

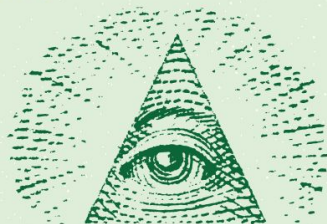
Cryptocurrency and Privacy Law:

4th Amendment and Non-delegation

The Case for Electronic Cash: Why Private Peer-to-Peer Payments are Essential to an Open Society

Jerry Brito
February 2019

Coin Center Report



Electronic Cash, Decentralized Exchange, and the Constitution

Peter Van Valkenburgh
March 2019

Coin Center Report



What is AML/CFT?

AML / CFT = Surveillance

**AML / CFT =
Warrantless Surveillance**

Warrantless Surveillance?

- **Financial Institutions must report some types of customer information without an investigator even having to ask for it**
 - **CTR**
 - **SAR**
- **Financial Institutions must collect other types of customer information and will generally make it available to an investigator with merely a subpoena**
 - **Travel Rule data**
 - **Other records**

4th Amendment?



The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon **probable cause**, supported by Oath or affirmation, and **particularly describing** the place to be searched, and the persons or things to be seized.

1974

California Bankers v. Shultz



[A]ll of the records which the Secretary requires to be kept pertain to transactions to which the bank was itself a party. The fact that a large number of banks voluntarily kept records of this sort before they were required to do so by regulation is an indication that the records were thought useful to the bank in the conduct of its own business, as well as in reflecting transactions of its customers.

[A]ll of the records which the Secretary requires to be kept pertain to transactions to which the bank was itself a party. The fact that a large number of banks **voluntarily** kept records of this sort before they were required to do so by regulation is an indication that the records were **thought useful to the bank in the conduct of its own business**, as well as in reflecting transactions of its customers.

Constitutional (but only “as applied”)



California Bankers v. Shultz



Constitutional (not a search)



Unconstitutional (warrantless search)

A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.

A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.

1976



US v. Miller



The checks are not confidential communications, but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

United States v. Miller, 425 U.S. 435 (1976)



The checks are not confidential communications, but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information **voluntarily conveyed** to the banks and exposed to their employees in the **ordinary course of business.**

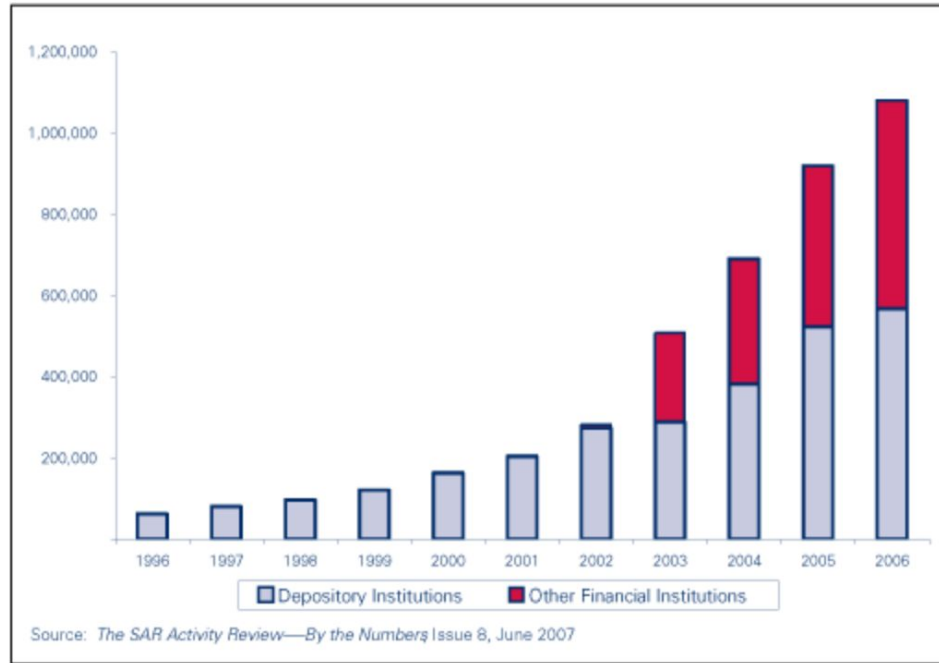
United States v. Miller, 425 U.S. 435 (1976)

Since 1976
BSA regs have been
“significantly expanded”

A close-up photograph of a transaction. A person's hands are shown exchanging US dollar bills. The person on the right, who is Black, is wearing a gold watch and a red sleeve, and is handing a \$100 bill to the person on the left. The person on the left is handing a \$20 bill to the person on the right. In the background, there is a computer monitor and a cash register. A dark grey rectangular box with orange text is overlaid on the lower half of the image.

**Less cash = more
bank records**

Chart 1: SAR Filings Skyrocket



New requirements

4th Amendment?



Third Party Doctrine



2018 Carpenter v. US



Are records kept by the third party for a legitimate business purpose?

Was the information in those records provided voluntarily by the person under investigation to the third party?

Legitimate Business Purpose?

“Smith pointed out the limited capabilities of a pen register; as explained in *Riley*, telephone call logs reveal little in the way of “identifying information.”

“Miller likewise noted that checks were “not confidential communications but negotiable instruments to be used in commercial transactions.” In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.”

Carpenter v. United States, 585 U.S. __ (2018)

Legitimate Business Purpose?

“Smith pointed out the limited capabilities of a pen register; as explained in *Riley*, telephone call logs reveal little in the way of “identifying information.”

“Miller likewise noted that checks were “not confidential communications but negotiable instruments to be used in commercial transactions.” In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are **no comparable limitations on the revealing nature of CSLI.**”

Carpenter v. United States, 585 U.S. __ (2018)

Information is not kept for a legitimate business purpose if it reveals intimate details well beyond what is needed to provide the service.

Voluntary?

“Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly “shared” as one normally understands the term. In the first place, cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is indispensable to participation in modern society.”

Carpenter v. United States, 585 U.S. __ (2018)

Voluntary?

“Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is **not truly “shared”** as one normally understands the term. In the first place, cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is **indispensable to participation in modern society.**”

Carpenter v. United States, 585 U.S. __ (2018)

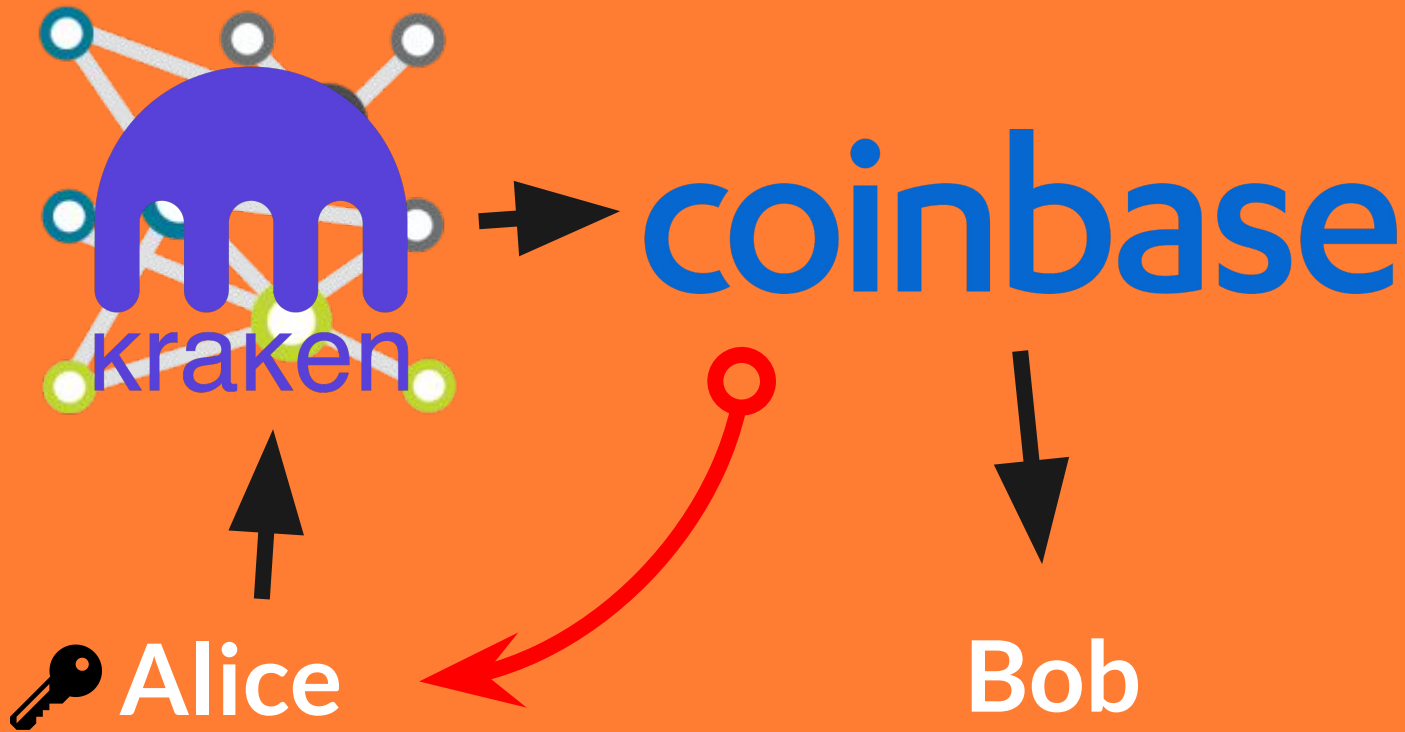
Information is not **voluntarily provided** if the customer had no choice but to supply that information in order to participate in modern society.



Applying *Carpenter* to Crypto:

- Centralized Exchange *vis-à-vis* their customer
- Centralized Exchange *vis-à-vis* a counterparty (self-hosted wallet)
- Software Developer
 - Protocol
 - Dex code
- Two people peer-to-peer tx. (6050i)

Centralized Exchange (self-hosted wallet) Decentralized Exchange (counterparty)



Applying *Carpenter* to Crypto:

- Centralized Exchange *vis-à-vis* their customer
- Centralized Exchange *vis-à-vis* a counterparty (self-hosted wallet)
- Software Developer
 - Protocol
 - Dex code
- Two people peer-to-peer tx. (6050i)



I WANT YOU TO
WRITE ME SOME
CODE

26 U.S. Code § 6050I - Returns relating to cash received in trade or business, etc.

[U.S. Code](#) [Notes](#)

[prev](#) | [next](#)

(a) CASH RECEIPTS OF MORE THAN \$10,000

Any [person](#)—

(1) who is engaged in a trade or business, and

(2) who, in the course of such trade or business, receives more than \$10,000 in [cash](#) in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

(b) FORM AND MANNER OF RETURNS

A return is described in this subsection if such return—

(1) is in such form as the Secretary may prescribe,

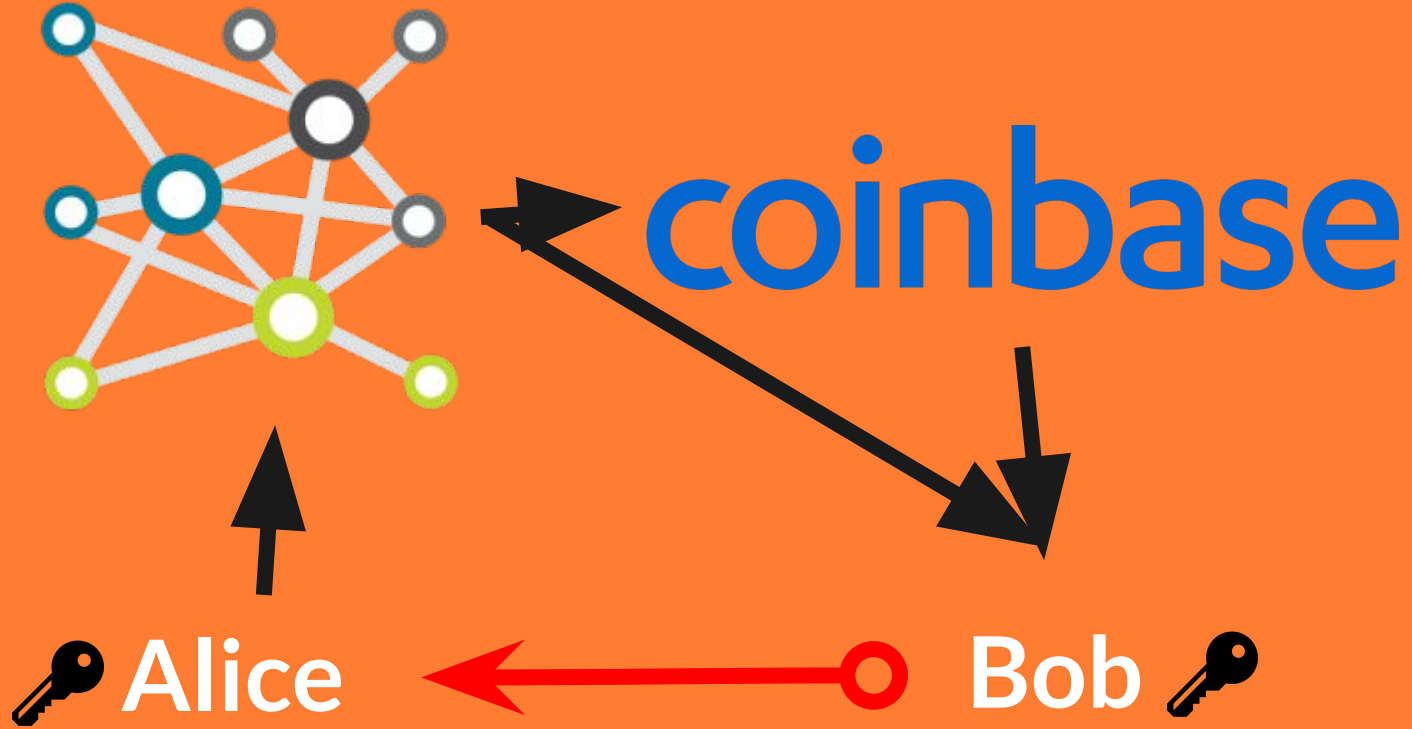
(2) contains—

(A) the name, address, and TIN of the [person](#) from whom the [cash](#) was received,

(B) the amount of [cash](#) received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe.



Applying *Carpenter* to Crypto:

- Centralized Exchange *vis-à-vis* their customer
- Centralized Exchange *vis-à-vis* a counterparty (self-hosted wallet)
- Software Developer
 - Protocol
 - Dex code
- Two people peer-to-peer tx. (6050i)

A Changing Court?

- **Gorsuch dissent in *Carpenter***
 - “I do not agree with the Court’s decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared.”
- **Property-based or trespass theory**
 - “These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents.”

A Changing Court?

- ***Ex Parte Jackson***

- “Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.”

- ***Kyllo***

- “[A sophisticated thermal imaging camera] might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate’; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on.”

Tornado Cash



SEC. 103. (a) Section 16 of the Trading With the Enemy Act is amended by striking out “\$10,000” and inserting in lieu thereof “\$50,000”.

(b) Section 5(b)(3) of such Act is amended by striking out the second sentence.

TITLE II—INTERNATIONAL EMERGENCY ECONOMIC POWERS

SHORT TITLE

SEC. 201. This title may be cited as the “International Emergency Economic Powers Act”.

SITUATIONS IN WHICH AUTHORITIES MAY BE EXERCISED

SEC. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

GRANT OF AUTHORITIES

SEC. 203. (a) (1) At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

“block... **property** in which some foreign country or national has an interest”

Arguments:

- 1. Outside Statutory Authority**
- 2. Due Process**
- 3. Speech Chilling**



2021

Arguments:

- 1. Outside Statutory Authority**
- 2. Due Process**
- 3. Speech Chilling**

Due Process

The Fifth Amendment requires that any deprivation by the federal government of a person's life, liberty, or property, must allow for notice, the opportunity to be heard, and a decision by a neutral decisionmaker.

Balancing Test in Matters of National Security

Identification of the specific dictates of due process generally requires consideration of three distinct factors:

1. first, the private interest that will be affected by the official action;
2. second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally,
3. the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Arguments:

- 1. Outside Statutory Authority**
- 2. Due Process**
- 3. Speech Chilling**

Treasury Official on Effect of Sanctions

We do believe that this action will send a really critical message to the private sector about the risks associated with mixers writ large,” the Treasury official said, adding that it was “designed to inhibit Tornado Cash or any sort of reconstituted versions of it to continue to operate.”

Scott Chipolina, James Politi, “US Treasury imposes sanctions on ‘crypto mixer’ over alleged laundering” Financial Times (August 8, 2022)

Thank you. Questions?

Peter Van Valkenburgh
peter@coincenter.org

Jerry Brito
jerry@coincenter.org



COIN CENTER