UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SETH WESSLER, *Plaintiff*, v. UNITED STATES COAST GUARD and UNITED STATES DEPARTMENT OF HOMELAND SECURITY *Defendants*.	No. 19-cv-0385-ENV-RML Served June 28, 2019

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Decades ago Congress declared, "trafficking in controlled substances aboard [sea] vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. § 70501. To combat the scourge of illicit narcotics trafficking, Congress passed the Maritime Drug Law Enforcement Act (hereinafter "the Act"), *id. et seq.*, which authorizes the domestic criminal prosecution of certain individuals caught possessing, manufacturing, or distributing controlled substances in international waters. The Coast Guard effectuates the Act by interdicting boats suspected of drug trafficking, investigating the vessels and their occupants, and, where drugs are found, bringing alleged smugglers to the United States for prosecution. As is true of other domestic criminal prosecutions, the identities of individuals interdicted in international waters become public through the initiation of criminal proceedings when formal charges are brought (i.e., through an indictment or complaint).

Seth Wessler, an investigative reporter, contends that the Coast Guard is constitutionally obliged to make public—*contemporaneously*—the names and dates of apprehension of foreign nationals interdicted in international waters. This startling conclusion is based on a tenuous chain of reasoning: Wessler first inaccurately portrays the Coast Guard's maritime drug interdictions as run-of-the-mill domestic arrests, then argues that the qualified First Amendment right of access to criminal judicial proceedings, *see Richmond Newspapers, Inc., v. Commonwealth of Virginia*, 448 U.S. 555 (1980), somehow attaches to extraterritorial law-enforcement activities directed against alien smugglers, thus mandating the immediate disclosure of government records. This theory is flawed from start to finish; not only are the interdictions at issue here fundamentally distinct from domestic arrests, but the First Amendment right on which Wessler grounds his claim is not nearly

so broad as he portrays. On the contrary, the Supreme Court squarely has rejected the argument that the First Amendment guarantees a general right to access government information, *see, e.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978), and the limited exception Wessler invokes applies only to judicial or adjudicative proceedings—something extraterritorial interdictions plainly are not. Wessler's claim fails as a matter of law and should be dismissed.

BACKGROUND

The Act provides for the domestic criminal prosecution of individuals who "knowingly or intentionally—manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance," and explicitly applies "even though the act is committed outside the territorial jurisdiction of the United States." 42 U.S.C. § 70503(a)-(b). Jursidiction may be established by a showing that a vessel lacks nationality (*e.g.*, unflagged or unregistered watercraft), *id.* § 70502(c)(1)(A), (d)(1), (e)(1)-(3), or for registered vessels, via consent or waiver of objection by either the foreign nation in which the craft is registered or within whose territorial waters the interdiction takes place, *id.* § 70502(c)(1)(C), (E). Consent or waiver of objection by a foreign state to prosecution of suspected traffickers may be obtained via "radio, telephone, or similar oral or electronic means." *Id.* § 70502(c)(2).

Authority to enforce the Act, including by conducting drug interdictions in international waters, lies with the Coast Guard. *See* ECF No. 1, 19-cv-0385, Compl., Factual Background ¶ 2 (hereinafter "Compl."). The Coast Guard "intercepts vessels suspected of drug trafficking," investigates by questioning those on board and searching for narcotics, and, in certain cases, detains aboard Coast Guard ships individuals alleged to be engaged in smuggling. *Id.* ¶¶ 3-6.[1]

[1] Although Defendants do not admit to facts contained in Plaintiff's Complaint, all allegations are accepted as true for purposes of this Motion to Dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Some alien smugglers "are later released by the Coast Guard to the countries to which their vessels are registered, without charges ever being filed against them," while detainees over whom jurisdiction is established are "brought to the United States, processed through Customs and Border Patrol, arraigned, and/or indicted for drug trafficking or other crimes." *Id.* ¶¶ 10, 11.

The initiation of formal criminal charges triggers application of the Speedy Trial Act, 18 U.S.C. § 3161(b), as well as Sixth Amendment protections. *See, e.g.*, *United States v. Hsin-Yung*, 97 F. Supp.2d 24, 28-19 & n.8 (D.D.C. 2000); *United States v. Blackmon*, 874 F.2d 378, 381 (6th Cir. 1989) (holding that "arrest" for speedy-trial purposes occurs when formal federal charges are pending); *United States v. Cepeda-Luna*, 989 F.2d 353, 356 (9th Cir. 1993) (confirming that civil detention does not trigger speedy-trial rights until federal indictment is filed). As with other domestic criminal proceedings, indictments of defendants charged with drug trafficking under the Act are public; the names and interdiction dates thus become available once the regular criminal process has begun. (For recent examples of such prosecutions within this circuit, see generally *United States v. Prado*, 143 F. Supp.3d 94 (S.D.N.Y. 2015) and *United States v. Cuero*, 309 F. Supp.3d 83 (S.D.N.Y. 2017).)

Seth Wessler is an investigative reporter who previously has written about the Coast Guard's interdiction activities. *See* Compl. ¶ 12. In this action Wessler alleges that the Coast Guard and the U.S. Department of Homeland Security (hereinafter collectively "the Coast Guard") violate the First Amendment by failing to disclose the identities and apprehension dates of individuals detained as a result of drug interdictions in international waters. *See* Compl. ¶¶ 25-57. Because defendants' names are not disclosed until formal criminal proceedings begin in the U.S.—and the identities of individuals returned to their home countries uncharged may never be released—Wessler characterizes the interdictions as "arrests that are currently being made in

secret." *Id.* ¶ 1. And the First Amendment compels the *contemporaneous* publication of these foreign nationals' names and interdiction dates, Wessler alleges, relying on the "history and logic" test first enunciated in *Richmond Newspapers, Inc., v. Commonwealth of Virginia*, 448 U.S. 555 (1980). That case and its progeny recognize a qualified "right of access to criminal trials." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986). Because arrest records historically have been public and because transparency in law enforcement is in the public interest, Wessler claims, the Coast Guard's failure to provide real-time information on its international narcotics interdictions runs afoul of the First Amendment.

LEGAL STANDARDS

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff's complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In considering a motion under Rule 12(b)(6), "a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, … documents incorporated by reference in the complaint[,]" "document[s] 'integral' to the complaint," and "matters of which judicial notice may be taken." *MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486, 498 (S.D.N.Y. 2017) (citations omitted).

ARGUMENT

Wessler's argument is fundamentally flawed. As an initial matter, he conflates international interdiction activities with mundane domestic arrests—without pleading or providing any reason to believe they are analogous. And even putting aside that impediment, there simply is no First Amendment right of public access to government records generally, including law-enforcement

activities, and *particularly* not those conducted extraterritorially. Wessler's complaint fails to state a claim for which relief can be granted and thus should be dismissed.

First, although Wessler's complaint is replete with references to "secret *arrests*," *see* ¶¶ 1, 31, 32, he inaccurately conflates maritime interdictions with run-of-the-mill domestic arrests, without providing any authority or factual allegations to back up the assumption that, as a matter of law, these detentions qualify as arrests. Nor could he, likely, since the constitutional arrest concept has no application to extraterritorial law-enforcement activities. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 267-75 (1990) (holding that Fourth Amendment does not apply "to activities of the United States directed against aliens in foreign territory or in international waters"). It thus matters not whether, "[i]n the United States, the names of persons arrested and the dates of their arrest have historically been disclosed contemporaneously to the public," Compl. ¶ 30. Wessler certainly does not plead that extraterritorial drug interdiction records ever have been disclosed contemporaneously to the public, and his theory ignores the critical legal distinctions between domestic arrests and detention of a foreign national in international waters.[2]

Second, even putting aside the materially different context in which international drug smugglers are detained, Wessler's claim fails as a matter of law because there simply is no constitutional right to the information he seeks. The First Amendment does not, as Wessler insists, "extend[] to the public a qualified right of contemporaneous access *to government proceedings and records* where such access traditionally has been provided and it promotes the proper functioning of government." Compl., ¶ 3 (emphasis added). On the contrary, the Supreme Court

[2] Indeed, Wessler's New York Times Magazine story on the Coast Guard, appended to his complaint, specifically references the position of "Coast Guard officials and federal prosecutors alike, who argue that suspects … are not formally under arrest when the Coast Guard detains them," and that, while in detention, "they're not read Miranda rights, not appointed lawyers … [and] don't appear to benefit from federal rules of criminal procedure." Compl., Exh. B, at 5.

repeatedly has rejected the argument that the First Amendment guarantees a general right to access government information. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 9, 14 (1978) (rejecting argument "that the Constitution *compels* the government to provide the media with information or access to it on demand," and explaining that the "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act") (internal quotation omitted); *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999) (rejecting claim that constitutional right of access required state to disclose arrestee addresses); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information"). Binding authority thus establishes the fatal flaw in Wessler's premise: "There is no discernible basis for a constitutional duty to disclose" government records. *Houchins*, 438 U.S. at 14.

In his complaint Wessler ignores this clear precedent, grounding his claim instead on a narrow exception to the general rule. In *Richmond Newspapers, Inc.*, 448 U.S. at 580, the Supreme Court first recognized "that the right to attend criminal trials is implicit in the guarantees of the First Amendment." Later the Court clarified the existence of a "qualified First Amendment right of access to *criminal proceedings*"—not strictly limited to trials themselves—and provided "tests of experience and logic" (essentially asking whether the proceeding in question historically has been open and whether public access aids the process's functioning) to determine whether the "right of public access attaches." *Press-Enterprise Co.*, 478 U.S. at 9, 13 (emphasis added).

But Wessler's portrayal of this doctrine is misleading: Although he claims these decisions establish "a qualified constitutional 'right to gather information' about government processes" that pass the tests of experience and logic, the caselaw says no such thing. The Supreme Court has *never* applied the right-of-access doctrine outside the context of criminal proceedings. And its opinions applying the experience and logic tests plainly base their reasoning on this unique context,

emphasizing that criminal trials historically have been open to the public and that public scrutiny fosters the proper functioning of the judicial process. *See id.* at 7-10 (discussing the importance to proper societal functioning of openness in criminal proceedings); *Globe Newspaper Co. v. Sup. Court for Cty. of Norfolk*, 457 U.S. 596, 604 (1982) ("Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment."). By contrast, international smuggling investigations have no similar history of public openness. Stated plainly, the experience and logic tests have *no relevance* to government information outside the judicial context. Indeed, the Court specifically has denied a claim that a state must provide information analogous to that sought by Wessler—without any reference to the experience and logic tests—explaining that "California could decide not to give out arrestee information at all without violating the First Amendment." *Los Angeles Police Dep't*, 528 U.S. at 32.

Not surprisingly, Second Circuit authority is in accord with this Supreme Court authority refuting the existence of the generalized "'right to gather information' about government processes" Wessler pleads, Compl. at ¶ 27. Although "[t]he Second Circuit has applied the 'experience-and-logic ' approach … to both judicial proceedings and documents" in civil, as well as criminal, proceedings, *United States v. Smith*, 985 F. Supp.2d 506, 517 (S.D.N.Y. 2013), it too has never held that it applies to government records generally, outside a judicial or adjudicative context. *See id.* (collecting circuit authority applying the right of access to various judicial contexts). The common thread underlying all right-of-access cases is application of the doctrine to materials generated as part of an *adjudicative* process. *See generally New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286 (2d Cir. 2012) (explaining application of right of access doctrine to adjudicative proceedings). Here, Wessler isn't seeking information part of,

or generated by, a judicial proceeding; nor does he seek access to any type of adjudicative material. There simply is no right to access the names and detention dates of interdicted individuals *before* the criminal process begins (at which time that information becomes publicly available).

Finally, persuasive, on-point authority demonstrates that Wessler's claim is meritless. In *Center for National Security v. Department of Justice*, the plaintiff argued that the First Amendment right of access required the government to disclose the names and detention dates of individuals detained, but not criminally charged, as part of a law-enforcement investigation. 331 F.3d 918, 934 (D.C. Cir. 2003). Rejecting the existence of such a right, the D.C. Circuit explained, "Plaintiffs seek not individual arrest records, but a comprehensive listing of the individuals detained in connection with a specified law enforcement investigation … The narrow First Amendment right of access to information recognized in *Richmond Newspapers* does not extend to non-judicial documents that are not part of a criminal trial." *Id.* Wessler's request to this Court is even broader; he asks that the Coast Guard be enjoined, on an ongoing, permanent basis, "to make contemporaneously public the names of persons arrested by the Coast Guard and the dates of their arrest." Compl., Prayer for Relief § (b). But as the D.C. Circuit emphasized, that information is investigatory, not adjudicative, in nature. *Id.* at 934-36; *see also id.* at 935 ("[T]he First Amendment is not implicated by the executive's refusal to disclose the identities of the detainees and information concerning their detention."). If the government has no obligation to disclose the identities of individuals detained *within* U.S. territory as part of an investigation, there certainly is no greater right of access to information about law-enforcement activities conducted abroad.

CONCLUSION

The First Amendment right of access plainly does not compel disclosure of government information obtained in the course of law-enforcement operations—particularly those conducted outside the United States. The Coast Guard respectfully requests this Court dismiss Wessler's complaint for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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