the 1998 season, Mark McGwire (seventy) and Sammy Sosa (sixty-six) challenged, and ultimately surpassed, Maris's record to much fanfare nationwide. *Id.*; *see also* Assael & Keating, *supra* note 24. Their "home run chase," as it is often called, is widely credited with reinvigorating interest in Major League baseball, which had reached a low point following the 1994–95 strike. *See, e.g.*, Wilson, *supra* note 6. Barry Bonds broke the record three years later by hitting seventy-three home runs during the 2001 season. *See* Assael & Keating, *supra* note 24. All three men have been linked to the performance enhancing drug controversy. *See, e.g., infra* note 200 (McGwire); *infra* note 73 (Sosa); *infra* note 93 (Bonds).

30. Assael & Keating, *supra* note 24, at 8.

31. *Id.*

32. *Id.*

33. *Id.* (noting that *Sports Illustrated* named both McGwire and Sosa its 1998 Sportsman of the Year and did not mention McGwire's andro use in its story).

34. *See id.*

35. *See generally id.*

of drug use in baseball.³⁶ Selig instituted in season testing for baseball's minor league players in 2001, the results of which were alarming: more than 500 players, roughly eleven percent of players on affiliated minor league teams, had tested positive for PEDs.³⁷ Finally, in 2002, baseball's drug problem resurfaced both at the negotiating table and on the newswire.³⁸

The owners' collective bargaining agreement proposal to the players included drug testing during the season.³⁹ The union opposed the plan on principle, but its stance soon shifted under the weight of increasing media attention.⁴⁰ Finally, on August 30, 2002, the two sides agreed to steroid testing for the first time.⁴¹ The 2002 program provided for anonymous drug testing in 2003.⁴² The players received assurances that the results would remain anonymous and confidential.⁴³ If at least five percent of the players tested positive for steroids, mandatory random testing would be implemented the following season.⁴⁴ On November 13, 2003, MLB announced that five to seven percent of players tested positive for steroids.⁴⁵ Since the initial results exceeded the stipulated threshold, mandatory random testing began during the 2004 season.⁴⁶ During the 2004 season, twelve out of 1,133 tests yielded undisputed positive results for steroids.⁴⁷ However, the inaugural program did not provide penalties for a first time offender.⁴⁸ Thus, the

36. *See id.*

37. *Id.* Baseball's minor league system is a hierarchy of leagues that operate at levels below that of MLB. *See generally* *How Minor League Baseball Teams Work*, HOWSTUFFWORKS, <http://entertainment.howstuffworks.com/minor-league-baseball-team.htm> (last visited Feb. 22, 2011). The levels range from the introductory rookie league up to AAA, directly below MLB. *See id.* Minor league teams are often affiliated with major league teams; these affiliations allow MLB to dictate league operation, including drug testing and penalties. *See id.*; *see also* Michael Schmidt, *Baseball Using Minor Leagues for a Drug Test*, N.Y. TIMES, July 23, 2010, at A1.

38. Assael & Keating, *supra* note 24.

39. *Id.*

40. *Id.* Two major revelations at the beginning of the 2002 season were largely responsible for the media frenzy. In May, Jose Canseco, the 1988 American League MVP, told a Fox Sports Net interviewer that eighty-five percent of all players were on PEDs. *Canseco Refuses to Answer if He Has Taken Steroids*, ESPN.COM (May 17, 2002) <http://a.espn.com/mlb/news/2002/0517/1383821.html>. In the June 3 issue of *Sports Illustrated*, Ken Caminiti, the 1996 National League MVP, admitted to the magazine that he took steroids and that at least half of the league did so as well. Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, June 3, 2002, at 36.

41. Murray Chass, *Last-Minute Deal in Baseball Talks Prevents a Strike*, N.Y. TIMES, Aug. 31, 2002, at A1.

42. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 54 (2007). Hereinafter, the inaugural testing is referred to as the "2003 Survey Testing."

43. *CDT III*, 621 F.3d 1162, 1166 (9th Cir. 2010).

44. MITCHELL, *supra* note 42.

45. Jack Curry & Jere Longman, *Results of Steroid Testing Spur Baseball to Set Tougher Rules*, N.Y. TIMES, Nov. 14, 2003, at A1.

46. MITCHELL, *supra* note 42, at 54-55.

47. *Id.* at 55.

48. Barry M. Bloom, *MLB Bans Use of Androstenedione*, MLB.COM (June 29, 2004), http://mlb.mlb.com/news/article.jsp?ymd=20040629&content_id=783595&vkey=news_mlb&fext=.jsp&c_id=mlb.

2004 testing resulted in no player suspensions.⁴⁹ This program drew scrutiny for perceived weaknesses in its testing procedures and penalties during a Senate subcommittee hearing in March 2004.⁵⁰

In 2005, MLB announced two major revisions to its drug testing program. On January 13, 2005, it instituted the following changes: 1) off season random testing; 2) multiple random tests during the season; 3) the addition of human growth hormone (“HGH”), steroid precursors and ephedra to the list of banned drugs; and 4) a penalty structure featuring a ten day suspension for the first offense, thirty day suspension for the second, sixty day suspension for the third and one year suspension for the fourth.⁵¹ Once again, members of Congress used the forum of a subcommittee hearing to voice their dissatisfaction with the strength of the program.⁵² This led to the second revision, announced on November 15, 2005, which provided for a tougher penalty structure—a fifty game suspension for the first offense, a hundred game suspension for the second offense and a lifetime ban for the third, subject to the right to apply for reinstatement after two years.⁵³ The revised policy also required testing for amphetamines for the first time, providing an alternative penalty structure for positive test results.⁵⁴

In March 2006, Commissioner Selig appointed former Senator George Mitchell to conduct an independent investigation into the extent of performance enhancing drug use in baseball.⁵⁵ The Mitchell Report, submitted on December 13, 2007, named eighty-nine current and former players with some connection to performance enhancing drugs.⁵⁶ The report also contained recommendations for changes to baseball’s drug policy, which MLB and the Major League Baseball Players Association (MLBPA) agreed to adopt in full in April 2008.⁵⁷ While some regard the current policy as the strongest in professional sports, it continues to receive criticism as not meeting the “universally accepted standards” of the international antidoping code.⁵⁸ Most notably, the MLB program bans human growth hormone but does not test for it.⁵⁹ The jury is out on whether baseball has truly put the so-called “Steroid Era” behind it, or whether it has simply ushered in

49. MITCHELL, *supra* note 42, at 55.

50. *Id.* at 56–57.

51. John O’Neil & Murray Chase, *Baseball Players to Face More Drug Tests and Tougher Penalties*, N.Y. TIMES (Jan. 13, 2005), http://www.nytimes.com/2005/01/13/sports/baseball/13end-base.html?_r=1&sq=janeary%2013%202005%20drug%20program&st=cse.

52. Jack Curry, *Congress Fires Questions Hard and Inside, and Baseball Can Only Swing and Miss*, N.Y. TIMES, Mar. 18, 2005, at D1.

53. Jack Curry, *Baseball Backs Stiffer Penalties for Steroid Use*, N.Y. TIMES, Nov. 16, 2005, at A1.

54. *Id.*

55. MITCHELL, *supra* note 42, at 2.

56. *See generally id.*

57. Barry M. Bloom, *MLB, Union Formalize New Drug Policy*, MLB.COM (Apr. 11, 2008), http://mlb.mlb.com/news/article.jsp?ymd=20080411&content_id=2515782&vkey=news_mlb&fext=.jsp&c_id=mlb.

58. *Id.*; WADA: *MLB Should Toughen on Cheats*, ESPN.COM (Jan. 12, 2010), <http://sports.espn.go.com/oly/news/story?id=4818799>.

59. WADA: *MLB Should Toughen on Cheats*, *supra* note 58.

the “HGH Era” through its refusal to test for the hormone.⁶⁰

B. THE “LIST”

The results of the 2003 Survey Testing have generated intense public interest in the identities of players who tested positive for steroids.⁶¹ The testing was anonymous and the players were not informed whether they tested positive or what substance triggered the positive result.⁶² Nonetheless, some players have been forced to deal with the consequences of public disclosure of their positive test results.⁶³ This disclosure traces its roots to two events: one, the Players Association did not immediately destroy the results; and two, the government seized them pursuant to a warrant in the BALCO investigation.⁶⁴

The government planned to use the results to question players about where and how they obtained the substance responsible for the positive test.⁶⁵ To this end, investigators prepared a list of positive test results.⁶⁶ The legitimacy of the List is questionable, however. First, the actual number of players with a positive test result is in dispute. Preliminary reports indicated that between forty-two and eighty-three players tested positive under the program.⁶⁷ The Mitchell Report later put the figure at ninety-six positive results out of 1,369 tests, thirteen of which were in dispute.⁶⁸ Second, the number of names on the List is 104, which MLB has noted is eight players more than the maximum number of positive test results, ninety-six.⁶⁹ Moreover, legal nutritional supplements could have triggered an

60. See Holli N. Heiles, *Baseball's "Growth" Problem: Can Congress Require Major League Baseball to Test Its Athletes for Human Growth Hormone? A Proposal*, 62 ARK. L. REV. 315, 333 n.126 (2009). But see Selig *Eyeing HGH Test in Minors*, ESPN.COM (Feb. 24, 2010), <http://sports.espn.go.com/mlb/news/story?id=4938135> (following the suspension of a British rugby player who tested positive for HGH, MLB announced its plan to test its minor league players for HGH in 2010—a similar move to testing minor leaguers for steroids prior to the 2003 Survey Testing). The testing began on a limited basis in July 2010. See *Minor Leaguers to Be Tested for HGH*, ESPN.COM (July 23, 2010), <http://sports.espn.go.com/mlb/news/story?id=5402071>.

61. It is clear from the media leaks themselves and the publishing of what is considered a fake list of positive test results that there is a strong demand for full disclosure of the test results. See *infra* note 73 and accompanying text (discussing media leaks); *infra* note 71 (discussing fake list).

62. See Michael S. Schmidt, *Stars of Red Sox Title Years Are Linked to Doping*, N.Y. TIMES, July 31, 2009, at A1.

63. See *infra* note 72 and accompanying text.

64. *CDT I*, 513 F.3d 1085, 1092–93 (9th Cir. 2008); Michael S. Schmidt, *Drug Test Results from 2003 Could Soon Be in Evidence*, N.Y. TIMES, May 18, 2008, at A2 (noting that it is unknown why the Players Association did not have the test results immediately destroyed, which was within their right under the 2002 testing agreement). The union did contest a handful of the positive results, but the five to seven percent threshold would have been met anyway. See MITCHELL, *supra* note 42, at 55 n.163. According to the Mitchell Report, ninety-six of 1,369 results, or 7.01%, were positive for steroids. *Id.* Subtracting the thirteen disputed results would yield 6.06% (83/1,369), which still meets the five to seven percent threshold.

65. See Schmidt, *supra* note 62, at A1.

66. *Id.* Hereinafter, this government list of 104 positive results shall be referred to as the “List.”

67. Curry & Longman, *supra* note 45.

68. MITCHELL, *supra* note 42, at 55 n.163.

69. Barry M. Bloom, *MLB, Union Cast Doubt on List of Names*, MLB.COM (Aug. 8, 2009),

initial positive result.⁷⁰ As a result, both MLB and the MLBPA released statements cautioning the media and the general public against drawing conclusions based solely on the names contained on the List.⁷¹

Despite reasons to doubt the legitimacy of the List, there has been substantial speculation about the names that appear on it.⁷² Moreover, since the existence of a list became public knowledge, four names have been leaked to the media by unknown sources: Alex Rodriguez, Sammy Sosa, Manny Ramirez and David Ortiz.⁷³ It is also public knowledge that both Jason Grimsley and David Segui appear on the List.⁷⁴

Neither MLB nor the Players Association anticipated the creation of any list whatsoever when negotiating the 2003 Survey Testing.⁷⁵ Although the Ninth Circuit has held the seizure of the 2003 Survey Testing results unlawful, this ruling came too late for the four players mentioned above.⁷⁶ Moreover, whoever leaked their names presumably has seen or has access to the rest of the List. Even though the players will not face questioning by the government, they still face future threats to their privacy.⁷⁷

II. FROM DUMPSTER TO DICTA: THE BALCO INVESTIGATION

When federal agents raided BALCO in September 2003, it was not the government's first interaction with the laboratory.⁷⁸ BALCO was also no secret to many prominent athletes, though it remained unknown to the public at large.⁷⁹ It was not until 2003 that the lab, its founder, Victor Conte, and a personal trainer named Greg Anderson became forever associated with baseball's drug

http://mlb.mlb.com/news/article.jsp?ymd=20090808&content_id=6316798&vkey=news_mlb&fext=.jsp&c_id=mlb

70. *Id.*

71. *Id.*

72. For example, a fantasy sports website briefly gained notoriety for publishing a list of 103 names, widely denounced as a hoax. See *2003 Steroid List Another Hoax? Rotoinfo Publishes "Unconfirmed" List*, BASEBALL'S STEROID ERA (June 30, 2009), <http://thesteroidera.blogspot.com/2009/06/2003-steroid-list-hoax.html>.

73. Selena Roberts & David Epstein, *Sources Tell SI Alex Rodriguez Tested Positive for Steroids in 2003*, SI.COM (Feb. 7, 2009), <http://sportsillustrated.cnn.com/2009/baseball/mlb/02/07/alex-rodriguez-steroids>; Schmidt, *supra* note 62, at A1; Michael S. Schmidt, *Sosa Is Said to Have Tested Positive in 2003*, N.Y. TIMES, June 17, 2009, at B11.

74. *Appeals Court Could Rehear Case*, ESPN.COM, (Nov. 9, 2009), <http://sports.espn.go.com/mlb/news/story?id=4639482>; *Report: Feds Wanted Grimsley to Help Implicate Bonds*, ESPN.COM, (June 9, 2006), <http://sports.espn.go.com/mlb/news/story?id=2474291>; see also *2003 Steroid List Another Hoax?*, *supra* note 72 (noting that in a tell all book about steroids in baseball, former clubhouse attendant Kirk Radomski mentions that Larry Bigbie also appears on the List).

75. This is evident from the fact that the testing was anonymous. See Schmidt, *supra* note 62.

76. *CDT III*, 621 F.3d 1162 (9th Cir. 2010).

77. See Schmidt, *supra* note 62.

78. In 1999, Bill Romanowski, star linebacker for the Denver Broncos, was under investigation for prescription drug fraud. Fainaru-Wada & Williams, *supra* note 11. In the course of that investigation, Romanowski's wife allegedly revealed that her husband obtained HGH from BALCO. *Id.* No prosecutions stemmed from that revelation. *Id.*

79. See *id.*

controversy.⁸⁰

Section A of this Part describes the events that led to the raid on BALCO. Section B examines how the 2003 Survey Testing results became comingled with the BALCO investigation. Section C traces the fate of the test results through the federal courts.

A. ORIGINS OF THE BALCO INVESTIGATION

The unveiling of BALCO to the general public originated with an anonymous phone call to the United States Anti-Doping Agency and the actions of an overzealous federal agent.⁸¹ In June 2003, a tipster, describing himself as a “high-profile track and field coach,” claimed to have evidence that Victor Conte was distributing an undetectable steroid to athletes.⁸² The agency received the evidence the next day, and soon after was able to reverse engineer the substance—a steroid “altered slightly to avoid detection.”⁸³ The agency developed a test for the drug, and retested hundreds of urine samples from athletes inside and outside track and field.⁸⁴ Five track and field competitors and four Oakland Raiders tested positive for THG.⁸⁵

Without more, the government had little evidence on which to proceed. It did, however, have a federal agent based out of San Jose who worked out at the same gym as Barry Bonds (a BALCO client) located just around the corner from BALCO.⁸⁶ Jeff Novitzky, an IRS Special Agent, had already initiated a sting operation in April 2003 aimed at uncovering a steroid ring in the Bay Area.⁸⁷ Novitzky himself performed the most fruitful endeavor of the sting, spending night after night scouring through a green dumpster located in the alley behind BALCO’s offices.⁸⁸ His midnight “dumpster diving” soon yielded enough evidence to secure a search warrant for BALCO’s premises.⁸⁹

80. *See id.*; *see also infra* Part II.A.

81. *See infra* Part IV.A.2 (describing the questionable motives and tactics of IRS Special Agent Jeff Novitzky).

82. *See* Fainaru-Wada & Williams, *supra* note 11. The tipster was later identified as Trevor Graham, former coach of Marion Jones, the now disgraced Olympic sprinter. Jon Pessah, *Over the Line? Critics Conflicted on Steroids Crusader*, ABC NEWS (Mar. 1, 2009), <http://abcnews.go.com/Sports/LegalCenter/Story?id=6968609&page=1>.

83. Fainaru-Wada & Williams, *supra* note 11. The substance was named tetrahydrogestrinone (“THG”), but it is more commonly known as “the clear.” *Id.*

84. *Id.*

85. *Id.*

86. Pessah, *supra* note 82.

87. Jonathan Littman, *Gunning for the Big Guy*, PLAYBOY, May 2004, at 66–70, 78, 142–45. The operation, initiated by Novitzky largely in an effort to implicate Barry Bonds, involved one state narcotics agent going undercover as a body builder, a court ordered tap on Conte’s email account and consistent monitoring of Greg Anderson’s whereabouts. *Id.*

88. Littman, *supra* note 87; *see* Pessah, *supra* note 82 (noting that Novitzky found enough evidence in BALCO’s garbage to convince his superiors to sign off on a warrant to search the lab).

89. *See supra* note 88. Armed additionally with a subpoena for BALCO’s medical waste pickup, Novitzky obtained Fed Ex receipts addressed to “colorful pseudonyms,” various samples of PEDs and a conspicuous blood test labeled “B. BONDS” that was supposedly mislabeled. Littman, *supra* note 87.

Federal agents executed that warrant on September 3, 2003.⁹⁰ They seized samples of THG, a testosterone lotion known as “the cream” and other performance enhancing drugs, along with numerous files on athletes.⁹¹ One month later, a grand jury convened to hear testimony from athletes with connections to BALCO.⁹² Baseball’s drug test results were about to become intertwined with the BALCO investigation.

B. THE SEARCH AND SEIZURE

The government initially served MLB with a grand jury subpoena for drug testing results of eleven players with connections to BALCO.⁹³ Upon learning that MLB did not have this information, the government served CDT, which held the results, and Quest, which held the urine samples, with subpoenas seeking drug test information for all MLB players.⁹⁴ Both CDT and Quest resisted production of the subpoenaed materials.⁹⁵ In response, the government issued new subpoenas to the labs requesting information related to the BALCO players only.⁹⁶ Despite knowing that the MLBPA just filed a motion to quash the latest round of subpoenas, the government obtained warrants to search CDT’s Long Beach, California office and Quest’s Las Vegas laboratory.⁹⁷ The magistrate judge who issued the warrant to search CDT was unaware of the pending motion to quash.⁹⁸ Moreover, the affidavit supporting the warrant purported “to ensure that samples of individuals not associated with BALCO are left undisturbed.”⁹⁹ On April 8, 2004, federal agents executed both warrants.¹⁰⁰

A group of twelve agents, led by Jeff Novitzky, entered CDT’s Long Beach office, where they located a hard copy document with names and identifying numbers for all MLB players.¹⁰¹ Novitzky faxed this document to Assistant United States Attorney Jeff Nedrow, the lead prosecutor, for preparation of a third search warrant to seize samples at Quest.¹⁰² Shortly thereafter, a CDT director handed

90. *Id.*

91. *Id.*

92. *Id.*

93. *CDT I*, 513 F.3d 1085, 1090 (9th Cir. 2008). This number was later reduced to ten, as the government decided not to seek drug testing evidence against one of the eleven players. *Id.* at 1090 n.7. The identity of the ten players (hereinafter the “BALCO players”) has not been publicly disclosed. However, it is fairly certain that Barry Bonds is one of the ten. *See* Pessah, *supra* note 82 (noting that Novitzky sent one of Bonds’s urine samples for further testing—an unnecessary step if Bonds was not part of the BALCO investigation).

94. *Id.* at 1090, 1118 (Thomas, J., concurring in part and dissenting in part). CDT was later notified that the subpoenas would be withdrawn, but that action was never taken. *Id.* at 1121.

95. *Id.* at 1090 (majority opinion).

96. *Id.*

97. *Id.* at 1091; *see also id.* at 1119 (Thomas, J., concurring in part and dissenting in part).

98. *Id.* at 1119 n.1. The government incorrectly asserted that Magistrate Judge Johnson did know about the pending motion to quash. *Id.*

99. *Id.* at 1121.

100. *Id.* at 1092–93 (majority opinion).

101. *Id.* at 1092.

102. *Id.* The samples at Quest did not list the players by name, instead using a numerical

agents a document containing the drug test results for the ten BALCO players.¹⁰³ Not satisfied, Novitzky demanded to search CDT's computer system.¹⁰⁴ A CDT director reluctantly pointed him to a computer directory containing the files related to sports drug testing.¹⁰⁵ The agents copied the directory, now known as the Tracey Directory, and brought the copy back to their offices for further review.¹⁰⁶

Another group of federal agents simultaneously entered Quest's facility in Las Vegas.¹⁰⁷ Once in possession of the third search warrant, agents seized the BALCO players' specimens.¹⁰⁸ At the end of the day, the government had the results and samples for the ten BALCO players. Additionally, the government had the drug testing records for all of Major League Baseball, thirteen other sports organizations, three unrelated sporting competitions, and a nonsports business entity—information with the unfortunate fate of having been stored in the same directory as the targeted results.¹⁰⁹

C. ADJUDICATION

The government quickly realized what it had uncovered.¹¹⁰ Intermingled with the drug test results for the ten BALCO players were the names of all MLB players who tested positive under the 2003 Survey Testing.¹¹¹ A flurry of court filings ensued, ultimately leading to protracted litigation over whether the government could retain the results of the non-BALCO players.¹¹² Subsection C.1 summarizes the procedural history across the three districts. Subsection C.2 then discusses the consolidated appeal before the Ninth Circuit.

1. District Court Rulings¹¹³

As a follow-up to its initial search of CDT and Quest, the government obtained seven search warrants across three districts within less than one month's time.¹¹⁴ It

identifier. *Id.* at 1093. This hard copy document was necessary to determine which samples at Quest to seize. *Id.* The government sought the actual urine samples presumably to retest them. *See* Pessah, *supra* note 82 (noting that Novitzky sent one of Bonds' urine samples for retesting). *But see* Littman, *supra* note 87 (noting that MLB did not retest any of its samples for THG).

103. *CDT I*, 513 F.3d at 1092.

104. Pessah, *supra* note 82.

105. *CDT I*, 513 F.3d at 1092.

106. *Id.* at 1092–93.

107. *Id.* at 1093.

108. *Id.*

109. *CDT III*, 621 F.3d 1162, 1177 (9th Cir. 2010).

110. *See* Pessah, *supra* note 82 (“Instead, Novitzky . . . reviewed the [seized] material and saw that he’d cornered the game’s best player, Alex Rodriguez. He quickly asked his grand jury for and received a subpoena for the records of the 104 players who tested positive.”).

111. *See CDT III*, 621 F.3d at 1177.

112. *See infra* Parts II.C.1–2.

113. *See infra* Appendix for a complete procedural history by district.

114. *CDT I*, 513 F.3d 1085, 1091 (9th Cir. 2008) (majority opinion) (initial warrants issued on April 7, 2004 to search CDT and Quest); *id.* at 1093 (third warrant issued on April 8, 2004 to seize specimen samples from Quest); *id.* at 1092 n.15 (fourth warrant issued on April 8, 2004 to search CDT's

also served three grand jury subpoenas each to CDT and Quest between January and May 2004.¹¹⁵ This activity resulted in at least two motions to quash grand jury subpoenas and at least four Rule 41(g) motions for the return of property improperly seized by the government.¹¹⁶

All three district courts that ruled on these motions granted them in favor of the movant, the MLBPA. In the Northern District of California, Judge Susan Illston granted its Rule 41(g) motion (the “Illston Order”).¹¹⁷ Judge Illston also granted the MLBPA’s motion to quash grand jury subpoenas requesting materials that were the subject of previous warrants, (the “Illston Quashal”).¹¹⁸ In the Central District of California, Judge Florence-Marie Cooper granted the MLBPA’s Rule 41(g) motion (the “Cooper Order”).¹¹⁹ Finally, in the District of Nevada, Judge James Mahan granted the MLBPA’s Rule 41(g) motion (the “Mahan Order”).¹²⁰ The government did not appeal the Illston Order, but appealed the other three rulings.¹²¹ The Illston Quashal, the Cooper Order and the Mahan Order were consolidated into one appeal before the Ninth Circuit.¹²²

2. Ninth Circuit Decisions

Oral argument for the consolidated appeal took place on November 15, 2005 before a three member panel comprised of Judges Diarmuid O’Scannlain, Sidney Thomas and Richard Tallman.¹²³ The three judge panel filed its original opinion and dissent on December 27, 2006.¹²⁴ This opinion was subsequently withdrawn and superseded by an opinion and dissent filed on January 24, 2008.¹²⁵ The panel dismissed the government’s appeal of the Cooper Order as untimely and affirmed Judge Cooper’s order denying its motion for reconsideration.¹²⁶ However, a divided panel reversed the Mahan Order and the Illston Quashal.¹²⁷ In doing so, it held that the government’s seizure of intermingled evidence for off site review was lawful and the issuance of subpoenas and contemporaneous execution of search

storage locker); *id.* at 1093 n.20 (fifth search warrant issued on April 30, 2004 to seize electronic data it already had); *id.* at 1094 (sixth and seventh search warrants issued on May 5, 2004 to seize specimens and records related to positive test results).

115. *See id.* at 1121–22 (Thomas, J., concurring in part and dissenting in part).

116. *See id.* at 1090–91, 1095 (majority opinion) (motions to quash); *id.* at 1094; *id.* at 1121, 1123 (Thomas, J., concurring in part and dissenting in part) (Rule 41(g) motions). Under Rule 41(g), a person subject to an unlawful search and seizure can file a motion for return of that property. FED. R. CRIM. P. 41(g). Hereinafter, this motion is referred to as a “Rule 41(g) motion.”

117. *CDT III*, 621 F.3d 1162, 1170 (9th Cir. 2010).

118. *Id.* at 1167.

119. *Id.* at 1166.

120. *Id.* at 1166–67.

121. *Id.* at 1167, 1170.

122. *Id.* at 1162.

123. *CDT I*, 513 F.3d 1085 (9th Cir. 2008).

124. *Id.* at 1089.

125. *Id.*

126. *Id.* at 1101, 1102.

127. *See id.* at 1103–15.

warrants was not unreasonable.¹²⁸ The three judge panel's final decision was two to one in favor of the government.¹²⁹

CDT and the MLBPA filed a petition for rehearing en banc, which was granted on September 30, 2008.¹³⁰ Oral argument took place on December 18, 2008.¹³¹ On August 26, 2009, the en banc panel filed its opinion, written by Chief Judge Alex Kozinski, consisting of two partial concurrences and partial dissents and a dissent.¹³² The en banc panel adopted *CDT I*'s analysis of the Cooper Order and dismissed the government's appeal of that order.¹³³ It further held that the Cooper Order and Illston Order have preclusive effect on the government's appeal of the Mahan Order.¹³⁴ In upholding the Mahan Order, the en banc panel also dismissed the government's contrary arguments regarding the "plain view" doctrine, the warrant protocol and the appropriateness of the Rule 41(g) motions.¹³⁵ Finally, the en banc panel upheld the Illston Quashal on the grounds that Judge Illston did not abuse her discretion in quashing the government's grand jury subpoena.¹³⁶ In sum, the en banc panel ruled that the government's seizure was unlawful.¹³⁷ It voted nine to two in favor of CDT and the MLBPA.¹³⁸

The panel opinion did not stop at a resolution of the consolidated appeals, however. Embedded in the en banc panel's discussion of the Mahan Order and the Illston Quashal, and then reiterated in its "Concluding Thoughts," was dicta in the form of five points of procedural guidance that magistrate judges should follow when dealing with searches and seizures involving electronic data ("the Dicta").¹³⁹ The case received scant attention in the legal community, but was not ignored by the government.¹⁴⁰ Pursuant to an order by Chief Judge Kozinski, both the government and the appellees, the MLBPA and CDT, submitted briefs addressing

128. *Id.* at 1110–11, 1114.

129. *Id.* at 1089.

130. *United States v. Comprehensive Drug Testing*, 545 F.3d 1106 (9th Cir. 2008). Due to its large size, the Ninth Circuit has a unique approach to the en banc court. *See Appeals Court Could Rehear Case*, *supra* note 74. Rather than convene a panel of twenty-seven judges, the court provides for limited en banc review by a randomly selected eleven judge panel. *Id.*; 9TH CIR. R. 35-3. There is a procedure for a full en banc panel, but this has yet to be invoked since the court adopted the limited panels in 1980. *Appeals Court Could Rehear Case*, *supra* note 74.

131. *CDT II*, 579 F.3d 989 (9th Cir. 2009).

132. *Id.*

133. *Id.* at 994.

134. *Id.* at 997.

135. *Id.* at 997–1003.

136. *Id.* at 1003–04.

137. *Id.* at 1000–03.

138. *Id.* at 992–93.

139. *Id.* at 998–99, 1004, 1006–07; *see also id.* at 1012–13 (Callahan, J., concurring in part and dissenting in part) ("[The majority's] protocols are dicta and might be best viewed as a 'best practices' manual, rather than binding law."). Hereinafter, this guidance is sometimes referred to as the "Dicta."

140. Shane Harris, *Cuffing Digital Detectives*, NAT'L J. MAG. (Dec. 19, 2009), http://www.nationaljournal.com/njmagazine/id_20091219_3389.php. *But see* Christine Mumford & Hugh Kaplan, *Electronic Discovery: Attorneys, Academics Sort Through Landmark Case on Computer Searches*, 14 Elec. Com. L. Rep. (BNA) 1284 (2009).

whether the case should be reheard by the full court.¹⁴¹ The government's brief heavily opposed the Dicta and called for withdrawal of the en banc opinion.¹⁴² The appellees' brief expressed no opinion on the Dicta and urged the court to leave its decision undisturbed.¹⁴³

On September 13, 2010, the Ninth Circuit issued its final opinion on the case.¹⁴⁴ The majority opinion has been relabeled as per curiam but in fact consists only of the original opinion minus the Dicta.¹⁴⁵ Chief Judge Kozinski is now the author of a separate concurrence, joined by four other judges, which includes the Dicta and is not Ninth Circuit law.¹⁴⁶

III. ANALYSIS

While this case has been resolved in the players' favor, the Ninth Circuit decision cannot erase over seven years of anxiety stemming from this unlawful seizure.¹⁴⁷ Moreover, four players in particular have suffered additional violations of their common law privacy rights.¹⁴⁸

Section A of this Part first addresses the common law privacy rights of professional athletes generally before analyzing the violation of those rights due to disclosure of the confidential test results to the media. Section B then explores how the players' fourth amendment rights, which embody a constitutional right to privacy, are implicated by the unreasonable seizure of their test results. Finally, Section C examines the outcome of *CDT III* and the tension between law enforcement objectives and individual privacy rights that pervades the Ninth Circuit decision.

141. Brief for the United States in Support of Rehearing En Banc by the Full Court, *CDT II*, 579 F.3d 989 (9th Cir. 2009), (Nos. 05-10067, 05-15006, 05-55354) [hereinafter Government's Brief]; Appellees' Brief Re Rehearing by the Full Court, *CDT II*, 579 F.3d 989, (Nos. 05-10067, 05-15006, 05-55354) [hereinafter Appellees' Brief]; *Appeals Court Could Rehear Case*, *supra* note 74.

142. Government's Brief, *supra* note 141.

143. Appellees' Brief, *supra* note 141, at 1–2. The brief provides:

Appellees take no position, however, and instead leave to the Court's sound discretion, whether the full Court or the en banc panel should review or clarify the en banc decision's forward-looking guidelines for searches of electronic records. Those guidelines are unnecessary to the resolution of the issues presented in this case.

Id.

144. *CDT III*, 621 F.3d 1162–1165 (9th Cir. 2010) (“The revised opinion filed concurrently herewith [this order] shall constitute the final action of the court. No petitions for rehearing will be considered.”).

145. Compare *id.* with *CDT II*, 579 F.3d 989.

146. *CDT III*, 621 F.3d at 1178, (Kozinski, C.J., concurring); *id.* at 1183 (Callahan, J., concurring in part and dissenting in part) (“The concurrence is not joined by a majority of the en banc panel and accordingly the suggested guidelines are not Ninth Circuit law.”).

147. *CDT III*, 621 F.3d at 1177–78; see also *List of Positive Tests Barred from Courts*, ESPN.COM (Dec. 10, 2010), <http://sports.espn.go.com/mlb/news/story?id=5907927> (noting the government will not appeal to the Supreme Court).

148. See *supra* note 73 and accompanying text.

A. PROFESSIONAL ATHLETES' RIGHT TO PRIVACY

As a legal right, privacy is grounded in common law and the Constitution. The common law right protects against intrusions by private parties (often involving the media), while the constitutional right protects against intrusions by the government.¹⁴⁹ This Section focuses on the common law right. The constitutional right is taken up in Section B.

1. Common Law Right to Privacy

The common law right to privacy is, essentially, the right to be left alone, the invasion of which is a tort.¹⁵⁰ Samuel Warren and Louis Brandeis first introduced this concept in their famous *Harvard Law Review* article entitled “The Right to Privacy.”¹⁵¹ William Prosser, the renowned tort expert, categorized the violation of the right as potentially comprising four separate torts: 1) unreasonable intrusion upon seclusion; 2) appropriation of another’s identity for one’s benefit; 3) public disclosure of private facts about another; and 4) placing another in a false light in the public eye.¹⁵² Today, an overwhelming majority of courts recognize this common law right.¹⁵³

Certain persons have a diminished expectation of privacy, particularly with regard to the third tort, public disclosure of private facts. A person who, by his or her own activities or by force of circumstances, becomes a public personage thereby relinquishes a part of the right of privacy “to the extent that the public has a legitimate interest in his doings, affairs, or character.”¹⁵⁴ The clearest examples of public figures are politicians, actors and actresses and professional athletes.¹⁵⁵

Professional athletes have long been considered public figures.¹⁵⁶ However, the level of media attention and scrutiny they currently receive is a much more recent phenomenon.¹⁵⁷ Professional athletes have achieved considerable notoriety, which

149. See *Katz v. United States*, 389 U.S. 347, 350–51 (1967).

150. See generally William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

151. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

152. Prosser, *supra* note 150, at 389. Today, most courts that recognize this right adhere to these four forms. See C.J.S. *Right of Privacy and Publicity* § 4 (2009).

153. 44 N.Y. JUR. 2D DEFAMATION AND PRIVACY § 288 (2009). Only a few states, including New York, Virginia, Minnesota, Rhode Island, Wisconsin and Nebraska, deny the existence of this right. *Id.*; see also 62A AM. JUR. 2D *Privacy* § 4 n.1 (2009).

154. *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 117 (Dist. Ct. App. 1961), *disapproved of on other grounds by Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969).

155. See *Carlisle v. Fawcett Publ'ns, Inc.*, 20 Cal. Rptr. 405, 414 (Ct. App. 1962) (naming actors and actresses, professional athletes and public officers as those who “have to some extent lost the right of privacy . . .”). Government officials and candidates for public office have a much lower expectation of privacy than actors, actresses and professional athletes. *Kapellas*, 459 P.2d at 922–23. In addition, there is a distinction between public figures and public officials—public figures include public officials, see *infra* note 160, but the reverse is not true. See *Damiano v. Sony Music Entm't, Inc.*, 168 F.R.D. 485, 491–92 (D.N.J. 1996) (noting that Bob Dylan, the famous American singer/songwriter, is a public figure but not a public official).

156. See *Carlisle*, 20 Cal. Rptr. at 414.

157. For instance, Michael Jordan, who played most of his career during the 1990s, never lost a

has translated into commercial opportunities outside of their athletic careers. For example, professional athletes star in movies, perform on record albums and headline advertising campaigns.¹⁵⁸ Not surprisingly, they also fill the tabloids and gossip columns just like other celebrities.¹⁵⁹

Public figures face a considerably high bar when asserting that their privacy has been violated. The public's legitimate interest has always been interpreted broadly.¹⁶⁰ Together with constitutional guarantees of freedom of speech and of the press, this broad interpretation amounts to substantial protection of the media's publication of information regarding public figures. In addition, the media has a qualified reporter's privilege, allowing a journalist to withhold sources or information received in confidence.¹⁶¹ That privilege is qualified in the context of

sponsorship despite a well known gambling problem and an adulterous relationship. Apryl Duncan, *Celebrity Endorsement Deals Gone Astray*, ABOUT.COM, <http://advertising.about.com/od/celebrityendorsements/a/celebendorse.htm> (last visited Feb. 3, 2011). By contrast, Kobe Bryant almost immediately lost his sponsorship with Nutella when sexual assault allegations arose against him in the summer of 2003. Davide Dukcevic, *Nutella to End Kobe Bryant Sponsorship; Saban Bids for ProSieben, Again*, FORBES.COM (Aug. 4, 2003), http://www.forbes.com/2003/08/04/cx_dd_0804faces.html. Finally, as of this writing, Tiger Woods has lost sponsorships with AT&T, Accenture and Gatorade since his infidelity became public in December 2009. Darren Rovell, *CNBC: Tiger Woods' Lost Endorsements Cost IMG \$4.6M*, U.S.A. TODAY (June 21, 2010), http://www.usatoday.com/money/media/2010-06-20-endorsements-tiger_N.htm.

158. Selected examples of athletes appearing in movies include Michael Jordan in *SPACE JAM* (Warner Bros. Pictures 1996), Shaquille O'Neal in *BLUE CHIPS* (Paramount Pictures 1994) and Dennis Rodman in *DOUBLE TEAM* (Mandalay Entertainment 1997). IMDB, <http://www.imdb.com> (search "Michael Jeffrey Jordan"; "Shaquille Rashaun O'Neal"; "Dennis Keith Rodman") (last visited Feb. 18, 2011).

In addition, Bernie Williams, a former New York Yankee, has recorded two albums, the latter of which was recently nominated for a Latin Grammy award. *2009 Nominees*, THE LATIN RECORDING ACADEMY, <http://www.latingrammy.com/en/nominees/16-instrumental> (last visited Jan. 9, 2010). Wayman Tisdale, a former NBA player, recorded eight jazz albums during his lifetime. *Former Sooners Great, NBA Player Tisdale Dies After Battle With Cancer*, CBSSPORTS.COM (May 15, 2009), <http://www.cbssports.com/collegebasketball/story/11749960>.

As for advertising campaigns, Nike's Air Jordan, the signature shoe created for Michael Jordan, remains popular today despite the fact that Jordan has been retired since 2003. *Jordan Brand History*, SNEAKERHEAD.COM, <http://www.sneakerhead.com/jordan-brand-history.html> (last visited Feb. 2, 2011). Until recently, Accenture's ad campaign was built almost entirely around Tiger Woods. *Accenture Cuts Woods as Sponsor*, ESPN.COM, (Dec. 14, 2009) <http://sports.espn.go.com/golf/news/story?id=4739219>.

159. The homepage for TMZ.com, the popular celebrity gossip website, listed Tiger Woods as one of three names under "Hot Searches" over one month after news of his repeated infidelity broke (the other two names are of recently deceased female celebrities). TMZ.COM, <http://www.tnz.com> (last visited Jan. 9, 2010).

160. See, e.g., *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940). As Circuit Judge Clark wrote:

[W]hen focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress [the community's notions of decency]. Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

Id.

161. In *Branzburg v. Hayes*, a plurality of the Supreme Court declined to grant journalists a

litigation, where the court must strike a balance between the reporter's privilege and a litigant's right to the information sought.¹⁶² Aside from this qualification, the media can generally publish any truthful information about a public figure that they legally obtain.¹⁶³ Professional athletes, therefore, seldom have a remedy in tort for invasions of privacy by private actors.

The privacy analysis changes once issues of confidentiality arise. The temptation certainly exists for those privy to confidential information about public figures, which has tremendous value to the media, to leak that information.¹⁶⁴ In spite of their status as public figures, however, professional athletes are private citizens whose confidential information is protected from public disclosure.¹⁶⁵ They have an expectation of privacy regarding certain private facts, particularly those to be kept confidential pursuant to a collective bargaining agreement.

Should such disclosure nonetheless occur, the media are generally not liable for its publication.¹⁶⁶ Athletes should instead seek their remedy from the source of the disclosure.¹⁶⁷ When that source is the government, their course of action should be the same.¹⁶⁸ Unfortunately, it does not appear that Congress or any state has provided such a remedy against itself or its officials.¹⁶⁹ A private right of action against the government may not be available if it has not explicitly provided for one.¹⁷⁰ Until legislatures create this remedy statutorily, professional athletes have

testimonial privilege grounded in the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972) (holding that journalists cannot refuse to answer relevant and material questions asked during a good faith grand jury investigation). However, Justice Powell's concurring opinion, which calls for the recognition of privilege on a case by case basis has been interpreted by lower courts to signify the existence of the reporter's privilege. *Id.* at 710; *see Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979); RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 344–45 (2009) (citations omitted). Most states also have some sort of reporter's shield law. *See, e.g.*, CAL. CONST., art. I, § 2(b). The California shield law is not a privilege, but provides immunity from being adjudged in contempt for refusal to disclose either unprivileged information or the source of information. *Delaney v. Superior Court*, 789 P.2d 934, 939 (Cal. 1990). This protection is "overcome only by a countervailing federal constitutional right." *Miller v. Superior Court*, 986 P.2d 170, 179 (Cal. 1999).

162. *Riley* provides a balancing test used for this purpose. *Riley*, 612 F.2d at 716. This test applies to both civil and criminal actions. *See, e.g.*, *Damiano v. Sony Music Entm't, Inc.*, 168 F.R.D. 485, 496 (D.N.J. 1996) (civil action); *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980) (criminal action).

163. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *see also* G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2389–90 (1992) (noting that both private and public figures fare poorly in private facts tort litigation).

164. *See, e.g.*, *Damiano*, 168 F.R.D. at 492 (noting the strong possibility that raw discovery materials would be used for financial profit).

165. *See id.* at 493 (granting motion to designate as confidential deposition transcripts and discovery materials pertaining to Bob Dylan).

166. *Florida Star*, 491 U.S. at 541; *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991).

167. *See Reuber*, 925 F.2d at 720 ("Such a suit compensates the injured plaintiff and encourages employers to maintain the confidentiality of their files.").

168. *Cf. Florida Star*, 491 U.S. at 534.

169. *See infra* Part IV.B.2.

170. *See, e.g.*, *Lawrence v. State*, 688 N.Y.S.2d 392, 395–96 (Ct. Cl. 1999) (finding that private right of action could not be implied under personal privacy protection laws where state legislature addressed civil remedies and did not create this right nor suggest one was intended).

little protection against public disclosure of confidential private facts. As a result of the BALCO investigation, this type of disclosure has begun to occur.¹⁷¹

2. An Invasion of Privacy: Untraceable Media Leaks

The results of the 2003 Survey Testing in Major League Baseball were supposed to remain anonymous and confidential.¹⁷² The government was presumably aware of this fact, as its affidavit supporting the initial warrant to search BALCO purported “to ensure that samples of individuals not associated with Balco are left undisturbed.”¹⁷³ Yet the government attempted to justify seizure of all positive results and planned to use them to further its investigation.¹⁷⁴

Prior to the seizure of the Tracey Directory in April 2004, the public knew only that the number of positive results had triggered the five to seven percent threshold required for implementation of a mandatory random testing program.¹⁷⁵ CDT and Quest had the results and samples in their possession since at least November 2003, and no disclosure of any kind had occurred.¹⁷⁶ In May 2004, MLB and the MLBPA agreed to move the drug testing program to the World Anti-Doping Agency (“WADA”) lab in Montreal, Canada.¹⁷⁷ The 2004 testing, which provided anonymous treatment for a first time offender, yielded twelve undisputed positive results for steroids.¹⁷⁸ None of these results have been publicly disclosed, consistent with the drug testing program in place that year.¹⁷⁹

In fact, the public knew very little about the contents of the List until fairly recently. In June 2006, Jason Grimsley became the first player revealed to be on the List.¹⁸⁰ This revelation was his own, part of his cooperation with a criminal investigation into his purchase of HGH.¹⁸¹ In December 2007, David Segui became the second, also by way of his own admission.¹⁸² While both players

171. See *supra* note 72 and accompanying text.

172. *CDT III*, 621 F.3d 1162, 1166 (9th Cir. 2010).

173. *CDT I*, 513 F.3d, 1085, 1121 (9th Cir. 2008). (Thomas, J., dissenting).

174. *CDT III*, 621 F.3d at 1170–71 (using the “plain view” doctrine, to be discussed in Part III.B); see Schmidt, *supra* note 64.

175. See Curry & Longman, *supra* note 45.

176. See *id.* (providing that MLB announced the results of the Survey Testing in November 2003).

177. Barry M. Bloom, *MLB, Union Agree to Move Testing*, MLB.COM (May 11, 2004), http://mlb.mlb.com/news/article.jsp?ymd=20040511&content_id=740972&vkey=news_mlb&fext=.jsp&c_id=mlb.

178. Bloom, *supra* note 48; MITCHELL, *supra* note 42, at 55.

179. Barry M. Bloom, *Mandatory Steroid Testing to Begin*, MLB.COM (Nov. 13, 2003), http://mlb.mlb.com/news/article.jsp?ymd=20031113&content_id=603458&vkey=news_mlb&fext=.jsp&c_id=mlb.

180. *Report: Feds Wanted Grimsley to Help Implicate Bonds*, *supra* note 74.

181. See *id.* (providing that in an affidavit, Grimsley admitted that he failed a steroid test in 2003).

182. *Report: Segui Admits Steroid Use*, MLB.COM (Dec. 10, 2007), http://mlb.mlb.com/news/article.jsp?ymd=20071211&content_id=2322662&vkey=news_mlb&fext=.jsp&c_id=mlb (noting that Segui admitted to purchasing steroids from Kirk Radomski). The Mitchell Report revealed that an anonymous player was told by then MLBPA Chief Operating Officer Gene Orza that he tested positive under the 2003 Survey Testing. MITCHELL, *supra* note 42, at 282. In Radomski’s tell all book, he wrote the following about that revelation: “I knew that Senator Mitchell was quoting David Segui (about the

enjoyed long careers, neither player had the kind of career that would merit consideration for baseball's Hall of Fame.¹⁸³ Not surprisingly, public interest in these revelations was underwhelming compared to what soon unfolded.

In 2009, media reports cited four of baseball's most accomplished players as having tested positive for steroids in the 2003 Survey Testing.¹⁸⁴ Alex Rodriguez, the three-time American League MVP who previously denounced drug use in Major League Baseball, was forced to admit that he took steroids during the 2001 to 2003 seasons.¹⁸⁵ Sammy Sosa, the 1998 National League MVP who currently ranks sixth on baseball's all-time home run list, declined comment after the *New York Times* reported his positive test.¹⁸⁶ Manny Ramirez, the 2004 World Series MVP who had recently served a fifty game suspension for PED use, also declined comment after a similar *New York Times* report surfaced in July 2009.¹⁸⁷ Finally, David Ortiz, the 2004 American League Championship Series MVP, was named in the same report as Ramirez.¹⁸⁸ Ortiz, however, was determined to clear his name.¹⁸⁹

Shortly after the *New York Times* story broke, Ortiz and MLBPA general counsel Michael Weiner appeared together in a press conference.¹⁹⁰ Ortiz admitted to being "a little bit careless back in those days when I was buying supplements and vitamins over the counter—legal supplements, legal vitamins over the counter—but I never buy [sic] steroids or use steroids."¹⁹¹ Ortiz also mentioned that, in a 2004 meeting with Weiner, he was not told that he tested positive.¹⁹² Weiner noted that the union could not provide any additional information to Ortiz other than to

2003 positive test) because David had told me exactly the same thing." KIRK RADOMSKI, BASES LOADED: THE INSIDE STORY OF THE STEROID ERA IN BASEBALL BY THE CENTRAL FIGURE IN THE MITCHELL REPORT 232 (2009). Segui's revelation in December 2007 corroborates Radomski's claim. *Report: Segui Admits Steroid Use*, *supra*.

183. Both Jason Grimsley and David Segui played at the Major League level for fifteen seasons, but neither player, based on Baseball-Reference's metrics, has a chance of being elected to the Hall of Fame. *Jason Grimsley*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/g/grimsja01.shtml> (last visited Feb 23, 2011); *David Segui*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/s/seguida01.shtml> (last visited Feb. 23, 2011).

184. See *supra* notes 73 and accompanying text.

185. Schwarz, *supra* note 1 (quoting Rodriguez on drug abuse in the 1980s: "As a fan, you don't want to believe it. It's surreal. My hero was Keith Hernandez. If you had said anything bad about Keith I would call you a liar. It tarnished the purity of the game."); *A-Rod Admits, Regrets Use of PEDs*, ESPN.COM, Feb. 10, 2009, <http://sports.espn.go.com/mlb/news/story?id=3894847>.

186. Schmidt, *supra* note 73.

187. Schmidt, *supra* note 62.

188. *Id.*

189. After the story broke, Ortiz immediately issued the following statement: "One, I have already contacted the players association to confirm if this report is true. I have just been told that the report is true. Based on the way I have lived my life, I am surprised to learn I tested positive. Two, I will find out what I tested positive for. And, three, based on whatever I learn, I will share this information with my club and the public." *Id.*

190. *Ortiz Apologizes For 'Distraction'*, ESPN.COM (Aug. 9, 2009), <http://sports.espn.go.com/mlb/news/story?id=4385699>.

191. *Id.*

192. *Id.*

confirm that he is on the List, because the List is currently under court seal.¹⁹³ MLB and the MLBPA had issued statements one day earlier cautioning the public against drawing conclusions based solely on the names contained on the List.¹⁹⁴ While Ortiz made his best attempt to dispute the implications of the news report, he may have suffered irreparable harm in the court of public opinion with little to no recourse in a court of law.¹⁹⁵

Professional athletes derive tremendous value from their ability to keep a clean public image.¹⁹⁶ A significant blow to one's reputation can result in loss of endorsements or even loss of one's job.¹⁹⁷ Being labeled a cheater may also prevent an elite player from being honored in his or her sport's hall of fame.¹⁹⁸ This honor brings with it prestige and also may spur a renewed interest in that player's career, increasing the value of his autograph and paid appearances. Mark McGwire and Sammy Sosa, the two players most often credited with the resurgence in baseball's popularity in the mid 1990s, are illustrative examples.¹⁹⁹ It is widely believed that Mark McGwire will never be voted into MLB's Hall of Fame due to his now admitted steroid use.²⁰⁰ Since his retirement in 2001, McGwire has kept a low profile (aside from one famous appearance before the House Committee on Government Reform) and generally avoided the media.²⁰¹ Tony La Russa, current manager for the St. Louis Cardinals and McGwire's manager for virtually all of his playing career, finally convinced him to return to baseball as the team's hitting coach for the 2010 season.²⁰² La Russa has even said

193. *Id.* Due to the significant number of positive results that have been disputed, it is possible to be on the List and ultimately not test positive. See *supra* notes 78–81 and accompanying text.

194. Bloom, *supra* note 69.

195. See, e.g., Howard Bryant, *Faith Unrewarded*, ESPN.COM (Aug. 9, 2009), http://sports.espn.go.com/mlb/columns/story?columnist=bryant_howard&id=4366974 (“Barring a spectacular, unprecedented exoneration, Ortiz will have lost the bank of goodwill and trust he spent years accruing.”).

196. See *infra* note 197.

197. See, e.g., *supra* note 157. Barry Bonds remained unsigned following the 2007 season in which he broke baseball's all-time home run record. Buster Olney, *Players Like Bonds, Gibbons, Logan Struggle to Find Work*, ESPN.COM (June 11, 2008), <http://sports.espn.go.com/mlb/news/story?id=3437067> (noting also that Jay Gibbons and Nook Logan have not been offered contracts following their inclusion in the Mitchell Report). It has been suggested that teams colluded against Bonds in an effort to keep him out of baseball. *Sniffing for Collusion, Fehr Wonders Why Bonds Is Unwanted*, CBSSPORTS.COM (Mar. 18, 2008), <http://www.cbssports.com/mlb/story/10719589/rss>.

198. See, e.g., *infra* note 200.

199. See, e.g., Wilson, *supra* note 6.

200. Josh Hargreaves, *Mark McGwire Doping Admission May Not Help Hall of Fame Shot*, REUTERS (Jan. 12, 2010), <http://www.reuters.com/article/idUSTRE60C07N20100113>; see also Jack Curry, *2 Stars Leap to Hall of Fame, but Steroid Cloud Stops 3rd*, N.Y. TIMES, Jan. 10, 2007, at D1 (providing perspective immediately after his first unsuccessful bid in 2007).

201. See Wilson, *supra* note 6; see, e.g., *McGwire Apologizes to La Russa*, Selig, *supra* note 29. McGwire's post-retirement actions are ironic because he was previously regarded as a “media darling” during his playing days. Harry Stein, *Writers Scrutinize Big Mac and Themselves*, N.Y. TIMES, Jan. 13, 2007, at D2.

202. *Mark McGwire Returns to Cardinals as Coach*, CBSSPORTS.COM (Oct. 26, 2009), <http://www.cbsnews.com/stories/2009/10/26/sportsline/main5422129.shtml>.

that McGwire's return can restore his tarnished reputation.²⁰³ It remains to be seen whether he can recoup his public image, but in the meantime, his return and subsequent admission of steroid use have generated plenty of controversy.²⁰⁴ On the other hand, Sammy Sosa has not reappeared in baseball since he last played in 2007.²⁰⁵ In a June 2009 interview, Sosa said he planned to formally retire soon, stating, "I will calmly wait for my induction to the Baseball Hall of Fame."²⁰⁶ However, only months prior to that interview, Sosa expressed hope that he would be offered a contract for the 2009 season.²⁰⁷ Both McGwire and Sosa have experienced the fall from national icon to unemployment and rejection by the game they both love, all as a result of their connection to steroids.

David Ortiz remains gainfully employed and his reputation was not completely tarnished by the revelation of his inclusion on the List.²⁰⁸ Why Ortiz has avoided most of the negative consequences of a connection to PEDs is unclear, but his ability to do so raises the possibility that people believe he is telling the truth. After all, legally available nutritional supplements could have triggered an initial positive test under the 2003 Survey Testing program.²⁰⁹ These supplements may have been tainted, as some professional athletes have tried to argue when confronted with a positive test result.²¹⁰ While that argument may not help MLB players avoid suspension, it would certainly absolve them of guilt in the public eye if it were true.²¹¹ To that end, at least one player has gone so far as to sue a supplement

203. *McGwire Apologizes to La Russa, Selig, supra* note 29.

204. *Mark McGwire Offers Steroid Apology*, ESPN.COM (Feb. 17, 2010), <http://sports.espn.go.com/mlb/news/story?id=4921052>. This Note does not suggest that McGwire returned to baseball purely for financial reasons and that he lacked adequate resources in the eight years following his retirement. Instead, this Note merely points out that McGwire felt compelled to return to baseball and face scrutiny about his now admitted steroid use. His ability to return to Major League Baseball clearly has value to him, both intrinsically and economically.

205. Yoel Adames, *Sosa Reflects on MLB Career*, ESPNDEPORTES.COM (June 4, 2009, 12:56 PM ET), <http://sports.espn.go.com/mlb/news/story?id=4229022> (mentioning also that Sosa now works for the Dominican government).

206. *Id.*

207. *Sosa Still Waiting for Offer*, ESPN.COM (Dec. 26, 2008), <http://sports.espn.go.com/mlb/news/story?id=3793001>.

208. *David Ortiz Returning to Red Sox*, ESPN.COM (Nov. 4, 2010), <http://sports.espn.go.com/boston/mlb/news/story?id=5764146>; Gordon Edes, *No Place Like Boston for David Ortiz*, ESPN.COM (Sept. 7, 2010), http://sports.espn.go.com/boston/mlb/columns/story?columnist=edes_gordon&id=5541571 ("Ortiz's image is not as pristine as [Derek] Jeter's, not after he was linked to performance-enhancing substances last year, but he remains an icon and a force in the community, one whose name has been linked to good far more than the opposite."); Johnette Howard, *All-Stars Realign for David Ortiz*, ESPN.COM (July 7, 2010), <http://sports.espn.go.com/espn/commentary/news/story?id=5360860> (arguing that Ortiz has not restored his reputation, but was nevertheless elected to the 2010 MLB All Star Game by vote of his fellow MLB players).

209. Bloom, *supra* note 69.

210. See, e.g., *Chargers' Merriman Apologizes, Will Appeal Suspension*, ESPN.COM (Oct. 25, 2006), <http://sports.espn.go.com/nfl/news/story?id=2636523> (Shawne Merriman's lawyer blamed the positive result on a tainted supplement); Michael S. Schmidt, *Reliever Who Helped Phillies to Title Is Suspended for Failed Drug Test*, N.Y. TIMES, Jan. 7, 2009, at B16 (both J.C. Romero and Sergio Mitre blamed tainted nutritional supplements for their positive tests).

211. See Schmidt, *supra* note 210.

company over his positive result.²¹² However, Ortiz and others on the List may not have this option. Ortiz learned of his inclusion on the List six years after he allegedly tested positive.²¹³ As Weiner stated in their joint press conference, “His reputation has been called into question. He does not know specifically why. And he can’t get the information that would allow him to offer a full explanation.”²¹⁴ The remaining ninety-eight players whose names have not been publicly disclosed should soon find out about their inclusion on the List.²¹⁵ If additional leaks occur, the players will be scrutinized about events that took place seven years ago. By now, receipts, records and even memories may be long gone and of no use in clearing an accused athlete’s name. Unfortunately, there is no statute of limitations in the court of public opinion.

As discussed at the end of the previous subsection, the players who have suffered or who may yet suffer from the effects of disclosure of their confidential test results have a very limited legal remedy.²¹⁶ They cannot sue the media, who are heavily protected by the First Amendment. They do, in most states, have a tort action available for public disclosure of private facts, as even professional athletes retain the right to keep their confidential information private.²¹⁷ However, finding the source of that disclosure may prove to be an impossible task. The media rarely gives up its sources, even to the point of serving jail time for contempt of court.²¹⁸ Even when subpoenaed by a federal grand jury, where there is no common law or statutory shield law protection, reporters remain silent.²¹⁹ Recently, for instance, the lawyer who leaked Barry Bonds’ grand jury testimony to the media admitted to doing so, saving two reporters from potential eighteen month jail sentences.²²⁰ This admission came months after a grand jury served the reporters with subpoenas to reveal their source.²²¹ It is even less likely that reporters will divulge their sources in a civil litigation, where a reporter’s shield law may apply.²²² Such a law is part of the Constitution in California, where *CDT III* was heard and presumably

212. Michael O’Keeffe & Nathaniel Vinton, *Suspended Phillies Reliever J.C. Romero Suing Supplement Makers over Positive Steroid Test*, N.Y. DAILY NEWS (Apr. 27, 2009), http://www.nydailynews.com/sports/baseball/2009/04/27/2009-04-27_suspended_phillies_reliever_jc_romero_su.html (asserting negligence, intentional misrepresentation and consumer fraud).

213. See *Ortiz Apologizes for ‘Distraction’*, *supra* note 190.

214. *Id.*

215. As *CDT III* has been resolved in favor of CDT and the MLBPA, the 2003 Survey Testing results will be returned shortly. At that point, it is likely that the MLBPA will inform each player of their inclusion on the List and what caused their positive test. *Cf. id.* (providing that Ortiz was told he was on the List, but was not told whether he tested positive and what caused the positive result because the information was under court seal).

216. See *supra* notes 169–70 and accompanying text.

217. See *supra* note 155 (noting the difference between public figures and public officials).

218. Jones, *supra* note 161, at 341–43.

219. *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972).

220. Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, SAN FRANCISCO CHRON., Feb. 14, 2007, at A1.

221. *Id.*

222. See, e.g., CAL. CONST., art. 1, § 2(b).

where the leaks occurred.²²³ The task of subpoenaing the media to learn their source(s) is therefore more than likely to fail. Without a sanctioned grand jury investigation into the leaks, there is no pressure for the culprit(s) to come forward.

Furthermore, it is virtually certain that members of the government's legal and/or investigative team(s) are responsible for the leaks. The *New York Times* reporter who broke the news of positive results for Sammy Sosa, Manny Ramirez and David Ortiz cited "lawyers with knowledge of the [drug-testing] results" as his source.²²⁴ A *Sports Illustrated* writer cited four sources—two with knowledge of the evidence gathered in the government's investigation on steroid use in baseball and two with knowledge of the test results—in her story about Alex Rodriguez's positive test.²²⁵ The story also mentions which substances triggered Rodriguez's positive test.²²⁶ Only the government has access to that information. The MLBPA may be able to confirm whether a player appears on the List, but has no access to the actual results.²²⁷ Moreover, lawyers for CDT and the MLBPA may have seen the List, but are the least likely candidates to leak information from it. Their efforts to keep this information confidential would be worthless if they simultaneously revealed it. The case against the government is indeed strong, but the players nevertheless still have no remedy.²²⁸

B. FOURTH AMENDMENT RIGHTS

The Fourth Amendment can be divided into two clauses.²²⁹ The so-called "Unreasonableness Clause" provides, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." ²³⁰ The "Warrant Clause" then provides, "[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."²³¹ The precise relationship between these two clauses is unclear.²³² What is "reasonable" under the Unreasonableness Clause "turns, at least in part, on the more specific commands of the [W]arrant [C]ause."²³³ These commands are reflected in Rule 41 of the Federal Rules of Criminal Procedure.²³⁴

The following Subsections address, in turn, the "plain view" doctrine, the

223. *Id.*; *CDT III*, 621 F.3d 1162 (9th Cir. 2010).

224. Schmidt, *supra* note 73 (Sosa); Schmidt, *supra* note 62 (Ramirez and Ortiz).

225. Roberts & Epstein, *supra* note 73.

226. *Id.*

227. *Ortiz Apologizes for 'Distraction'*, *supra* note 190 (noting that the union could not confirm to Ortiz that he tested positive, only that he was on the List).

228. *See supra* notes 169–70 and accompanying text.

229. *See Groh v. Ramirez*, 540 U.S. 551, 571 (2004) (Thomas, J., dissenting).

230. U.S. CONST. amend. IV.

231. *Id.*

232. *Groh*, 540 U.S. at 571 (Thomas, J., dissenting).

233. *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297, 315 (1972).

234. *See FED. R. CRIM. P. 41*; *United States v. Ventresca*, 380 U.S. 102, 105 n.1 (1965) ("The Fourth Amendment's policy against unreasonable searches and seizures finds expression in Rule 41 of the Federal Rules of Criminal Procedure.").

constitutional right to privacy found in the Fourth Amendment and the application of these legal principles to the players whose names are on the List.

1. The “Plain View” Doctrine

Not all evidence seized during the execution of a warrant must be pursuant to that warrant.²³⁵ The “plain view” exception to the Fourth Amendment permits a law enforcement officer to seize evidence or contraband in plain view.²³⁶ To justify such warrantless seizure, the officer must be lawfully present at the place where the object could be plainly viewed, the incriminating character of the object must be “immediately apparent” and the officer must have lawful right of access to the object.²³⁷ Nearly thirty years ago, the Ninth Circuit announced a procedure in *United States v. Tamura* by which “the Government and law enforcement officials generally can avoid violating fourth amendment rights” in “the comparatively rare instances where documents are so intermingled that they cannot feasibly be sorted on site.”²³⁸ The procedure includes “sealing and holding the documents pending approval by a magistrate of a further search, in accordance with the procedures set forth in the American Law Institute’s Model Code of Pre-Arrest Procedure The essential safeguard required is that wholesale removal must be monitored by the judgment of a neutral, detached magistrate.”²³⁹ Compliance with *Tamura* has become increasingly complex in today’s digital age. Modern searches and seizures frequently involve information stored on electronic media.²⁴⁰ Seizable materials are often intermingled with materials not included in the warrant and thus theoretically protected under the Fourth Amendment.²⁴¹ The *Tamura* guidance, which was designed to address “comparatively rare instances” of intermingled paper documents may need to be updated accordingly.²⁴² Otherwise, the “plain view” doctrine may be expanded *ad infinitum*.

235. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (describing “plain view” doctrine). Additionally, not all searches must be pursuant to a warrant. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989) (addressing the “special needs” doctrine, which allows for warrantless searches and seizures where “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable” (citations omitted)); see also *Ramirez*, 540 U.S. at 572–73 (Thomas, J., dissenting) (“[O]ur cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.”).

236. *Coolidge*, 403 U.S. at 465.

237. *Horton v. California*, 496 U.S. 128, 136–37 (1990).

238. *United States v. Tamura*, 694 F.2d 591, 595–96 (9th Cir. 1982). The opinion refers to (though not specifically by name) the “plain view” doctrine, but implies that the doctrine does not apply to this case. *Id.* at 595 n.1 (citing *Coolidge*, 403 U.S. at 469–71); *cf. id.* at 595.

239. *Id.* at 596.

240. *CDT III*, 621 F.3d 1162, 1175 (9th Cir. 2010).

241. See, e.g., *id.*

242. *Id.* at 1176; *Tamura*, 694 F.2d at 595–96; see *infra* Part III.C.3 (discussing tension inherent in searches of comingled electronic data), Part IV.B.2 (advocating for *Tamura*-like guidance to remain in the opinion).

2. Constitutional Right to Privacy

The U.S. Constitution does not mention the word “privacy,” but a number of its Amendments indicate that there are limits to government intrusion upon an individual’s privacy.²⁴³ As relevant to this analysis, the Fourth Amendment creates a “right to privacy, no less important than any other right carefully and particularly reserved to the people.”²⁴⁴ This right is captured in the so-called “Unreasonableness Clause,” which protects against unreasonable searches and seizures.²⁴⁵

Unlike the common law right to privacy, privacy rights under the Fourth Amendment are not affected by professional baseball players’ status as public figures. The plain language of the Amendment contains no such qualifications regarding the target of the search and seizure.²⁴⁶ Yet, drawing from another search and seizure context, some commentators have argued that, should the government invoke the “special needs” doctrine to constitutionally justify suspicionless drug testing in professional sports, MLB players will as a corollary be found to have a diminished expectation of privacy under the Fourth Amendment.²⁴⁷ The issue in dispute in the “special needs” case is quite different from the search and seizure issue addressed in this Note: the government secured warrants to seize the 2003 Survey Testing results, whereas suspicionless testing primarily raises issues of probable cause.²⁴⁸ Nevertheless, we should not allow the dubious corollary conclusion—that MLB players have a diminished expectation of privacy under the Fourth Amendment—to serve as a justification for disregarding the fourth amendment rights of professional athletes in the future.

One commentator addressing suspicionless drug testing of MLB players analogized professional athletes to politicians and jockeys, relying on two cases that found a diminished expectation of privacy for both groups.²⁴⁹ In the first case, *Chandler v. Miller*, the Supreme Court noted that political candidates “are subject to relentless scrutiny-by their peers, the public, and the press. Their day to day conduct attracts attention notably beyond the norm in ordinary work

243. A constitutional right to privacy was first recognized in *Griswold v. Connecticut*, where the Court found the right in the “penumbras” that emanate from specific guarantees in the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965). Privacy rights can be found in the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments. *Id.* at 481–86 (recognizing marital privacy related to birth control under the Fourteenth Amendment); *see also* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (privacy related to abortion).

244. *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968); *Griswold*, 381 U.S. at 484–85 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)).

245. *See* U.S. CONST. amend. IV.

246. *See* U.S. CONST. amend. IV.

247. *E.g.*, Joshua Peck, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 *FORDHAM L. REV.* 1777, 1820–22 (2006). To invoke the “special needs” doctrine, the government must show that its legitimate interest in the intrusion outweighs the individual’s privacy interest. *See* *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1987).

248. *Compare supra* Part II.B with *Skinner*, 489 U.S. at 619–20.

249. Peck, *supra* note 247, at 1809 & n.308, 1820–22.

environments.”²⁵⁰ Professional athletes indeed face “‘relentless scrutiny’ from all avenues.”²⁵¹ However, this scrutiny is distinguishable from that which politicians face. Politicians gain clout by taking strong ethical stances on issues facing their constituents and the government (e.g. fraud in the financial markets).²⁵² As a result, they are held to a certain moral standard, digressions from which often lead to their resignation.²⁵³ Professional athletes, by contrast, typically continue in their athletic endeavors in spite of similar moral transgressions.²⁵⁴ The scrutiny faced by professional athletes is more properly analogous to that faced by celebrities.²⁵⁵ The moral transgressions of professional athletes are a matter of public interest, but bear little on their ability to perform in their profession. In the second case discussed by the commentator, *Dimeo v. Griffin*, the Seventh Circuit, analogizing to persons giving urine samples in a routine medical examination, held that random drug testing produced only a slight incremental loss of privacy to jockeys.²⁵⁶ The opinion also asserts that athletes value privacy less than the average person.²⁵⁷ In

250. *Chandler v. Miller*, 520 U.S. 305, 321 (1997).

251. Peck, *supra* note 247, at 1821–22; *see also* Heiles, *supra* note 60, at 358.

252. *See, e.g.*, Michael M. Grynbaum, *Spitzer Resigns, Citing Personal Failings*, N.Y. TIMES, Mar. 12, 2008, <http://www.nytimes.com/2008/03/12/nyregion/12cnd-resign.html> (discussing Eliot Spitzer’s rise to political power).

253. *See, e.g., id.* (noting that Spitzer, then governor of New York, resigned amid a scandal surrounding his involvement with prostitutes).

254. It is not uncommon for professional athletes to engage in extramarital affairs, which the media often reports. *See, e.g., Rodriguez and Wife Reach Settlement*, N.Y. TIMES, Sept. 20, 2008, at D3 (discussing the divorce between Alex Rodriguez, star third baseman for the New York Yankees, and his ex-wife, which involved allegations of infidelity). However, Rodriguez did not take any time off from his sport to deal with these issues. *Cf. Jack Curry, Youkilis Swats Away Any Pitch Promoting Him as Candidate for M.V.P.*, N.Y. TIMES, Aug. 27, 2008, at D3 (mentioning that Rodriguez missed twenty games due to a leg injury; no mention of his then-pending divorce); *see also Alex Rodriguez*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/r/rodria01.shtml> (last visited Feb. 23, 2011) (indicating that Rodriguez played 138 of 162 games in 2008). Most recently, Tiger Woods took a leave of absence from professional golf following revelations of his extramarital activities. Bob Harig, *Tiger Says He’ll Play in Masters*, ESPN.COM (Mar. 17, 2010), <http://sports.espn.go.com/golf/news/story?id=4999991>. Nevertheless, he returned to the sport four months later. *See id.*

255. *See* Tiffany D. Lipscomb, *Can Congress Squeeze the “Juice” Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports’ Steroid Controversy*, 69 OHIO ST. L.J. 303, 337 (2008). Lipscomb argues:

Under a reading of the case law that renders all people in the public eye subject to diminished privacy rights, Congress could foreseeably mandate drug testing for musicians and celebrities under a similar theory: celebrity and musician use affects child use. This slippery slope cannot be what the Court mandated in *Chandler* by rejecting a drug-testing policy for politicians.

Id.

256. *Dimeo v. Griffin*, 943 F.2d 679, 682–83 (7th Cir. 1991).

257. *Id.* at 682. Unlike most citizens,

Athletes (not limited to boxers), actors, and airline pilots are illustrative of the many types of worker whose job is of a character that requires the worker to submit to frequent medical examinations. . . . [T]he more habituated [a person] is to [undergoing medical or other intrusions into his private realm], the less sensitive he is apt to be [to such intrusions]. A further point . . . is that the [person who has frequent medical examinations because his job requires it] *voluntarily* trades away some of his privacy for other goods. Self-selection will tend to allocate jobs in which privacy is limited to persons who value privacy less.

other words, athletes in general may have a diminished expectation of constitutional privacy. However, the Tenth Circuit, in distinguishing the diminished privacy interests in *Dimeo* on the grounds that jockeys belong to “an industry that is regulated pervasively to ensure safety,” and not on any grounds related to how athletes value privacy, arguably treats the assertion that athletes value privacy less as dicta.²⁵⁸ The *Dimeo* court recognized that horse racing is the second most dangerous of the common sports behind auto racing, citing statistics revealing that on average two jockeys per year are killed and another 100 are disabled for at least one week.²⁵⁹ By comparison, baseball players are frequently injured, but no one has died from injuries sustained during a game in nearly a century.²⁶⁰ Moreover, horse racing is heavily regulated by the government, whereas the major professional sports are heavily “regulated” by their own private leagues.²⁶¹ Another commentator argues that professional athletes’ privacy interests are diminished because they work in a “closely-regulated industry” analogous to one regulated by the government.²⁶² This argument falls short because government regulation is simply not analogous to private regulation, regardless of how strict the private regulation is. For the most part, professional athletes participate in a collective bargaining process with their respective leagues and therefore have agreed to the degree of strictness included in those regulations.²⁶³ There is no similar arms length negotiation process with the government.

The losing plaintiff in *Dimeo* did not seek certiorari; the case remains only Seventh Circuit precedent.²⁶⁴ The Tenth Circuit’s opinion in *Rutherford* arguably confines *Dimeo* to dangerous sports with significant government regulation, further limiting the significance of any comparison between jockeys and MLB players.²⁶⁵ As the analogies to both the politician at issue in *Chandler* and the jockeys at issue in *Dimeo* have significant shortcomings, whether professional athletes can have a diminished expectation of constitutional privacy is not easily ascertainable. The

Id.

258. *Rutherford v. City of Albuquerque*, 77 F.3d 1258, 1262 (10th Cir. 1996) (quoting *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, at 627 (1989)).

259. *Dimeo*, 943 F.2d at 683.

260. Ray Chapman died on August 17, 1920, after being hit in the head by a pitch the day before. *Beaned by a Pitch, Ray Chapman Dies*, N.Y. TIMES, Aug. 17, 1920, http://www.nytimes.com/packages/html/sports/year_in_sports/08.17.html.

261. *Dimeo v. Griffin*, 943 F.2d at 681.

262. Heiles, *supra* note 60, at 358.

263. The four major professional sports leagues have a collective bargaining agreement between the respective players union and the team owners. *See generally Major League Baseball Players Association: Frequently Asked Questions*, MLB.COM, <http://mlb.mlb.com/pa/info/faq.jsp> (last visited Feb. 23, 2011); *NFL CBA-Related Questions & Answers*, SI.COM (Jan. 20, 2010), <http://sportsillustrated.cnn.com/2010/football/nfl/01/20/cba.qa/index.html>; *CBA 101: Owners, Players Brace for Negotiations*, NBA.COM (Nov. 18, 2010), <http://www.nba.com/2010/news/11/17/labor-primer/index.html>; *Collective Bargaining Agreement*, NHL.COM, <http://www.nhlpa.com/About-Us/CBA> (last visited Feb. 23, 2011).

264. *Dimeo*, 943 F.2d 679.

265. *Rutherford v. City of Albuquerque*, 77 F.3d 1258 (10th Cir. 1996).

Supreme Court has previously cautioned “against the assumption that suspicionless drug testing will readily pass constitutional muster in . . . contexts [other than public school student athletics].”²⁶⁶ In other words, the Court will not freely bless the diminishing of privacy rights through warrantless searches.

3. Seizure of MLB Players’ 2003 Drug Test Results

a. Evaluation of the “Plain View” Argument

Although the government only had warrants for information related to the ten BALCO players, investigators seized an entire directory containing the positive results of the 2003 Survey Testing.²⁶⁷ The government argued that it had the right to the positive test results under the “plain view” doctrine.²⁶⁸ This argument was not reached by the three judge panel in *CDT I*, which held that the entire seizure was lawful.²⁶⁹ The en banc panel in *CDT III*, however, rejected the government’s “plain view” argument as a mockery of the *Tamura* procedural guidance.²⁷⁰ Chief Judge Kozinski wrote separately, calling for the government to foreswear reliance on the “plain view” doctrine in all future warrant applications involving intermingled evidence.²⁷¹

In her dissent, Judge Callahan argued that the majority’s rejection of the “plain view” argument is inconsistent with Ninth Circuit case law.²⁷² Callahan wrote, “Agent Novitsky [sic] acted with the reasonable purpose of learning the location of the relevant material in the Tracey Directory. Upon encountering other potentially incriminating material in the Tracey Directory, he sought a subsequent warrant.”²⁷³ She then likened Novitzky’s actions to the actions of the case agent in *United States v. Giberson*.²⁷⁴ In *Giberson*, the Ninth Circuit upheld a district court order denying a motion to suppress evidence of child pornography found on a computer hard drive while investigating production of false identification cards.²⁷⁵ The case agent found images of child pornography while scanning thumbnail images for evidence of production of fake I.D.s.²⁷⁶ Significantly, the court did not reach the “plain view” argument in deciding the case.²⁷⁷ Moreover, this comparison fails because Novitzky’s actions are distinguishable from the case agent in *Giberson*.

First, CDT officials cooperated with Novitzky, offering him a document

266. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

267. *CDT I*, 513 F.3d 1085, 1091, 1119 (9th Cir. 2008) (Thomas, J., dissenting); *see supra* Part II.B.

268. *CDT III*, 621 F.3d 1162, 1170 (9th Cir. 2010).

269. *CDT I*, 513 F.3d at 1112 n.48.

270. *CDT III*, 621 F.3d at 1171; *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982).

271. *CDT III*, 621 F.3d at 1178 (Kozinski, C.J., concurring).

272. *Id.* at 1183–84 (Callahan, J., dissenting).

273. *Id.*

274. *Id.* (referencing *United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008)).

275. *Giberson*, 527 F.3d at 889–90.

276. *Id.* at 885.

277. *Id.* at 889.

containing the sought after information prior to his search of the hard drive.²⁷⁸ By contrast, the case agents in *Giberson* searched the defendant's computer without any assistance from the defendant or third parties.²⁷⁹ Second, Novitzky could have easily avoided encountering the positive test results while searching the Tracey Directory. Judge Bea's concurring opinion describes a very simple procedure for viewing only the desired results in Microsoft Excel, the spreadsheet format of the file containing the test results.²⁸⁰ In *Giberson*, the case agent utilized a software program called ILOOK that retrieves all graphics and images on a computer and dumps them into one folder.²⁸¹ The agent was required to search the entire folder, which inevitably would result in uncovering the images of child pornography.²⁸² Moreover, upon finding the images, the agent immediately called his supervisor for direction.²⁸³ If Novitzky had done the same, *CDT I, II* and *III* may never have arisen. Finally, Novitzky intended to find positive test results for players other than the ten with BALCO connections.²⁸⁴ In fact, Judge Bea concluded:

Agent Novitsky [sic] intentionally and volitionally scrolled right on the spreadsheet, without first having segregated only the responsive files, 'to see if there was anything above and beyond that which was authorized for seizure in the initial warrant.' This demonstrates the seized evidence of illegality was not 'immediately apparent' nor in 'plain view.'²⁸⁵

Novitzky's actions and intentions indicate that he deliberately went on a fishing expedition through the Tracey Directory. In contrast, the case agent in *Giberson* neither knew of nor expected to find child pornography in his search for evidence of false I.D. production.²⁸⁶ Even after he found the first image, he did not continue with the intention of searching for additional pornographic images but found more nonetheless.²⁸⁷

As the foregoing comparison reveals, the situations in *CDT III* and *Giberson* could not be more different. The government's argument that the entire List was in "plain view" has been deemed a losing one.²⁸⁸ Nevertheless, the government's application of the "plain view" doctrine to its seizure of Tracey Directory had significant consequences for the players on the List.²⁸⁹

278. *CDT I*, 513 F.3d 1085, 1092 (9th Cir. 2008).

279. *See Giberson*, 527 F.3d at 885.

280. *CDT III*, 621 F.3d at 1181 n.2 (Bea, J., concurring).

281. *Giberson*, 527 F.3d at 885.

282. *See id.*

283. *Id.*

284. *CDT III*, 621 F.3d 1162 at 1188 n.6 (Callahan, J., dissenting) ("So the idea behind taking [the entire Tracey Directory] was to take it and later briefly peruse it to see if there was anything above and beyond that which was authorized for seizure in the initial warrant.").

285. *Id.* at 1180 (Bea, J., concurring).

286. *Giberson*, 527 F.3d at 885.

287. *Id.*

288. *See CDT III*, 621 F.3d at 1177.

289. *See id.* at 1170; *see also infra* Part III.B.3.b.

b. Implication for Players' Fourth Amendment Rights

The government's seizure of the Tracey Directory and subsequent compilation of the List created two significant risks to the fourth amendment rights of the players on the List. First, the government planned to question those players about where and how they obtained the substance responsible for their positive test.²⁹⁰ Players would be forced to answer questions about activities that took place years ago—a potentially difficult task for those players who were not deliberately taking illegal PEDs.²⁹¹ Such inquiries, and any consequences that might flow from them, would provide the government with an end run around the Warrant Clause.²⁹² This is precisely the type of procedure that would “make a mockery of *Tamura* and render the carefully crafted safeguards in the Central District warrant a nullity.”²⁹³ The government's actions came dangerously close to achieving this result. Fortunately, it must return the List and all non-BALCO related specimens.²⁹⁴

Second, there is a heightened risk of public disclosure now that the positive results are nicely compiled into one list. Unwanted public disclosure has in fact already occurred despite a court order sealing the List.²⁹⁵ The government's questionable application of the “plain view” doctrine has therefore not only impinged upon players' fourth amendment rights, but has also enabled further violations of their common law rights to privacy.²⁹⁶ Regardless of the merits of the government's “plain view” argument, blatant violation of a court order is plain wrong. The en banc panel gave significant weight to these disclosures when affirming the Mahan Order.²⁹⁷ Nevertheless, the players remain prone to future disclosures despite the outcome of *CDT III*.²⁹⁸

C. THE FATE OF THE LIST AND THE DICTA: AN ANALYSIS OF *CDT III*

The *CDT III* decision resolves the fate of two major aspects of the case: the List and the Dicta. First, CDT (and therefore the MLBPA) will get the 2003 Survey Testing results back, a result undoubtedly desirable for the MLBPA.²⁹⁹ Second,

290. See Schmidt, *supra* note 64.

291. See, e.g., *Ortiz Apologizes for 'Distraction'*, *supra* note 190 (“[David Ortiz's] reputation has been called into question. He does not know specifically why. And he can't get the information that would allow him to offer a full explanation.”).

292. The government has a penchant for perjury investigations in connection with baseball's drug problem. See Michael Schmidt, *Clemens Lied About Doping, Indictment Charges*, N.Y. TIMES, Aug. 19, 2010, at A1 (reporting indictment of Roger Clemens and mentioning ongoing trial of Barry Bonds); Associated Press, *Tejada Sentenced to Year's Probation*, ESPN.COM, Mar. 26, 2009, <http://sports.espn.go.com/mlb/news/story?id=4017558> (noting that Miguel Tejada pled guilty to withholding information about an ex-teammate's PED use from congressional investigators).

293. *CDT III*, 621 F.3d 1162 at 1171.

294. *Id.* at 1175–77.

295. Bloom, *supra* note 69; see *supra* Part III.A.2.

296. *CDT III*, 621 F.3d at 1170–71 (noting that the government's application of the “plain view” doctrine makes a “mockery of *Tamura*”).

297. *Id.* at 1177.

298. See *supra* Part I.B.

299. *List of Positive Tests Barred from Courts*, *supra* note 147.

the Ninth Circuit shunted the Dicta from the majority opinion in *CDT II* to a concurring opinion in *CDT III*.³⁰⁰ It is therefore no longer Ninth Circuit controlling law. This move largely eliminated the controversy surrounding the case and essentially eliminated the risk of reversal at the Supreme Court level.³⁰¹

The MLBPA certainly won this battle, but is it still losing the war? The test results are no longer in the government's hands, but that does not undo the fact that they were there in the first place, let alone the privacy invasions suffered by four players to date.³⁰² At this point, it is helpful to determine what, if any, contribution *CDT III* has made to enhancing search and seizure law in the Ninth Circuit.³⁰³ In addition, it is instructive to explore why the majority in *CDT II*, and Chief Judge Kozinski specifically, felt compelled to provide guidance in the first place, and the tension inherent in comingled electronic data searches that the guidance attempts to resolve.³⁰⁴ These inquiries shed light on whether the existing law is sufficient to prevent another *CDT*.³⁰⁵

1. The Precedential Value of *CDT III*

CDT II caused quite a stir for the government.³⁰⁶ The inclusion of the Dicta raised significant concerns over the lawful conduct of computer investigations.³⁰⁷ In support of its petition for rehearing by the full circuit court, the government wrote a twenty page brief disputing the legality and content of the Dicta.³⁰⁸ This brief was signed by a veritable "Who's Who" in the Department of Justice, including newly appointed Supreme Court Justice Kagan and all of the United States Attorneys in the Ninth Circuit.³⁰⁹

Moreover, commentators and the courts had split on how to evaluate *CDT II*.³¹⁰ Some practitioners supported the Dicta.³¹¹ One practitioner noted that "for too

300. Compare *CDT II*, 579 F.3d 989, 993–1007 (9th Cir. 2009) (majority opinion) with *CDT III*, 621 F.3d at 1178–80 (concurring opinion).

301. See *infra* Part III.C.1 (discussing the government's opposition to the Dicta and the legal community's mixed response).

302. *CDT III*, 621 F.3d at 1169; *List of Positive Tests Barred from Courts*, *supra* note 147; *supra* Part III.A.2.

303. *CDT III*, 621 F.3d 1162.

304. *CDT II*, 579 F.3d 989.

305. See *infra* Part IV.B.2 (discussing the possibility that a similar case will arise in the future).

306. See, e.g., Government's Brief, *supra* note 141.

307. *Id.* at 1 ("In some districts, computer searches have ground to a complete halt, and, throughout the Circuit, investigations have been delayed or impeded. Magistrate judges are uniformly viewing compliance with the newly announced rules as mandatory, but they are implementing those rules in vastly different ways.")

308. See generally *id.*

309. See *id.*; see also Orin Kerr, *DOJ Files Brief Supporting Super-En-Banc in CDT, VOLOKH CONSPIRACY* (Nov. 24, 2009), <http://volokh.com/2009/11/24/doj-files-brief-supporting-super-en-banc-in-cdt/> (last visited Dec. 28, 2009) ("I don't think I have ever seen a brief signed by the SG, Deputy SG, AAG, DAAG and all of the United States Attorneys in a Circuit. If you're presently a DOJ official and your name isn't on the brief, you are probably feeling left out.")

310. *CDT II*, 579 F.3d 989 (9th Cir. 2009).

311. Mumford & Kaplan, *supra* note 140.

long . . . searching agents simply mirrored hard drives, taking all the electronic data present back to the lab for examination. The Ninth Circuit was right to protect against the ‘erosion of Fourth Amendment rights.’”³¹² Another scholar took the opposite stance, arguing that ex ante restrictions on the execution of computer warrants are unwise and should be eliminated.³¹³ Similarly, courts took different positions on the Dicta. A Texas district court adopted the *CDT II* guidelines in its fourth amendment analysis, whereas the Seventh Circuit refused to do so.³¹⁴ Indeed, *CDT II* generated widespread uncertainty surrounding the legitimacy and application of the Dicta.³¹⁵

CDT III purported to resolve this uncertainty by simply removing the Dicta from the per curiam opinion.³¹⁶ The conclusion remains the same—the government illegally seized the drug test results.³¹⁷ In fact, a word for word comparison of *CDT II* and *III* reveals little else changed between the two opinions.³¹⁸ It appears that the Ninth Circuit simply used the cut and paste function in Microsoft Word, made a few minor changes to the surrounding text for grammar and readability, and then relabeled the opinion per curiam.³¹⁹

Two conclusions can be drawn from the comparison of *CDT II* and *III*: 1) this case contributes to the confusion over search and seizure law in the digital age; and 2) an apparent and misleading oversight in the drafting of the opinion further enhances this “contribution.”³²⁰ First, *CDT III* creates additional uncertainty in the law by including an ambiguous safe harbor provision and providing an unclear precedent to magistrate judges.³²¹ The safe harbor’s ambiguity stems from the apparent lack of protection it provides.³²² According to Kozinski’s concurring opinion, following the Dicta purportedly “offers the government a safe harbor . . .” in that “heeding this guidance will significantly increase the likelihood that the searches and seizures of electronic storage that they authorize will be deemed reasonable and lawful.”³²³ Safe harbors generally provide the follower with a rebuttable presumption that his or her conduct is lawful. “[S]ignificantly increas[ing] the likelihood” that conduct will be lawful is not the same thing.³²⁴ Moreover, it is not entirely clear how the government benefits from this safe harbor. *CDT III* provides an illustrative example.³²⁵ If the government followed

312. *Id.*

313. Orin Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 VA. L. REV. 1241, 1292–93 (2010).

314. *Compare* United States v. Kim, 677 F. Supp. 2d 930, 946–47 (S.D. Tex. 2009), *with* United States v. Mann, 592 F.3d 779, 785–86 (7th Cir. 2010).

315. *CDT II*, 579 F.3d 989.

316. *CDT III*, 621 F.3d 1162 (9th Cir. 2010).

317. *Id.* at 1172, 1175, 1178.

318. *Compare CDT II*, 579 F.3d 989, *with CDT III*, 621 F.3d 1162.

319. *See CDT III*, 621 F.3d 1162.

320. *Compare CDT II*, 579 F.3d 989, *with CDT III*, 621 F.3d 1162.

321. *CDT III*, 621 F.3d 1162 (majority opinion), 1178 (Kozinski, C.J., concurring).

322. *Id.* at 1178.

323. *Id.*

324. *CDT III*, 621 F.3d at 1178 (Kozinski, C.J., concurring).

325. *CDT III*, 621 F.3d 1162.

the Dicta and was nonetheless sued, its actions may be presumed lawful by the safe harbor.³²⁶ However, following the Dicta requires the government to “forswear reliance on the plain view doctrine.”³²⁷ If the government did so in *CDT III*, it would have only seized the test results for the ten BALCO players. There would be no improper seizure of the List, and therefore no litigation. What then would be left to litigate? Certainly, the MLBPA and CDT could still sue the government for other wrongful conduct, but by definition that conduct would not be covered (and therefore) not protected by the safe harbor.³²⁸ The foregoing illustration suggests that the safe harbor’s protection is illusory: following the Dicta will either prevent the government from engaging in conduct resembling a fourth amendment violation or will fail to protect it from conduct that would be unlawful with or without the safe harbor. It would seem unwise for a federal investigator in the Ninth Circuit to “heed[] this guidance” knowing that it is not Ninth Circuit precedent and the protection it offers is dubious.³²⁹

Furthermore, *CDT III* provides no additional clarity to a magistrate judge evaluating a warrant application.³³⁰ She can either follow or not follow the Dicta. If she ignores the Dicta, she can cite the per curiam opinion in her defense.³³¹ If she follows the Dicta, she can cite the Kozinski concurrence.³³² In other words, *CDT III* leaves magistrate judges in essentially the same position they were in prior to the decision. The case ultimately has little precedential value and perhaps little importance in the development of search and seizure law.

Or does it? The second conclusion—that the per curiam opinion contains an apparent and misleading drafting error—derives from its penultimate paragraph, which reads:

Everyone’s interests are best served if there are clear rules to follow that strike a fair balance between the legitimate needs of law enforcement and the right of individuals and enterprises to the privacy that is at the heart of the Fourth Amendment. *Tamura* has provided a workable framework for almost three decades, and might well have sufficed in this case had its teachings been followed. We have updated *Tamura* to apply to the daunting realities of electronic searches.³³³

A version of the last sentence above also appears in *CDT II*.³³⁴ The *CDT II*

326. *See id.* at 1178 (Kozinski, C.J., concurring).

327. *Id.*

328. For example, if a government investigator assaulted CDT personnel, the victims could sue the investigator for damages. *See infra* Part IV.A.2 (discussing *Bivens* action). This conduct is unrelated to the search and seizure, and therefore, by definition, outside the scope of the safe harbor. *See CDT III*, 621 F.3d at 1178 (Kozinski, C.J., concurring).

329. *See CDT III*, 621 F.3d at 1178 (Kozinski, C.J., concurring).

330. *CDT III*, 621 F.3d 1162.

331. *Id.*

332. *Id.* at 1178 (Kozinski, C.J., concurring).

333. *Id.* at 1177 (per curiam).

334. *Compare CDT II*, 579 F.3d 989, 1006 (9th Cir. 2009) (“We believe it is useful, therefore, to update *Tamura* to apply to the daunting realities of electronic searches . . .”), *with CDT III*, 621 F.3d at 1177.

opinion also includes the Dicta, which of course is the “update[.]” to *Tamura*.³³⁵ *CDT III*, on the other hand, no longer contains the Dicta yet claims that the opinion “updated *Tamura*.”³³⁶ One searches in vain for anything in *CDT III* resembling a discussion of *Tamura* in a forward looking manner.³³⁷ It would be illogical to argue the effect of this sentence is to read the Dicta into the opinion. Thus, without more, this sentence is a drafting error that should have been altered or deleted. Instead, it remains on the pages of the Federal Reporter as a further reminder of the uncertainty associated with search and seizure law in the digital age.

In sum, *CDT III* contributed little, if anything, to computer search and seizure law.³³⁸ The law failed to protect the MLB players in 2004, and still lacks the clarity needed to protect future parties in interest going forward. As one commentator notes, “Ex ante limitations on the execution of computer warrants have arisen from the best of intentions.”³³⁹ The next two Subsections explore these intentions as applied to the MLB players in this case.

2. The Rationale for Guidance

Throughout what is now the per curiam opinion, the en banc panel took issue with the government’s actions pursuant to the BALCO investigation.³⁴⁰ It noted how “[m]ore than one of the judges involved in this case below . . . felt misled or manipulated by the government’s apparent strategy of moving from district to district and judicial officer to judicial officer in pursuit of the same information, and without fully disclosing its efforts elsewhere.”³⁴¹ Additionally, the court noted, “It is not surprising, then, that all three of the district judges below were severely troubled by the government’s conduct in the case.”³⁴² Simply put, thirteen federal judges felt that the government’s actions were wrong.³⁴³

As previously discussed, the *CDT III* opinion is essentially *CDT II* minus the Dicta.³⁴⁴ When Chief Judge Kozinski authored *CDT II*, he faced a considerable

335. *CDT II*, 579 F.3d at 1006.

336. *CDT III*, 621 F.3d at 1177.

337. Requiring the government to “fully disclose to each judicial officer prior efforts in other judicial fora to obtain the same or related information, and what those efforts have achieved,” is indeed part of the Dicta. *CDT III*, 621 F.3d at 1175. However, without more, this one point of guidance can simply be read as a good procedural reform and not necessarily as an update to *Tamura*. If this could be read as an update, it would have the effect of reading the concurring opinion into the per curiam opinion. Similarly, a charge to magistrate judges to exercise “greater vigilance . . . in striking the right balance between the government’s interest in law enforcement and the rights of individuals to be free from unreasonable searches and seizures” is no update to the *Tamura* guidance. *Id.* at 1777.

338. *Id.* at 1162.

339. Kerr, *supra* note 313, at 1292.

340. *CDT III*, 621 F.3d 1162.

341. *Id.* at 1175.

342. *Id.* at 1177 (citing language from district judges and Circuit Judge Thomas).

343. The thirteen judges are: the three district court judges who ruled against the government; Circuit Judge Thomas, the dissenter in *CDT I*; and the nine circuit judges who comprise the majority in *CDT III*. See *supra* Part II.C.

344. See *supra* Parts II.C.2, III.C.1.

dilemma in deciding how to remedy the government's wrongdoing.³⁴⁵ His ability to protect the rights of the players was limited. Already, he noted, "[S]ome players appear to have suffered this very harm [of public disclosure] as a result of the government's seizure."³⁴⁶ He was presumably familiar with *The Florida Star v. B.J.F.*, and knew the players would have a hard time suing the media.³⁴⁷ Moreover, he likely knew that neither the U.S. government nor the states have enacted statutes providing for a damages remedy in most cases where the government has mishandled confidential information.³⁴⁸ Finally, he may have realized that the MLBPA likely cannot seek a *Bivens* action against Jeff Novitzky, the lead case agent, by application of the qualified immunity defense.³⁴⁹

Instead, Kozinski apparently elected to protect the rights of future persons in the players' position. Knowing that the Supreme Court previously rejected the notion that different rules are necessary for third party searches, Kozinski applied the rules to everyone.³⁵⁰ His remedy, the Dicta, is summarized as follows:

1. Magistrate judges should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.
2. Segregation and redaction of electronic data must be done either by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, the government must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.
3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.
4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.
5. The government must destroy or, if the recipient may lawfully possess it, return nonresponsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.³⁵¹

Each item addresses a different government wrong. The first point would prevent the government from reaping the benefits of Novitzky's fishing expedition. The second point would prevent Novitzky from performing the initial inspection of the electronic data. The third point would prevent "the government's apparent strategy of moving from district to district and judicial officer to judicial officer in

345. *CDT II*, 579 F.3d 989 (9th Cir. 2009).

346. *Id.* at 1003.

347. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

348. *Cf. id.* See also *infra* Part IV.B.2 (discussing rape shield laws, only one of which provides for a damages remedy).

349. See *infra* Part IV.A.2 (determining availability of *Bivens* action against Novitzky).

350. *Zurcher v. Stanford Daily*, 436 U.S. 547, 553, 559 (1978) (cited in Government's Brief, *supra* note 141, at 11).

351. *CDT III*, 621 F.3d 1162, 1180 (9th Cir. 2010) (Kozinski, C.J., concurring) (citations omitted).

pursuit of the same information, and without fully disclosing its efforts elsewhere.”³⁵² The fourth point would prevent Novitzky from “intentionally and volitionally scroll[ing] right on the spreadsheet [containing the positive test results] . . . ‘to see if there was anything above and beyond that which was authorized for seizure in the initial warrant.’”³⁵³ Finally, the last point would prevent the protracted litigation that resulted from the government retaining the test results.

Overall, the Dicta simply “update[s] *Tamura* to apply to the daunting realities of electronic searches.”³⁵⁴ *Tamura* has not been overturned since it was decided in 1982; it seems only logical to modernize the decision for the digital age.³⁵⁵ The same nine judges voted in favor of the original *CDT II* opinion and the current per curiam opinion.³⁵⁶ Four of those judges joined Kozinski’s concurrence.³⁵⁷ Even after the government’s pointed brief attacking the legitimacy of the Dicta, Kozinski’s guidance fell one vote short of remaining in the majority opinion.³⁵⁸ It appears that the judges felt so strongly about the injustice that the government caused the MLBPA and the inadequacy of the current law to prevent future recurrences that they nearly risked certiorari (and possibly reversal) by the Supreme Court.

3. The Tension the Dicta Seeks to Resolve

To borrow from the Chief Judge, “A word about *Tamura* is in order, and this seems as good a place as any for it.”³⁵⁹ *Tamura*, like *CDT III*, involved computers and documents.³⁶⁰ At the time, the court worried that “comparatively rare instances” would arise where hard copy documents “are so intermingled that they cannot feasibly be sorted on site.”³⁶¹ Although the opinion does not use the term “plain view,” the court’s concern was primarily to avoid the expansion of this doctrine.³⁶² Even if those “comparatively rare instances” became commonplace, the tension between law enforcement objectives and individual privacy rights would be limited to the storage space in a given room or rooms.³⁶³ Computers in 1982 lacked the hard drive capacity of computers today, so the machines

352. *Id.* at 1175 (per curiam).

353. *Id.* at 1181 (Bea, J., concurring).

354. *CDT II*, 579 F.3d 989, 1006 (9th Cir. 2009).

355. *United States v. Tamura*, 694 F.2d 591 (9th Cir. 2004).

356. *CDT II*, 579 F.3d 989; *CDT III*, 621 F.3d 1162.

357. *CDT III*, 621 F.3d at 1178 (Kozinski, C.J., concurring).

358. *See CDT III*, 621 F.3d at 1178 (Kozinski, C.J., concurring); Government’s Brief, *supra* note 141.

359. *CDT II*, 579 F.3d at 996.

360. *Tamura*, 694 F.2d at 594–95.

361. *Id.* at 595.

362. *See id.* (“[T]he wholesale *seizure* for later detailed examination of records not described in the warrant is significantly more intrusive, and has been characterized as ‘the kind of investigatory dragnet that the fourth amendment was designed to prevent.’”) (citation omitted); *see also id.* at 595 n.1 (citing, but not identifying by name, the “plain view” doctrine).

363. *Id.* at 595.

themselves were not storage units.³⁶⁴

Nearly three decades later, those “comparatively rare instances” have indeed become commonplace.³⁶⁵ Computers have evolved into ubiquitous repositories of data, becoming frequent targets of search warrants.³⁶⁶ Remarkably, the *Tamura* guidance, which requires the sealing and holding of documents pending approval by a neutral magistrate, is equipped to deal with this new reality.³⁶⁷ To the contrary, the “plain view” doctrine is not.³⁶⁸ The tension at the heart of *Tamura* has expanded from the four corners of a room to the boundless capacity of today’s computer.³⁶⁹

The distinction between *Giberson* and *CDT III* illustrates the difficulty of policing electronic searches.³⁷⁰ *Giberson* allows the innocent agent to seize the child pornography he stumbles upon using search technology, whereas *CDT III* prevents the government from retaining the fruits of Novitzky’s fishing expedition.³⁷¹ Yet the investigator’s intent, arguably the most important distinguishing factor between the two cases, is not always so important, let alone readily identifiable.³⁷² In cases where the investigator’s intent is not dispositive, there are no safeguards to prevent the government from performing wholesale seizures.³⁷³

Moreover, the target of the search warrant is fraught with ambiguity. Computers are not the only sources of electronic data. Information is also stored on discs and external drives as small as a thumb.³⁷⁴ If unrestrained, investigators can use the “plain view” doctrine to search and seize almost anything.³⁷⁵ Without proper

364. In the early 1980s, hard drive capacity was five megabytes, whereas today’s hard drives can store up to two terabytes (or 400,000 times greater capacity). *Amazing Facts and Figures About the Evolution of Hard Disk Drives*, PINGDOM (Feb. 18, 2010), <http://royal.pingdom.com/2010/02/18/amazing-facts-and-figures-about-the-evolution-of-hard-disk-drives>.

365. *Tamura*, 694 F.2d at 595.

366. See *Amazing Facts and Figures About the Evolution of Hard Disk Drives*, *supra* note 364; see also *CDT III*, 621 F.3d 1162, 1176 (9th Cir. 2010).

367. See *Tamura*, 694 F.2d at 595–96.

368. See *Mumford & Kaplan*, *supra* note 140 (“What can be seen with eyes is often far less expansive than what can be discovered with search technologies, and the amount of information in a room, a house, a file pales in comparison to the volume of data, the millions of documents, that even a single hard drive can contain.”).

369. *Tamura*, 694 F.2d 591.

370. Compare *United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008), with *CDT III*, 621 F.3d 1162. See *supra* Part III.B.3.a (noting the following distinctions: the availability of third party assistance in the search, the ability of the investigator to avoid the incriminating material and the investigator’s mens rea).

371. Compare *Giberson*, 527 F.3d 882, with *CDT III*, 621 F.3d 1162. See *supra* Part III.B.3.a.

372. Compare *Giberson*, 527 F.3d at 885 (noting that the case agent immediately called a supervisor for direction upon finding the incriminating images), with *CDT III*, 621 F.3d at 1171 (“The government agents obviously were counting on the search to bring constitutionally protected data into the plain view of the investigating agents.”).

373. Cf. *Mumford & Kaplan*, *supra* note 140 (“For too long . . . searching agents simply mirrored hard drives, taking all the electronic data present back to the lab for examination.”).

374. See *Amazing Facts and Figures About the Evolution of Hard Disk Drives*, *supra* note 364.

375. *CDT III*, 621 F.3d at 1171. The court writes:

Since the government agents ultimately decide how much to actually take, this will create a

protections in place—guidance or otherwise—private citizens will continue to witness “the ‘erosion of Fourth Amendment rights.’”³⁷⁶ The BALCO investigation has demonstrated that the government may not always be the best source of that protection. To that end, this Note proposes the remedies described in Part IV.

IV. REMEDIES

Two separate injuries occurred in the course of the BALCO investigation. First, Major League Baseball players whose confidential drug testing information was stored at CDT and Quest were subject to an unreasonable search and seizure under the Fourth Amendment.³⁷⁷ Second, to date, four of the players with positive test results have fallen victim to an improper disclosure of their confidential information while this information was under government control.³⁷⁸

Section A examines existing remedies available for each injury, ultimately concluding that these remedies are inadequate. Section B then proposes a civil remedy designed to protect persons from improper disclosure of sensitive information before concluding with a proposal to resolve the uncertain state of computer search and seizure law.

A. EXISTING REMEDIES

1. Rule 41(g) Motion

The Federal Rules of Criminal Procedure provide a remedy for persons aggrieved by an unlawful search and seizure of property. Those persons may file a Rule 41(g) motion for the return of that property.³⁷⁹ This motion protects the property or privacy interests impaired by the seizure.³⁸⁰ A district court must balance the four factors set forth in *Ramsden v. United States* to determine whether to allow the government to retain the property, return the property to the movant or reach a compromise solution that attempts to accommodate the interests of all parties.³⁸¹ These factors are:

- 1) whether the Government displayed a callous disregard for the constitutional rights

powerful incentive for them to seize more rather than less: Why stop at the list of all baseball players when you can seize the entire Tracey Directory? Why just that directory and not the entire hard drive? Why just this computer and not the one in the next room and the next room after that? Can't find the computer? Seize the Zip disks under the bed in the room where the computer once might have been. (citation omitted).

Id.

376. Mumford & Kaplan, *supra* note 140.

377. *CDT III*, 621 F.3d at 1177.

378. *See supra* Parts III.A.2, III.B.3.b.

379. FED. R. CRIM. P. 41(g).

380. *CDT III*, 621 F.3d at 1173. In contrast, a suppression motion under Rule 41(h) applies to criminal defendants who are seeking to exclude evidence wrongfully seized. *Id.* at 1173; *see also* FED. R. CRIM. P. 41(h). As the players are not criminal defendants here, this motion is not applicable as a remedy. *CDT III*, 621 F.3d at 1172.

381. *CDT III*, 621 F.3d at 1173.

of the movant; 2) whether the movant has an individual interest in and need for the property he wants returned; 3) whether the movant would be irreparably injured by denying return of the property; and 4) whether the movant has an adequate remedy at law for the redress of his grievance.³⁸²

CDT and the MLBPA filed at least four of these motions in three separate districts during a two month span in 2004.³⁸³ Each district court ruled in favor of the movant, resulting in the Illston Order, Cooper Order and Mahan Order.³⁸⁴ In *CDT III*, the Ninth Circuit dismissed the government's appeal of the Cooper Order as untimely and affirmed the Mahan Order.³⁸⁵ In affirming the Mahan Order, the court balanced the four *Ramsden* factors in favor of the MLBPA.³⁸⁶ It quickly dispensed with three of the four factors.³⁸⁷ First, the MLBPA was "plainly aggrieved by the deprivation" as the seizure worked a breach of its negotiated confidentiality agreement, a violation of its members' privacy interests and an interference with the operation of its business.³⁸⁸ Second, some of its members already suffered "irreparable injury" because the property was not returned.³⁸⁹ Third, the government conceded that the MLBPA lacked an adequate remedy at law.³⁹⁰ Finally, the court balanced "[t]he only *Ramsden* factor fairly in dispute"—whether the government showed a callous disregard for the constitutional rights of the MLBPA—in favor of the MLBPA, agreeing with the conclusion of Judge Mahan and the other district court judges.³⁹¹

As a result of the Ninth Circuit decision, the MLBPA will get its test results back.³⁹² For those players who did not test positive, this remedy is adequate (albeit six years late). However, this remedy is inadequate for any player who tested positive, particularly the four players whose positive test results were disclosed to the media.³⁹³ The court's final decision cannot protect their privacy interests from such improper disclosures.³⁹⁴

Moreover, a Rule 41(g) motion is ineffective in general to prevent the dissemination of private information. The court can order the physical return of the item(s) containing that information (in this case, the hard drive image and the urine specimens), but can do nothing to prevent a tipster from revealing what he or she

382. *Ramsden v. United States*, 2 F.3d 322, 325 (9th Cir. 1993).

383. *See infra* Appendix.

384. *Id.*

385. *CDT III*, 621 F.3d at 1177. The government did not appeal the Illston Order. *Id.* at 1170.

386. *Id.* at 1174.

387. *Id.* at 1173.

388. *Id.*

389. *Id.*

390. *Id.*; *CDT I*, 513 F.3d 1085, 1103 (9th Cir. 2008). Neither opinion sheds any light on the rationale behind the government's concession.

391. *CDT III*, 621 F.3d at 1174.

392. *Id.* at 1177–78; *List of Positive Tests Barred from Courts*, *supra* note 147.

393. *Cf. id.* at 1174 ("The risk to the players associated with disclosure . . . is very high. Indeed, some players appear to have already suffered this very harm as a result of the government's seizure. . . . Judge Mahan certainly did not abuse his broad discretion when balancing these equities [in granting their Rule 41(g) motion].").

394. *See id.*

knows.³⁹⁵ Thus, a Rule 41(g) motion is inadequate protection where a player's information has been unlawfully seized.

2. *Bivens* Action

In general, persons can sue federal law enforcement officials in their personal capacities for monetary damages under a judge-made doctrine introduced in *Bivens v. Six Unknown Federal Narcotics Agents*.³⁹⁶ The Supreme Court has been very hesitant to imply other private actions for money damages.³⁹⁷ Instead, the Court has limited the expansion of the *Bivens* doctrine.³⁹⁸ Consistent with this posture, circuit courts including the Ninth Circuit have been nearly unanimous in concluding that *Bivens* actions are unavailable for alleged constitutional violations by Internal Revenue Service ("IRS") agents and officials pursuant to the assessment and collection of taxes.³⁹⁹

The law is a little less certain when the IRS agent is not assessing or collecting federal taxes. IRS special agents investigate federal crimes within the jurisdiction of the IRS.⁴⁰⁰ This jurisdiction extends beyond tax cases to include "bankruptcy fraud, money laundering, identity theft, obstruction of justice, and perjury, as well as offenses under [the] Bank Secrecy Act."⁴⁰¹ These actions are clearly different from the tax assessment and collection activities to which *Bivens* does not apply.⁴⁰² In fact, some circuits have allowed *Bivens* claims against IRS special agents for alleged fourth amendment violations.⁴⁰³ It appears that the Ninth Circuit is in accord.⁴⁰⁴ Thus, an individual can probably bring a *Bivens* action in the Ninth Circuit against an IRS special agent.

Government officials performing discretionary functions have a qualified immunity defense that shields them from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁴⁰⁵ The defense of qualified

395. See FED. R. CRIM. P. 41(g); *supra* Part III.A.2.

396. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* covers claims against federal law enforcement officers. *Id.* at 395. If state and local law enforcement officials were also involved, the players have a similar remedy under 42 U.S.C. § 1983 (2006). The analysis is identical under either cause of action. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

397. *Judicial Watch Inc. v. Rossotti*, 317 F.3d 401, 409 (4th Cir. 2003).

398. *Id.* (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001)).

399. See *Adams v. Johnson*, 355 F.3d 1179, 1184 (9th Cir. 2004) ("The First, Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all held *Bivens* actions inapplicable for claims arising from federal tax assessment or collection."); *accord id.* at 1186.

400. ROBERT S. FINK, *TAX CONTROVERSIES: AUDITS, INVESTIGATIONS, TRIALS* § 5.02 (2009).

401. *Id.* at § 5.02 n.32.

402. See *Adams*, 355 F.3d at 1184, 1186.

403. See, e.g., *Nat'l Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521, 1527 (10th Cir. 1994).

404. See *Tekle v. United States*, 511 F.3d 839, 844 (9th Cir. 2007) (reversing grant of summary judgment in favor of defendants, which included IRS special agents, on plaintiff's *Bivens* action); *Vaillancourt v. United States*, 188 F.3d 516 (9th Cir. 1999) (unpublished table decision) (dismissing *Bivens* action against IRS special agents as time barred).

405. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

immunity is subject to a two part test.⁴⁰⁶ A court “must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.”⁴⁰⁷ The Supreme Court has determined that deciding the constitutional question prior to the qualified immunity question has financial, legal, social and personal benefits.⁴⁰⁸

Jeff Novitzky, the lead case agent in the BALCO investigation, was, at the time, an IRS special agent.⁴⁰⁹ Therefore, he probably can be sued under *Bivens* for violations of MLB players’ fourth amendment rights.⁴¹⁰ However, he will likely succeed in invoking the qualified immunity defense.⁴¹¹ Under the first prong, the players have alleged the deprivation of their fourth amendment rights pursuant to the government seizure of the Tracey Directory.⁴¹² *CDT III* held this seizure to be unlawful, thereby satisfying this prong.⁴¹³ On the other hand, the second prong is problematic for the players.⁴¹⁴ The “plain view” doctrine in the Ninth Circuit was not “clearly established at the time of the violation” and remains unclear after *CDT III*.⁴¹⁵ Kozinski’s effort to update *Tamura* would not be necessary if the law was already settled. Therefore, the qualified immunity defense will likely bar the players’ *Bivens* claim against Novitzky.

This is a disturbing result for two reasons. First, Novitzky’s questionable actions led to the common law and constitutional privacy violations suffered by the players. The decision to raid BALCO was largely due to Novitzky’s efforts in a green dumpster.⁴¹⁶ Novitzky turned down a document containing the drug test results for the ten BALCO players, instead choosing to seize the Tracey Directory.⁴¹⁷ Finally, it was Novitzky who “later briefly peruse[d] [the Tracey Directory] to see if there was anything above and beyond that which was authorized for seizure in the initial warrant.”⁴¹⁸ It is certainly fair to conclude that, but for Jeff Novitzky, there would be no List. Without a List, there would be no test results to leak.

Second, Novitzky may have had ulterior motives for participating in the BALCO investigation. He reportedly hoped to profit from his involvement, talking

406. *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)).

407. *Id.*

408. *Id.*

409. *CDT I*, 513 F.3d 1085, 1092, 1093 n.20 (9th Cir. 2008); *see also* Pessah, *supra* note 82.

410. *See supra* notes 402–04 and accompanying text.

411. *See Wilson*, 526 U.S. at 609.

412. *See CDT III*, 621 F.3d 1162, 1165 (9th Cir. 2010). A claim that one’s fourth amendment rights have been violated is inherent in a Rule 41(g) motion. *See* FED. R. CRIM. P. 41(g) (“A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return.”).

413. *CDT III*, 621 F.3d at 1177–78.

414. *See Wilson*, 526 U.S. at 609.

415. *See id.*; *see also supra* Part III.C.1.

416. *See supra* notes 88–89 and accompanying text.

417. *See supra* notes 103–06 and accompanying text.

418. *CDT III*, 621 F.3d at 1188 n.6 (Callahan, J., dissenting).

openly with a colleague about securing a book deal.⁴¹⁹ To that end, he apparently tipped off the media about the BALCO raid in September 2003.⁴²⁰ He also used questionable tactics during the execution of the warrant to search CDT and is accused of lying in his investigative report.⁴²¹ Moreover, he allegedly had a personal vendetta against Barry Bonds, a BALCO client.⁴²² Granted, much of the case for Novitzky's ulterior motives relies on hearsay evidence.⁴²³ Nonetheless, Novitzky still seized the Tracey Directory with the intent to "briefly peruse it to see if there was anything above and beyond that which was authorized for seizure in the initial warrant."⁴²⁴ In the process, he dragged the rest of the MLBPA through six years of protracted litigation and four improper disclosures.⁴²⁵ Yet he is protected under the shield of qualified immunity from a suit for money damages.⁴²⁶

B. PROPOSED REMEDIES

As made clear in Section A, the MLBPA has no adequate remedy at law against Jeff Novitzky and the other federal investigators due to operation of the qualified immunity defense.⁴²⁷ Furthermore, Alex Rodriguez, Sammy Sosa, Manny Ramirez and David Ortiz have no adequate remedy for their additional injury due to improper disclosure of their 2003 Survey Testing results.⁴²⁸

Extending a remedy to allow the MLBPA to sue Novitzky would be both difficult and unproductive. His defense of qualified immunity is not easily

419. Littman, *supra* note 87. Novitzky claims his comments were in jest. Pessah, *supra* note 82. However, in a sworn statement before Judge Illston, Novitzky denied any such conversation took place. Jonathan Littman, *Novitzky Was Target of Secret Probe*, YAHOO! SPORTS (Feb. 4, 2009), <http://sports.yahoo.com/mlb/news?slug=li-novitzky020309>.

420. Littman, *supra* note 87 ("The search of BALCO, which was supposed to remain secret for countless investigative reasons, now resembles an episode of *Cops*."); Pessah, *supra* note 82.

421. Pessah, *supra* note 82 (describing allegations that Novitzky lied about Victor Conte's confession and questionable tactics by Novitzky during the investigation, including his decision to image the hard drive and inspect its contents). The IRS investigated Novitzky, but ultimately cleared him of any wrongdoing. *Id.*; see also Littman, *supra* note 87 (detailing IRS internal investigation on Novitzky and its consequences: favorable plea deals for Conte and Greg Anderson, and suggestion that Bonds may similarly benefit).

422. Littman, *supra* note 87. Novitzky is reported as saying:

"That Bonds. He's a great athlete," White says Novitzky told him. "You think he's on steroids?" White took a minute before replying . . . "I think they're all on steroids. All of our top major leaguers." Novitzky seemed to only care about Bonds. "He's such an asshole to the press," he said. "I'd sure like to prove it."

Id. Novitzky, not surprisingly, claimed he had no idea why White thought he was out to get Bonds. Pessah, *supra* note 82. In a sworn statement before Judge Illston, Novitzky also denied initiating the BALCO investigation "for personal reasons against any of its subjects or witnesses." Littman, *supra* note 87.

423. See *supra* note 422.

424. *CDT III*, 621 F.3d 1162, 1188 n.6 (9th Cir. 2010) (Callahan, J., dissenting).

425. See *supra* Parts II.C, III.A.2.

426. See *supra* notes 409–15 and accompanying text.

427. See *supra* Part IV.A.

428. See *supra* Part III.A.2.

repudiated.⁴²⁹ Moreover, a successful *Bivens* action against Novitzky is unlikely to yield a large monetary award.⁴³⁰ Therefore, this Section proposes a statutory remedy to protect against public disclosure of sensitive information under government control and advocates for the further amendment of the Federal Rules of Criminal Procedure to further clarify search and seizure law for the digital age.

1. Damages Claim Against the Government

Congress and state legislatures should statutorily extend the damages remedy contemplated in *Florida Star v. B.J.F.*⁴³¹ In this case, a newspaper published the name of a rape victim it obtained from a police report found in the sheriff's department pressroom.⁴³² The Supreme Court held that the newspaper was not liable for the publication.⁴³³ In addressing the disclosure of sensitive information, the Court observed:

To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and *extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination.* Where the information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.⁴³⁴

Nevertheless, it does not appear that Congress or any state has extended such a remedy against itself or its officials that covers this situation.⁴³⁵ Thus, the four players mentioned above have no remedy for their injuries suffered as a result of the improper disclosure. They have, at best, a remote chance of identifying the individual(s) responsible. If identification were possible, recovery in a suit for damages would be fairly limited given that the culprits are likely government employees.⁴³⁶ If identification were to prove impossible, the players would need to

429. See *supra* notes 409–15 and accompanying text.

430. At the time of the BALCO raid, Novitzky was making \$145,000, which is top salary for a special agent. Pessah, *supra* note 82. As a result, a multimillion dollar damage award may leave him insolvent, precluding collection and therefore remediation of the injury.

431. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

432. *Id.* at 526–27.

433. *Id.* at 541.

434. *Id.* at 534 (emphasis added).

435. Several states have enacted rape shield laws aimed at limiting the information that the government can disseminate. See Daniel M. Murdock, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177, 1187 n.102 (2007) (citing eleven such statutes). These statutes are analogous to the remedy sought here, but are limited in application to victims of sex offenses. See, e.g., N.Y. CIV. RIGHTS LAW § 50-c (1992). Moreover, not all of these statutes provide for a private right of action. Compare CAL. PENAL CODE § 293 (Deering 2011) (no private right of action), with N.Y. CIVIL RIGHTS LAW § 50-c (1992) (private right of action for improper disclosure of a sex offense).

436. See, e.g., *supra* note 430 (describing Novitzky's salary, which was the top salary for his position at the time).

subpoena *Sports Illustrated* or the *New York Times*, the two media outlets which reported the positive results, and make a compelling argument for overcoming the qualified reporter's privilege.⁴³⁷ Even assuming a successful argument could be made, the players have no one to sue because Congress has not extended such a remedy against the federal government.⁴³⁸ A damages remedy against the government is necessary regardless of the merits of the government seizure. Absent this statutory remedy, these media leaks would go unpunished.

Congress and each state legislature should therefore enact legislation that provides a damages remedy against any person, entity, State or the United States for improper disclosure of information under court seal.⁴³⁹ The remedy must be civil, rather than a criminal penalty. Because the source of the disclosure is often impossible to identify, it is more beneficial to the victim to be able to sue the government itself.⁴⁴⁰ In addition, criminal penalties, which may prove to be an effective deterrent, do not compensate the victim for the injury.⁴⁴¹ This statutory remedy will also indirectly serve a deterrent function. If the government knows it will be (vicariously) liable, then it will put into place stronger procedures to preserve confidentiality, much like banks have created anti-money-laundering departments to regulate the conduct of their employees.

2. Clarify Modern Search and Seizure Law

Both the Government Brief and Judge Callahan's dissent in *CDT III* argued that the Dicta conflicted with the recent amendments to Federal Rule of Criminal Procedure 41(f)(1)(B), which went into effect December 1, 2009.⁴⁴² The Rule now reads:

In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.⁴⁴³

The Dicta, however, requires the government to "provide the issuing officer with a return disclosing precisely what it has obtained as a consequence of the search, and what it has returned to the party from whom it was seized."⁴⁴⁴ Furthermore, the government "should not retain copies of such returned data unless

437. Roberts & Epstein, *supra* note 73.

438. *See supra* note 435.

439. Persons are included in this remedy because the government or its agents are not necessarily always the source of the disclosure. *See, e.g.,* Egelko, *supra* note 220 (noting that source of leaked grand jury testimony was former attorney representing BALCO).

440. *See* Murdock, *supra* note 435, at 1196.

441. Indeed, a criminal penalty already exists: contempt of court. *See generally* 17 C.J.S. *Contempt* § 3 (2010). Unfortunately, this proved to be an ineffective deterrent in this case.

442. *CDT III*, 621 F.3d 1162, 1183 (9th Cir. 2010) (Callahan, J., dissenting); Government's Brief, *supra* note 141, at 12–13.

443. FED. R. CRIM. P. 41(f)(1)(B).

444. *CDT III*, 621 F.3d at 1179 (Kozinski, C.J., concurring).

it obtains specific judicial authorization to do so.”⁴⁴⁵

Assuming Rule 41(f)(1)(B) supersedes this point of guidance, the newly amended Rule still lacks sufficient clarity.⁴⁴⁶ In particular, it squarely conflicts with the holding in *CDT III*.⁴⁴⁷ A federal investigator following Rule 41(f)(1)(B) can do in a future case exactly what Novitzky did here.⁴⁴⁸ He or she can enter CDT with a warrant, make a determination (good faith or otherwise) that the data is too intermingled to be reasonably sorted onsite, and seize or copy the electronic storage media.⁴⁴⁹ After returning to the office, the investigator must describe, at a minimum, the physical storage media seized or copied, but otherwise can keep a copy of what was taken.⁴⁵⁰ Even though the majority does not address Rule 41(f)(1)(B), the judges were certainly aware of the new amendment, having read the Government Brief.⁴⁵¹ Therefore, *CDT III* cannot simply be distinguished from Rule 41(f)(1)(B) on its facts.

Moreover, what stops *CDT III* from arising again? The “plain view” doctrine might, but its application to computer searches and seizures is not entirely clear.⁴⁵² The answer may turn on whether the case is more like *Giberson* or *CDT III*, cases whose key distinctions lay in the investigator’s intent.⁴⁵³ This standard is unworkable in cases where intent cannot be easily ascertained. The advisory committee notes are inapposite.⁴⁵⁴ Federal investigators in this circuit need a clearer standard than that provided in the Rule to avoid violating the fourth amendment rights of the subjects of future investigations.

Before discussing the proper remedy, we should ask whether a case like *CDT III* will arise again. Undoubtedly, any warrant authorizing search of a computer will raise concerns similar to those of the MLBPA. But how likely will baseball players, or professional athletes in general, be subject to this situation again? Interestingly enough, the seeds for a *CDT* redux are already being planted. MLB Commissioner Bud Selig began testing certain minor league players (not subject to the collective bargaining agreement) for HGH in 2010.⁴⁵⁵ Since this process involves a blood test, MLB and the MLBPA will need to agree to test for HGH in the next collective bargaining agreement—the current agreement expires after the 2011 season.⁴⁵⁶ It is easy to imagine the parties agreeing to anonymous testing

445. *Id.*

446. *Id.* at 1183 (Callahan, J., dissenting) (“Presumably these suggestions are superseded by the detailed amendments to Rule 41, which provide comprehensive guidance in this area.”).

447. *Id.* at 1177–78.

448. FED. R. CRIM. P. 41(f)(1)(B).

449. *See id.*

450. *See id.*

451. Government’s Brief, *supra* note 141.

452. *See supra* Part III.C.1.

453. *See supra* Part III.B.3.a (comparing *Giberson* with *CDT III*).

454. *See* FED. R. CRIM. P. 41(f)(1) advisory committee’s note (making no mention of the “plain view” doctrine).

455. *See Minor Leaguers to Be Tested for HGH, supra* note 60. It is unclear whether the results will remain anonymous. *Cf. id.*

456. *See generally Major League Baseball Players Association: Frequently Asked Questions, supra* note 263.

initially, given the precedent set by the 2003 testing. For *CDT* to arise again, the government just needs to find a drug ring to bust.⁴⁵⁷

To clarify the law for future investigations, the Supreme Court should amend Rule 41(f)(1)(B) to address the limits of the “plain view” doctrine in electronic search and seizures.⁴⁵⁸ The exact parameters of this doctrine in this context are unclear and should be explored through the Court’s rule making procedure.⁴⁵⁹ To that end, this Note proposes that the Court add the following as the penultimate sentence in Rule 41(f)(1)(B):

Segregation and redaction of electronic data must be done either by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, the government must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.⁴⁶⁰

This amendment does not go so far as to require the government to “forswear reliance on the “plain view” doctrine.”⁴⁶¹ Nevertheless, it establishes a “Chinese wall” that prevents federal agents, regardless of motive, from expanding the “plain view” doctrine at will in a federal investigation. It also ensures that innocent third parties like the MLBPA are not victimized by the seizure of electronic storage media. If this rule had been in effect in April 2004, or if Novitzky had simply followed the warrant protocol, Novitzky would have received the test results of the ten BALCO players, and those players only, without further issue.⁴⁶² This rule provides stronger protection than a well policed warrant application process because it removes the opportunity to handle the evidence from the Novitzkys of the world. In the end, the government will get its evidence and the public, in particular the players, will finally be able to rest easy.

V. CONCLUSION

In the first paragraph of the *CDT III* opinion, the en banc panel writes: “This case is about a federal investigation into steroid use by professional baseball players. More generally, however, it’s about the procedures and safeguards that federal courts must observe in issuing and administering search warrants and subpoenas for electronically stored information.”⁴⁶³ For the MLBPA, and

457. It may have already found one. See *Anthony Galea on Path to Trial*, ESPN.COM (Oct. 14, 2010), <http://sports.espn.go.com/espn/news/story?id=5686404> (describing indictment of Anthony Galea, a Canadian doctor who treated Tiger Woods and Alex Rodriguez, who is accused of smuggling HGH and other drugs across the U.S.-Canadian border).

458. FED. R. CRIM. P. 41(f)(1)(B).

459. As discussed in Part III.C.1, the “plain view” doctrine remains unclear following *CDT III*. As discussed in this Part, IV.B.2, the scope of the “plain view” doctrine is unclear under the newly amended Rule 41(f)(1)(B).

460. See *CDT III*, 621 F.3d 1162, 1180 (9th Cir. 2010) (Kozinski, C.J., concurring) (citations omitted).

461. *Id.* at 1178.

462. See *supra* notes 108–11 and accompanying text.

463. *CDT III*, 621 F.3d at 1165–66 (per curium).

professional athletes generally, this case takes on an additional meaning: whether the law adequately protects their confidential information. As public figures, professional athletes do not have the same guarantees of privacy afforded most ordinary citizens.⁴⁶⁴ However, they should have the same privacy expectations when they contractually negotiate for them.

It may be difficult to find sympathy for the 104 players who are on a list of what the government believes to be positive test results from the 2003 Survey Testing.⁴⁶⁵ Steroids were rampant in Major League Baseball for nearly two decades.⁴⁶⁶ Despite what admitted users would like you to believe, using a performance enhancing drug, particularly one that is prohibited by the league and/or illegal under the laws of the United States, is cheating.⁴⁶⁷ PEDs may not necessarily enhance a player's performance to a level superior to that of his or her peers, but, at a minimum, they enhance recovery and allow players to perform at any level for a longer period of time.⁴⁶⁸ But this blanket condemnation ignores the fact that legal substances could have caused a positive test or that many substances that are now controlled substances were not listed on any Schedule back then.⁴⁶⁹ When viewed in this light, it is difficult to condemn the players on the List for conduct that was neither illegal nor banned by baseball.⁴⁷⁰ It is further disturbing that many are so willing to support the improper disclosures of names on the List, in clear violation of the law.⁴⁷¹

In its pursuit of a regional drug ring that may have involved money laundering, the government permitted the dumpster diving of one overzealous IRS special agent to balloon into six years of litigation and over \$50 million wasted on an outcome that would have been the same if the government had followed its own warrant protocol.⁴⁷² Major League Baseball players' constitutional and common law rights were violated in the process. Under the current state of the law, *CDT III* could easily arise again. Legislatures and the Supreme Court must fashion remedies to deter government personnel from allowing this history to repeat itself.

APPENDIX

The procedural history of *United States v. Comprehensive Drug Testing* is fairly

464. See *supra* Part III.A.1.

465. See *supra* Part I.B.

466. See *supra* Part I.

467. See, e.g., *Mark McGwire Offers Steroid Apology*, *supra* note 204 (noting that McGwire refused to back off his assertion that steroids did not help his in-game performance).

468. See Mike Gimbel, *Did Steroids Help Alex Rodriguez?*, THE HARDBALL TIMES (Feb. 12, 2009), <http://www.hardballtimes.com/main/article/did-steroids-help-alex-rodriguez>.

469. See Bloom, *supra* note 57; see also *supra* note 29 (indicating that andro was not classified as a controlled substance until 2004).

470. See *supra* note 29 (indicating that andro was not classified as a controlled substance until 2004); see also Bloom, *supra* note 57 (indicating that andro was not banned by MLB until 2004).

471. See, e.g., *Ortiz Apologizes for 'Distraction'*, *supra* note 190 (noting that past and present players have called for the names on the List to be released).

472. See Pessah, *supra* note 82.

complicated and difficult to glean from *CDT I* and *III*.⁴⁷³ This Appendix provides the interested reader with a detailed timeline of events at the district court level. As a point of reference, the government searched the premises of CDT and Quest on April 8, 2004.⁴⁷⁴

A. NORTHERN DISTRICT OF CALIFORNIA

On April 9, 2004, the MLBPA arranged an emergency hearing with Judge White regarding its motion to quash the March grand jury subpoena.⁴⁷⁵ The union sought an order restricting the government from disseminating any information it had obtained until the union could litigate the motion to quash or a Rule 41(g) motion to return the seized property.⁴⁷⁶ Judge White accepted the government's representation that it would not disseminate the information.⁴⁷⁷

On April 22, 2004, the government informed CDT in a letter that it was withdrawing the January subpoenas, which requested the drug testing information for all MLB players, and modifying the March subpoena to reflect only ten BALCO players.⁴⁷⁸ This was hardly a concession; the government now possessed the Tracey Directory.⁴⁷⁹ Moreover, the government never actually withdrew the January subpoena.⁴⁸⁰

On April 30, 2004, on the same day it filed its opposition to the union's Rule 41(g) motion, the government obtained a fifth search warrant from Magistrate Judge Howard Lloyd authorizing it to search all electronic data related to MLB drug testing in the Tracey Directory and "seize all data pertaining to illegal drug use by any member of [M]ajor [L]eague [B]aseball."⁴⁸¹ The government sought the warrant in this district because its copy of the directory was in the San Jose, California office of the IRS.⁴⁸² In support of its warrant, Novitzky's affidavit claimed:

[I]t is logical to assume that a review of the drug testing records for other players may provide additional evidence of the use of similar illegal performance-enhancing drugs which establishes a link to the charged defendants in the charged [BALCO] case, given the relatively small number of professional baseball players and the closely-knit professional baseball community.⁴⁸³

The government did not notify CDT, as the Tracey Directory was already in its

473. *CDT I*, 513 F.3d 1085 (9th Cir. 2008); *CDT III*, 621 F.3d 1162 (9th Cir. 2010).

474. *CDT I*, 513 F.3d at 1092–93.

475. *Id.* at 1121 (Thomas, J., dissenting).

476. *Id.*

477. *Id.*

478. *Id.* at 1095 n.25, 1121 (Thomas, J., dissenting).

479. *See id.* at 1093 n.20.

480. *Id.* at 1121 (Thomas, J., dissenting).

481. *Id.* at 1093–94 & n.20, 1122 (Thomas, J., dissenting).

482. *Id.* at 1094 n.20.

483. *Id.* at 1122 (Thomas, J., dissenting).

possession.⁴⁸⁴

On May 6, 2004, the government served grand jury subpoenas on CDT and Quest for the materials sought in the April 30 and May 5 search warrants.⁴⁸⁵ The subpoenas contained the names of the players who allegedly tested positive despite the government's assertion to Judge White that it would not disclose the names.⁴⁸⁶ The government also sent a letter to Quest instructing it not to disclose the existence of this subpoena for fear that any such disclosure "could impede the investigation"⁴⁸⁷ Quest complied with the May 6 subpoena and produced hundreds of pages of documents, but the government deferred CDT's compliance pending resolution of the Rule 41(g) motions.⁴⁸⁸

CDT and the MLBPA filed a Rule 41(g) motion on June 7, 2004 for return of electronic documents seized pursuant to the fifth warrant.⁴⁸⁹ On August 9, 2004, Judge Susan Illston granted their June 7 motion, known as the Illston Order.⁴⁹⁰ The government did not appeal this ruling.⁴⁹¹

On July 9, 2004, Judge White held a hearing on the motion to quash the grand jury subpoenas, but deferred action pending the outcome of the Rule 41(g) motions.⁴⁹² It does not appear that Judge White ruled on this motion.

On August 31, 2004, having lost its opposition to the June 7 motion, the government revoked its indefinite deferral of CDT's compliance with the May 6 subpoena and instructed CDT to comply by September 14.⁴⁹³ On September 13, 2004, the MLBPA filed a motion to quash the subpoena.⁴⁹⁴ On December 10, 2004, Judge Illston granted the union's motion to quash the May 6 subpoena, known as the Illston Quashal.⁴⁹⁵ The government timely appealed this ruling.⁴⁹⁶

B. CENTRAL DISTRICT OF CALIFORNIA

On April 24, 2004, the MLBPA filed a Rule 41(g) motion seeking return of the information seized from CDT.⁴⁹⁷ Six days later, the government filed its opposition to the motion, arguing that, despite CDT's agreement not to destroy or alter documents, it had "good-faith reasons to believe that CDT was detrimentally delaying the investigation"⁴⁹⁸

484. *Id.* at 1094 n.20.

485. *Id.* at 1122 (Thomas, J., dissenting).

486. *Id.*

487. *Id.*

488. *Id.* at 1095.

489. *Id.* at 1123 (Thomas, J., dissenting).

490. *Id.* at 1123–25.

491. *CDT III*, 621 F.3d 1162, 1170 (9th Cir. 2010).

492. *CDT I*, 513 F.3d at 1123 (Thomas, J., dissenting).

493. *Id.* at 1095.

494. *Id.*

495. *CDT II*, 579 F.3d 989, 994 (9th Cir. 2009); *CDT I*, 513 F.3d at 1127–28 (Thomas, J., dissenting).

496. *CDT I*, 513 F.3d at 1095.

497. *Id.* at 1121 (Thomas, J., dissenting).

498. *Id.*

On May 5, 2004, the government obtained a search warrant from Magistrate Judge Rosalyn Chapman for CDT's records of players who tested positive.⁴⁹⁹ The warrant application conceded that no specific evidence existed linking these players to BALCO, nor did the application disclose the pending proceedings regarding the grand jury subpoenas.⁵⁰⁰

On August 13, 2004, Magistrate Judge Johnson issued a report recommending denial of the Rule 41(g) motion related to property seized from CDT.⁵⁰¹ On October 1, 2004, Judge Florence-Marie Cooper granted the motion, known as the Cooper Order, declining to adopt Magistrate Judge Johnson's recommendation.⁵⁰² On November 19, 2004, the government moved for reconsideration, which Judge Cooper denied on February 9, 2005.⁵⁰³ On March 9, 2005, the government appealed both the Cooper Order and the denial of the motion for reconsideration.⁵⁰⁴

C. DISTRICT OF NEVADA

On April 26, 2004, the MLBPA filed a Rule 41(g) motion seeking return of the information seized from Quest.⁵⁰⁵

On May 5, 2004, the government obtained a search warrant from Magistrate Judge Leavitt for the urine samples of those players who tested positive.⁵⁰⁶ The warrant application conceded that no specific evidence existed linking these players to BALCO.⁵⁰⁷ The next day, the government executed the warrant, seizing between 250 and 300 samples (players gave multiple samples).⁵⁰⁸

On May 21, 2004, CDT and the MLBPA filed a Rule 41(g) motion for return of the samples seized from Quest.⁵⁰⁹ On August 19, 2004, Judge James Mahan orally granted this motion, which was followed by a written order on September 7.⁵¹⁰ This order, known as the Mahan Order, required the government to return all property seized with the exception of materials pertaining to the ten BALCO players.⁵¹¹ The government moved for a stay of the Mahan Order because the evidence was otherwise lawfully in its possession pursuant to the May 6 subpoena.⁵¹² On November 1, 2004, Judge Mahan denied this motion based on the

499. *Id.* at 1122 (Thomas, J., dissenting).

500. *Id.*

501. *Id.* at 1125 (Thomas, J., dissenting).

502. *CDT II*, 579 F.3d 989, 993–94 (9th Cir. 2009); *CDT I*, 513 F.3d at 1125 (Thomas, J., dissenting).

503. *CDT I*, 513 F.3d at 1097.

504. *Id.*

505. *Id.* at 1094.

506. *Id.* at 1122 (Thomas, J., dissenting).

507. *Id.*

508. *Id.* at 1094, 1122 (Thomas, J., dissenting).

509. *Id.* at 1123 (Thomas, J., dissenting).

510. *Id.* at 1125 (Thomas, J., dissenting).

511. *CDT II*, 579 F.3d 989, 994 (9th Cir. 2009).

512. *CDT I*, 513 F.3d at 1094 n.22. Judge Illston ultimately quashed the May 6 subpoena on December 10, 2004. *Id.* at 1127–28 (Thomas, J., dissenting).

2011]

FROM DUMPSTER TO DICTA

543

government's failure to raise the subpoena argument at the original hearing.⁵¹³

513. *Id.* at 1094 n. 22.