



## Fourth Amendment the Loser in BALCO Ruling

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A recent ruling of the U.S. Court of Appeals for the 9th Circuit is a win for Major League Baseball players whose drug-testing records must now be returned to them after they were improperly seized in a 2002 federal steroids probe.

But it's not a win for Fourth Amendment values.

In a September 13, 2010, en banc ruling, the appeals court took a major step away from an endorsement of the fairly strict guidelines for government searches and seizures of electronic data that it had handed down in the same case last year.

After this rehearing by the full court, which had also handed down the 2009 opinion, the guidelines, which are intended to apply to broad searches for electronic data in the future, became merely a nonbinding concurring opinion rather than part of the majority opinion by Chief Judge Alex Kozinski.

Only five judges, including Kozinski, signed on to the opinion, as opposed to eight who had endorsed it a year ago.

The case grew out of the federal investigation of Bay Area Lab Co-operative (BALCO) in 2002. At that time, Major League Baseball players had agreed to submit to anonymous testing for steroids. When the government seized the records of an independent drug-testing company known as Comprehensive Drug Testing, it ended up with electronic data on more than 100 players. Some of those names were leaked to the public.

As the attorney for the Major League Baseball Players Association told the press after the ruling, the players are still the winners after the current en banc decision, as they were a year ago. Comprehensive Drug Testing must return the information to them.



However, Kozinski's efforts to lay down clear rules to limit future electronic searches ended up only as a concurring opinion not necessary for the court's ruling on the drug data.

Kozinski wrote in the concurring opinion that he had wanted to provide "guidance about how to deal with searches of electronically stored data in the future so that the public, the government and the courts of our circuit can be confident such searches and seizures are conducted lawfully. The guidance below offers the government a safe harbor, while protecting the people's right to privacy and property in their papers and effects."

For example, he wrote in the opinion, "the warrant application should normally include, or the issuing judicial officer should insert, a protocol for preventing agents involved in the investigation from examining or retaining any data other than that for which probable cause is shown. The procedure might involve, as in this case, a requirement that the segregation be done by specially trained computer personnel who are not involved in the investigation."

We think that this appeals court has backtracked on an important Fourth Amendment issue and that broad data searches that impinge on people's property rights may well occur again.

The case can be found at

<http://www.ca9.uscourts.gov/datastore/opinions/2010/09/13/05-10067.pdf>. A

good article summarizing it is at

<http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1202472007634>.

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