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Financial Privacy and the Fourth Amendment: Restoring Balance to the Crypto Universe

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On Tuesday I had the privilege of participating in *Crypto Wars: Balancing Privacy versus National Security*, a Federalist Society panel moderated by Dina Rochkind. The other panelists–Michele Korver, Kathy Kraninger, and Mick Mulvaney–and I discussed a wide range of issues related to the current regulatory environment for digital assets, a bit broader than the title might suggest.

We touched on the Biden administration's recent executive order, the use of crypto in Ukraine, the outlook for the U.S. regulatory environment, and even central bank digital currencies (CBDCs).

One point of agreement was that there needs to be a balance between privacy and the ability of law enforcement to gather evidence. And I think it's fair to say that all of us agreed the anti-money laundering/know your customer (AML/KYC) regime is not going away anytime soon.

The question that remains, though, is how to strike that balance.

Speaking for myself, the Fourth Amendment provides that balance. That is, the constitutional right that requires the government to obtain a warrant (upon a showing of probable cause) to gain access to an individual's person, house, papers, and effects *should* also apply to individuals' financial records gathered by financial firms.

If but for a few split-decision Supreme Court cases in the 1970s, with two blistering dissents by none other than Justice Thurgood Marshall, the Fourth Amendment might still apply to the customer records that banks keep. Instead, bank customers have no such constitutional protection.

While it appears unlikely to happen anytime soon, Congress could fix the situation by amending the Bank Secrecy Act as my colleague Jen Schulp and I have proposed. (Spoiler alert: We suggest relying on the Fourth Amendment.)

As for the full panel discussion, it was pretty lively and covered multiple perspectives, including those of the industry, the government, and the think tank world. Anyone interested can catch the replay here–I highly recommend it, but I'm biased–and judge for themselves, so I won't summarize the whole thing.

Instead, I'll just reiterate a few of the main points that I made as well as a couple of others that I wasn't able to get to.

- The federal government should not make it difficult to use a financial service or product because criminals or terrorist might use it. Terrorism and criminal activity are problems that law enforcement should tackle directly, irrespective of what method of payment is involved.
- If anything, it's easier to hide a crime using national currencies versus cryptocurrencies, and even U.S. Treasury officials acknowledge that using crypto is not a good way to evade international sanctions.

- Even if Congress repeals the Bank Secrecy Act of 1970 in its entirety, it would still be illegal for any financial firm to facilitate criminal activity.
- The dollar is the world's reserve currency
- The dollar is the world's reserve currency because of the strength of the American economy and the relatively strong property rights that our system of government provides, a fact only bolstered by so many stable coin issuers tying their tokens to the U.S. dollar.
- The Western world should not follow any autocratic regime when it comes to issuing a CBDC simply to "keep up." Doing so is incredibly short sighted and fails to acknowledge that few people will ditch the dollar in favor of a Chinese, Iranian, or Russian CBDC merely because such a digital transfer is backed by the Chinese, Iranian, or Russian governments.
- The U.S. financial system should be based on the principle that law abiding citizens are free to engage in anonymous transactions, secure in the knowledge that the Fourth Amendment will protect them from government overreach.
- The heavier the regulatory burden that gets placed on fintech firms, the more the regulatory environment will favor larger well-established firms, stifling innovation and competition.

The United States government should never have led the way in designating private companies as an extension of law enforcement agencies in search of money laundering. But it did, and now proponents of the current system have to come to terms with a harsh reality: Virtually every bit of evidence shows that the BSA framework has proven a minor inconvenience for criminals and a major burden on law abiding citizens.

It is long past the time to fix this broken regulatory system. The way forward is to reaffirm that the Fourth Amendment provides the appropriate balance between the competing interests of individuals' financial privacy and the government's ability to gather evidence to enforce laws.

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