

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

SETH WESSLER

Plaintiff,

v.

UNITED STATES COAST GUARD and  
UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY

Defendants.

Civil Action No. 19-CV-0385

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, by and through his attorneys, alleges and states as follows:

**INTRODUCTION**

1. This action seeks to compel public access to information about arrests that are currently being made in secret. Courts have long recognized that “[s]ecret arrests [are] a concept odious to a democratic society.” *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969) (internal quotation marks omitted). Reflecting that principle, law enforcement agencies at every level of government in this country have traditionally published arrest logs that catalog the names of those arrested and the date of the arrest.

2. Yet the United States Coast Guard routinely interdicts small vessels in international waters, arrests their occupants, and holds them incommunicado—often for extended periods—without letting the public know who has been arrested and when.

3. The First Amendment to the United States Constitution extends 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.

This constitutional access right extends to the names and dates of those arrested by law enforcement officials. The Coast Guard's failure to disclose this information when it makes an arrest at sea violates the public's First Amendment access right. Plaintiff Seth Wessler brings this action to vindicate the public's right to know who the Coast Guard has arrested whenever it makes an arrest.

### **JURISDICTION AND VENUE**

4. This case arises under the United States Constitution and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331.

5. This Court has authority to grant declaratory relief pursuant to 28 U.S.C. § 2201(a), § 2202, and Federal Rule of Civil Procedure 57. This Court has authority to grant injunctive relief pursuant to Federal Rule of Civil Procedure 65.

6. Venue is proper under 28 U.S.C. § 1391(e). Plaintiff resides within the district. The events giving rise to this Complaint are part of an unconstitutional government policy, practice, or custom, and a substantial part of the events giving rise to this claim occurred in this District.

### **PARTIES**

7. Plaintiff Seth Freed Wessler is an investigative reporter based in New York and a Fellow with Type Investigations (formerly called The Investigative Fund).

8. Defendant United States Coast Guard is a branch of the United States Armed Forces. During peacetime, the Coast Guard operates under the United States Department of Homeland Security. In addition to other activities, the Coast Guard conducts maritime law enforcement operations.

9. Defendant United States Department of Homeland Security is a cabinet department of the United States government that is tasked with combating various threats to domestic security.

## FACTUAL BACKGROUND

### A. Coast Guard Arrests Under the Maritime Drug Law Enforcement Act

1. In 1986, Congress enacted the Maritime Drug Law Enforcement Act (MDLEA), making it a crime to “knowingly or intentionally—manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance [while on board a covered vessel].” Maritime Drug Law Enforcement Act, Pub. L. No. 96-350, § 1, 94 Stat. 1159 (1980) (codified at 46 U.S.C. § 70503).

2. Under the MDLEA, the United States Coast Guard has routinely interdicted small vessels in international waters for alleged drug trafficking.

3. When the Coast Guard intercepts vessels suspected of drug trafficking, it often attempts first to immobilize the vessel and then initiate communication with persons on board.

4. In some instances, the Coast Guard has fired shots into the engine of interdicted vessels to render them immobile before initiating communication.

5. Under current policy, after boarding and searching a vessel the Coast Guard may arrest persons on board and transfer them to Coast Guard ships. *See Nat’l Drug Control Policy, The Interdiction Committee 3*, <https://www.whitehouse.gov/wp-content/uploads/2017/11/The-Interdiction-Committee.pdf> (last visited January 18, 2019), a true and correct copy of which is attached as Exhibit A.

6. When arrested individuals are brought aboard a Coast Guard ship, they are typically photographed and questioned for basic information, including their names and home countries.

7. Arrestees are then often shackled, sometimes by their ankles, to either the deck of the Coast Guard ship or to the wall of a below-deck area.

8. Arrestees are held incommunicado for the duration of their arrest aboard Coast Guard ships.

9. The Coast Guard makes no public disclosure that an arrest has been made, and typically provides no notification to family members of the individuals it arrests at sea.

10. Some arrestees are later released by the Coast Guard to the countries to which their vessels are registered, without charges ever being filed against them.

11. Other arrestees are eventually brought to the United States, processed through Customs and Border Patrol, arraigned, and/or indicted for drug trafficking or other crimes.

12. The number of Coast Guard arrests in international waters has increased over the years. Before 2010, the Coast Guard arrested approximately 200 individuals per year. In 2015, the last year for which data is available, the Coast guard arrested approximately 600 people. *See* Seth Freed Wessler, *The Coast Guard's 'Floating Guantánamos'*, N.Y. TIMES, (Nov. 20, 2017) <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html>, a true and correct copy of which is attached as Exhibit B.

13. The duration of the pre-indictment detentions for individuals arrested by the Coast Guard has also increased over the years. While five days was a typical pre-indictment detention period in 1985, the current average duration of pre-indictment detention is 18 days. *Id.*

14. The Coast Guard has held individuals under arrest for at least 70 days before they are formally charged with any crime. *Id.*

15. The duration of the pre-indictment detention for some individuals arrested by the Coast Guard is prolonged when the Coast Guard chooses to deliver them to jurisdictions that are far away from the place of arrest and are not the nearest U.S. port. For example, the Coast Guard has arrested individuals in the Pacific Ocean and transported them to the east coast of the United States for prosecution. *See, e.g., United States v. Aragon*, No. 15-CR-0292, 2017 WL 2889499 (S.D.N.Y. July 5, 2017).

16. Pre-indictment detention may also be prolonged when Coast Guard ships take “liberty calls” for rest and relaxation of their crew while arrestees remain shackled on board the vessel. *See* Transcript of Defendant’s Motion to Dismiss at 19, *United States v. Giler*, No. 0:17-cr-60032 (S.D. Fla. Apr. 19, 2017), ECF No. 59, a true and correct copy of which is attached as Exhibit C.

17. Prolonged detentions associated with Coast Guard arrests have become so prevalent that high-level officials in the Coast Guard have suggested the creation of a permanent prison boat for pre-indictment arrestee confinement. *See* Hope Hodge Seck, *Coast Guard Eyes Leasing Civilian Jail Ship to Hold Detainees*, Military.com (Jan. 16, 2018), <https://www.military.com/dodbuzz/2018/01/16/coast-guard-eyes-leasing-civilian-jail-ship-hold-detainees.html>, a true and correct copy of which is attached as Exhibit D.

18. Charges are sometimes dismissed against individuals arrested by the Coast Guard because courts have found that the lapse between arrest and presentment for trial violates the arrestees’s Speedy Trial Act rights. *See, e.g.,* Ex. C (dismissing charges because the indictment was filed 37 days after the arrest at sea).

**B. Coast Guard's Refusal to Affirmatively Publish Arrest Information**

19. On information and belief, the Coast Guard contemporaneously catalogues the names of arrestees and the dates of arrest at the time of interdiction.

20. The Coast Guard does not make public a record of its arrests.

21. As a result, the identities of those ultimately charged and dates of their arrests typically remain entirely secret until they arrive in the United States; the public generally never learns of arrests that do not result in U.S. prosecutions.

22. The Coast Guard has denied and continues to deny public access to the names of those it arrests and the dates of their arrest.

23. On November 15, 2018, Plaintiff Seth Wessler submitted a written request to the Coast Guard, requesting information about the names of arrestees currently detained in international waters. A true and correct copy of this request is attached as Exhibit E.

24. On November 23, 2018, the Coast Guard responded that it does not make basic arrest information available to the public. A true and correct copy of the Coast Guard's response is included in Exhibit E.

**CAUSE OF ACTION**

**Violation of the First Amendment of the U.S. Constitution  
(Declaratory and Injunctive Relief)**

25. Plaintiff repeats the allegations set forth above as if fully set forth herein.

26. The public has an affirmative, enforceable First Amendment right to know the names of those arrested by government officials and the dates of their arrests.

27. The public has a qualified constitutional "right to gather information" about government processes for which (a) there is a tradition of accessibility and (b) access plays a significant positive role in the functioning of the process. *Richmond Newspapers, Inc. v.*

*Virginia*, 448 U.S. 555, 576 (1980); *see also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

28. Where the government wishes to abridge the constitutional access right, it must show that a limitation on access is essential to protect a compelling governmental interest and that the limitation is narrowly tailored to serve that interest.

29. The public has a right of access to information about arrests because there is a tradition of access to such information and because it plays a significant positive role in the functioning of law enforcement and the administration of justice. That right attaches to records of Coast Guard detentions and is not overcome here.

#### **A. History of Access to Arrest Records**

30. In the United States, the names of persons arrested and the dates of their arrest have historically been disclosed contemporaneously to the public.

31. This history of public access to this information dates back to English common law. In 1691, England abolished the Star Chamber, a court that had privately arrested people and brought them before the King's Council on secret information. In so doing, England recognized that secret arrests were a means of introducing an arbitrary form of government. From that point forward, publicity was a hallmark of English common-law procedure.

32. The Founders of our Constitution similarly denounced secret arrests. In the *Federalist Papers*, Alexander Hamilton, citing William Blackstone, described secret arrests as more dangerous to democracy than arbitrary executions:

To bereave a man of life, says he, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

Federalist No. 84 (J. Cooke ed. 1961), at 577 (quoting 1 William Blackstone, *Commentaries* \*136).

33. In keeping with the tradition of public access to basic arrest information—including the names of arrestees and dates of their arrest,—the first formal records that police departments used to document their arrests were made public. These records became known as “police blotters.”

34. Police blotters have been contemporaneously available to the press and public throughout American history. In the last century, state courts consistently ruled that police blotters must be available for public inspection.

35. Reports from the Department of Justice acknowledge this long tradition of public access to names of arrestees and dates of their arrest. *See, e.g.*, U.S. Dept. of Justice, Criminal Justice Information Policy, Public Access to Criminal History Record Information, NCJ - 111458, at 2-3 (1988) (“By statute or case law in most states, and by tradition in every state, these daily blotters and logs are available to the public.”).

36. Today, every state makes its police department’s arrest logs available for public inspection.

37. More than sixty years ago, Congress also recognized the ingrained history of public access to arrest records in this country. In 1954, the District of Columbia attempted to impose limitations on access to its arrest records, and in response Congress required all of its arrest books to be “open for public inspection,” D.C. Official Code 5-113.01. In doing so, Congress cited the “long custom and practice” of “keeping arrest books and [making] them available for public inspection,” which it considered central to protection “against the abuse in any way of the arrest power.” H.R. Rep. 2332, 83rd Cong., 2d Sess., at 1 (1954).

38. In keeping with this long tradition of access, other federal law enforcement agencies make information about their detainees publicly available. *See, e.g., Online Detainee Locator System*, U.S. Immigration and Customs Enforcement, <https://locator.ice.gov/odls> (last visited Apr. 20, 2018) (allowing the public to search for basic information about persons in ICE custody). For example, U.S. Immigration and Customs Enforcement (ICE) publicly reports its arrests within eight-hours. *About the Detainee Locator / FAQs*, U.S. Immigration and Customs Enforcement, <https://locator.ice.gov/odls/#/about> (last visited Apr. 20, 2018).

#### **B. The Significant Positive Role of Access to Arrest Records**

39. Access to arrest records plays a significant positive role in the functioning of law enforcement and the criminal justice system.

40. Public access to arrest information enhances the proper functioning of law enforcement by deterring abuses of power that uniquely arise in the context of an arrest. The knowledge that arrest information must be recorded and may be examined by the public deters illegal arrests.

41. Public access to arrest information further ensures fairness in the criminal justice process by deterring law enforcement officials from mistreating arrestees or unjustly prolonging their detentions.

42. Public access to arrest records promotes public confidence in the integrity of the manner in which the government has exercised its monopoly on criminal arrest powers. Without access to even the most basic information about who the government has arrested, there can be no public oversight, discourse, or accountability when the government oversteps.

43. Access to arrest records allows the public to monitor the use of government resources. Disclosing the names of arrestees and dates of their arrests enables accurate fact finding about the government's use of tax payer dollars.

44. Access to arrest records is essential for public confidence in the government's compliance with domestic and international laws in making arrests.

45. Access to arrest records enables defense counsel to offer their legal services to arrestees, who have a constitutional right to counsel, and further ensures that proper procedures are being followed.

46. Public access to arrest records enables members of the public, including the defense bar, to contact law enforcement officials to inquire about specific arrestees.

47. Public access to contemporaneous information about arrestees facilitates the ability of members of the public, including the defense bar, to ensure that potentially exculpatory evidence is properly preserved.

48. Public access to arrest records is especially vital to deter abuse and enable public discourse when arrestees are denied, or are never provided with, the opportunity to communicate with defense counsel, the media, or any outside actors.

### **C. The Right of Access to Arrest Records is Not Overcome**

49. Where the government attempts to limit the public right of access, it must show that the limitation is necessitated by a compelling governmental interest, and that the limitation is narrowly tailored to serve that interest.

50. Defendants have not established a compelling government interest for refusing to provide contemporaneous access to the names of individuals arrested and the dates of their

arrests. Rather, they have asserted vague and insufficient “safety and security” concerns. *See* Exhibit E.

51. Even if there were a compelling safety and security interest in denying public access to information about some arrests, the Coast Guard’s categorical denial of access to information about all of its arrests is not narrowly tailored.

\* \* \* \* \*

52. Defendants’ denial of access to basic arrest information prevents plaintiff and other members of the public from monitoring the use of government resources spent on drug interdictions.

53. Defendants’ denial of access to basic arrest information impairs the ability of plaintiff and other members of the press to investigate and report on the Coast Guard’s law enforcement activities.

54. Defendants’ denial of access to basic arrest information deprives plaintiff and other members of the public of sufficient information to assess the adequacy, desirability, and necessity of the Coast Guard’s maritime drug law enforcement activities.

55. Defendants’ denial of access to basic arrest information prevents plaintiff and other members of the public from determining whether or not the Coast Guard is complying with domestic and international law in its treatment of arrestees.

56. Defendants’ denial of access to the names of individuals arrested by the Coast Guard and the dates of their arrest violates the public’s First Amendment right of access.

57. Defendants will continue to deprive plaintiff and other members of the public of their rights under the First Amendment if they are not prevented by this Court from denying public access to the names of individuals arrested by the Coast Guard and the dates of their arrest.

**PRAYER FOR RELIEF**

**WHEREFORE**, plaintiff respectfully requests that this Court:

- a. Declare that plaintiff has a public right of access protected by the First Amendment to the United States Constitution to the names and dates of those arrested by the Coast Guard, including individuals arrested in international waters under the authority of the Maritime Drug Law Enforcement Act.
- b. Permanently enjoin defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction to make contemporaneously public the names of persons arrested by the Coast Guard and the dates of their arrest.
- c. Award plaintiff his costs, including reasonable attorneys' fees, pursuant to 28 U.S.C. § 2412; and
- d. Grant plaintiff such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 18 day of January, 2019.

By: /s/ David A. Schulz

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