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FinCEN Needs More Oversight But Congress Needs To Fix The Bank Secrecy Act

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On Thursday the House Financial Services Committee will hold an oversight hearing for the Financial Crimes Enforcement Network, the bureau of the Treasury known as FinCEN. It is certainly good to see a full committee oversight hearing for FinCEN, but the narrow issue of cryptocurrency and Russian sanctions will likely dominate this hearing.

For months, members of Congress have been publicly warning of the possibility that people might use crypto to evade sanctions, so a public hearing is warranted. It is already clear, though, that using crypto to avoid sanctions is terribly ineffective. Treasury officials have even acknowledged that trying to launder money through crypto exchanges "is expensive, time-consuming and would likely be visible in the broader crypto market."

Hopefully, the House will soon hold a more general oversight hearing for FinCEN because, as my colleague Nick Anthony recently pointed out, there is much to oversee. For instance, long before 2022, many Russian Americans had their accounts closed by banks who feared being liable for money-laundering violations simply due to these customers' connections to Russia. Another long-running problem is that FinCEN does not publicly provide evidence of the purported effectiveness of its enforcement operations.

FinCEN does announce the number of reports that financial institutions file each year, as well as the penalties it assesses for alleged violations of money laundering laws. But these sorts of statistics do not provide evidence of effectiveness or efficiency. In fact, these statistics provide strong evidence that the regulatory framework FinCEN is enforcing is, at best, grossly inefficient.

Moreover, government officials have known–for decades–that FinCEN's enforcement actions typically come *after* a predicate crime has already been discovered. That is, money laundering violations are typically added to the prosecution of other crimes rather than used to discover or prevent a crime.

According to a General Accounting Office report, as of 2002, FinCEN was unable to report whether any of its Suspicious Activity Report (SAR) referrals resulted in criminal prosecutions. This inability to point to such results is a long-running problem, and it's one that multiple congressional offices and Treasury officials still privately acknowledge.

The problem is much bigger, though, than these questions of basic effectiveness and efficiency.

The core of the problem is in the Bank Secrecy Act (BSA) itself, the 1970 law that–after multiple amendments through the years–forms the basis of the anti-money laundering (AML) regulatory framework that FinCEN enforces. As my colleague Jen Schulp and I explain in a new paper:

The historical record demonstrates that the BSA was enacted without careful study or forethought. Congressional hearings clearly show that the bill's supporters had not fully considered whether the legislation included appropriate solutions to the supposed abuse of secret foreign bank accounts [ostensibly the main reason for the legislation]. Congress and Treasury then spent five-plus decades building on this shaky BSA framework to supposedly better deter criminals, but the evidence shows no net benefit to this approach. Rather, the expansion of the BSA has dramatically increased explicit compliance costs for financial institutions and diminished Americans' constitutionally protected rights.

Still, it does appear that many Americans under appreciate the extent to which the BSA has diminished their constitutionally protected rights.

For instance, when the Biden administration recently proposed to create a new financial reporting regime for all financial accounts with a "gross flow threshold" of $600 or more, many Americans expressed their disbelief that the proposal did not run afoul of the protections guaranteed by the Fourth Amendment. But the BSA–even as enacted in 1970–raises potential conflicts with several constitutional amendments.

It raises concerns about the Fifth Amendment's right against self-incrimination and due process protections, as well as the First Amendment's speech and association rights. And, as Schulp and I explain in our paper, the BSA raises major questions about Fourth Amendment protections. In fact, it raised so many questions from the very beginning that multiple BSA-cases ended up before the Supreme Court in the early 1970's.

As Schulp and I explain in our paper, in 1974, when evaluating a far narrower BSA regime, five Supreme Court Justices raised major concerns with the law's requirements under the Fourth Amendment. While two of those Justices ultimately found that the BSA did not violate the Constitution, today's BSA asks much more of financial institutions and citizens. It also operates on a financial system that has changed dramatically from the early 1970s.

Because of these (and other) changes, two current Supreme Court Justices have signaled a willingness to revisit some of the constitutional questions raised by the Court in the early 1970s. This fact should please everyone who values their constitutional rights because many elected officials want to double down on this failed approach *expand* the BSA framework.

The problem for proponents of the current system is that virtually every bit of evidence shows that the BSA framework has proven a minor inconvenience for criminals but a major burden on law abiding citizens. The only silver lining is that Congress can easily fix the core problems with the BSA by accepting the Fourth Amendment.

In other words, the basic framework to balance any competing interests of individuals' financial privacy and the government's ability to gather evidence to enforce laws is already present in the Fourth Amendment.

It is *this* framework that should guide BSA reform. Congress can simply require financial firms to keep customer records while requiring law enforcement to abide by the Fourth Amendment to access those records.

This idea is rooted in one of the principles that set America apart at its founding and helped craft a freer future for millions of people. Congress should promote this principle and help guarantee Americans' freedoms going forward.

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