# THE MISGUIDED ACTIVISM OF THE CRYPTOCURRENCY INDUSTRY: RECKONING WITH THE BANK SECRECY ACT OF 1970

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## INTRODUCTION

Since at least World War I, the United States through various legislative, judicial, and enforcement apparatuses has been engaged in massive surveillance of its citizens' financial activity,[1] despite the privacy rights granted by the Fourth Amendment of the United States Constitution.[2] Since the U.S. Supreme Court's 1967 decision *Katz v. United States*, which

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1. *See U.S. Supreme Court Case Summaries: 1891-Present*, CTR. FOR REPROD. RTS. (Aug. 1, 2007), https://reproductiverights.org/u-s-supreme-court-case-summaries-privacy-law-1891-present/ [https://perma.cc/GW94-FLHG]; *see generally* ALFRED W. MCCOY, POLICING AMERICA'S EMPIRE: THE UNITED STATES, THE PHILIPPINES, AND THE RISE OF THE SURVEILLANCE STATE 1, 14 (2009); *see generally* John O. Tyler Jr., *FISA vs the Constitution*, HBU NEWS (July 24, 2018) https://hbu.edu/news-and-events/2018/07/24/fisa-vs-the-constitution/ [https://perma.cc/72YD-DW7M].

2. U.S. CONST. amend. IV.

upheld a liberal interpretation of the Fourth Amendment's privacy protections,[3] the Supreme Court, Congress, and various regulatory agencies have subverted *Katz* to infringe on U.S. citizens' reasonable expectations of privacy regarding their financial data.[4] The most prominent tool used by the United States to access the private financial data of its citizens is the Bank Secrecy Act of 1970.[5] The issue of government financial surveillance has recently become a hot topic among activists once again.[6] This time, however, it is those in the cryptocurrency industry raising the alarm about government surveillance as a result of a new rule proposed by the U.S. Financial Crimes Enforcement Network's (FinCEN). FinCEN's proposed rule would require banks and other money service businesses (MSBs), such as cryptocurrency exchanges, to report identifying information pertaining to cryptocurrency transactions of $10,000 or more to the federal government.[7] A few scholars have

3. *See* Katz v. U.S., 389 U.S. 347 (1967).

4. *See* Boyd v. U.S., 116 U.S. 616, 620—21 (1886); *see also* Anna Leslie Krouse, Eavesdropping on History: Olmstead v U.S and the Emergence of Privacy Jurisprudence during Prohibition 1 (2011) (M.A. thesis, Will. & Mary), https://dx.doi.org/doi:10.21220/s2-97zs-w976 [https://perma.cc/2QCZ-FJK6]; *see also* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. UNIV. L. REV. 555 (1996).

5. 31 U.S.C. § 5311; *see also* 12 C.F.R. § 21.11; 12 C.F.R. § 21.21; *see generally* Jackie Wheeler, *The Bank Secrecy Act: Five Decades of Fighting Financial Crime*, FORBES (Nov. 2, 2020, 9:45 AM), https://www.forbes.com/sites/jumio/2020/11/02/the-bank-secrecy-act-five-decades-of-fighting-financial-crime/?sh=7632106f5331 [https://perma.cc/XT67-LQP5].

6. *See* Sebastian Sinclair, *Civil Liberties Group Calls FinCEN Crypto Wallet Rule 'Unconstitutional'*, COINDESK NEWS (Mar. 29, 2021, 9:07 PM), https://www.coindesk.com/fincen-us-treasury-department-civil-rights-group [https://perma.cc/74RJ-8FLK]; Caleb Kruckenberg, *Re: Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, NEW CIV. LIBERTIES ALL. (Mar. 29, 2021), https://nclalegal.org/wp-content/uploads/2021/03/NCLA-Comment-FinCEN-Digital-Asset-Rule-3.29.21.pdf [https://perma.cc/9PHA-UMBC]; *see generally* Ben Jessel, *The Treasury's Crypto Reporting Proposal May Be a Fourth Amendment Breach*, FORBES (Jan. 4, 2021, 10:04 AM), https://www.forbes.com/sites/benjessel/2021/01/04/the-treasurys-crypto-reporting-proposal-may-be-a-fourth-amendment-breach/?sh=22c6844ea1ee [https://perma.cc/49TK-LG9P]; *see generally* Marta Belcher, *FinCEN's Crypto Surveillance Rule Violates the US Constitution*, COINDESK (Jan. 13, 2021, 12:55 PM), https://www.coindesk.com/fincens-crypto-surveillance-rule-violates-us-constitution [https://perma.cc/86C9-WVHZ].

7. Brian R. Michael, et al., *Pumping the Brakes: FinCEN Reopens Comment Period for Controversial Crypto Reporting & Recordkeeping Rules*, KING & SPALDING (Jan. 15, 2021), https://www.kslaw.com/attachments/000/008/499/original/Pumping_the_Brakes_FinCEN_Reopens_Comment_Period_for_Controversial_Crypto_Reporting___Recordkeeping_Rules.pdf?1610742340 [https://perma.cc/AA2S-K2G3].

criticized this proposed rule as violative of civil liberties and the promise of anonymity central to the appeal of cryptocurrency,[8] but these analyses fall short in that they are exposed to an obvious counterargument: that FinCEN's proposed rule is simply closing the loophole between the federal surveillance of monetary transactions everywhere besides the blockchain.[9] In this paper, the author aims to illustrate how the United States' financial surveillance of its citizens is broadly violative of the Fourth Amendment and issues a challenge to the Supreme Court's 1976 *United States v. Miller* decision. The author argues that the Court's decision in *Miller* and the financial surveillance activities which have used that decision as supporting precedent contradict both the holding of *Katz* and the broad privacy protections granted to Americans by the Fourth Amendment. The Court's reasoning in *Miller* completely ignores the two-prong test handed down by the Court in *Katz*: that a warrantless search or seizure violates the Fourth Amendment if the citizen had (1) an expectation of privacy, and (2) that expectation was one that "society [is] prepared to accept as reasonable."[10] This paper takes a critical lens to the *Miller* decision, demonstrating not only that FinCEN's proposed rule violates the Constitution, but so too does the broader American financial surveillance state and the Supreme Court case central to their supposed legality.

## I. BACKGROUND: PRIVACY RIGHTS FROM *OLMSTEAD* TO *KATZ*

### *A. The Olmstead Era*

In 1791, the United States Congress ratified the Fourth Amendment of the United States Constitution.[11] The oft-cited language of the Fourth Amendment provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

8. Belcher, *supra* note 6.

9. *The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions*, U.S. DEPT. OF THE TREASURY (Jan. 18, 2020), https://home.treasury.gov/news/press-releases/sm1216 [https://perma.cc/S42T-QWQG]; *see* Jessel, *supra* note 7.

10. U.S. v. Miller, 425 U.S. 435, 442 (1976); *see also* Katz v. U.S., 389 U.S. 347 (1967).

11. *The Bill of Rights: A Transcription*, America's Founding Documents, NAT'L ARCHIVES (Oct. 7, 2021), https://www.archives.gov/founding-docs/bill-of-rights-transcript.

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."[12]

The goal of the Fourth Amendment is above all to protect the right to privacy and freedom from unreasonable intrusions by the government.[13] It is important to understand that the language of the Fourth Amendment protects individuals only from searches and seizures performed by the government.[14] Additionally, such searches and seizures must be "unreasonable" in order to gain Fourth Amendment protection.[15] Until its landmark 1967 decision in *Katz,* the United States Supreme Court struggled to define the bounds of the privacy protections granted by the Fourth Amendment.[16] Lower courts in the United States eroded those protections through narrow interpretations of the Fourth Amendment, which held that only *physical* intrusions resulting in unreasonable searches and seizures were unconstitutional.[17] This era of jurisprudence was crystallized in the Supreme Court's 1928 decision in *Olmstead v. United States*.[18] In *Olmstead,* the participants of a Prohibition-era liquor ring were arrested and convicted on the basis of incriminating evidence obtained through the then-novel technology of wiretapping.[19] Infamously weakening citizens' constitutional privacy rights to be equivalent to the property rule of trespass,[20] the Court held that despite the Founders' intent to confer broad liberties through the Fourth Amendment, the Constitution is not violated "unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage'

12. U.S. CONST. amend. IV.

13. Cornell L. Sch., *Fourth Amendment Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fourth_amendment [https://perma.cc/WG2X-RH6E]; *see generally* , NAT'L ARCHIVES *supra* note 11.

14. Cornell L. Sch., *supra* note 14; *see generally* Katz v. U.S., 389 U.S. 347 (1967); *see also* NAT'L ARCHIVES, *supra* note 11.

15. Cornell L. Sch., *supra* note 13; *see generally* Katz v. U.S., 389 U.S. 347 (1967); *see also* NAT'L ARCHIVES, *supra* note 11.

16. *See generally* Daniel T. Pesciotta, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century*, 63 CASE W. RSRV. L. REV. 187 (2012).

17. *See* Boyd v. U.S., 116 U.S. 616, 620–21 (1886); *see also* Krouse, *supra* note 4; *see also* Cloud, *supra* note 4.

18. Olmstead v. U.S., 277 U.S. 438 (1928).

19. *Id.* at 455–57.

20. *See generally* Krouse, *supra* note 4.

for the purpose of making a seizure."[21] With this decision, the Supreme Court set the stage for decades of widespread electronic surveillance of its citizens, based on the notion that only physical governmental intrusions could be considered unconstitutional searches and seizures under the Fourth Amendment.[22]

### *B. Katz Balances the Scales*

In the years following 1928, the Supreme Court consistently wrestled with its own decision in *Olmstead*.[23] It was less than thirty years before the Court again faced the daunting task of delimiting the privacy protections enjoyed by U.S. citizens under the Fourth Amendment.[24] In the 1967 case *United States v. Katz*, the facts were extremely similar to those in the *Olmstead* case: an individual was arrested for violating federal anti-gambling laws, and at trial the government introduced evidence obtained through wiretapping a public telephone booth.[25] This time, the Supreme Court explicitly rejected the false equivacation ofthe property rule of trespass and the privacy protections imparted by the Fourth Amendment it had espoused only decades earlier.[26] The following language from the *Katz* decision completely changed course from previous Supreme Court Fourth Amendment jurisprudence: the "Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures. . . [it is] clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[27] With these words, the Supreme Court affirmed that the Fourth Amendment is a shield against all forms of unreasonable governmental

21. *Olmstead*, 277 U.S. at 466.

22. *See* U.S. v. Bell, 48 F. Supp. 986, 995 (S.D. Cal 1943); *see also* Krouse, *supra* note 4; *see also* Cloud, *supra* note 4; *see also* NAT'L ARCHIVES, *supra* note 11; *see also* Cornell L. Sch., *supra* note 13.

23. *See Bell*, 48 F. Supp. at 995.; *see also* Krouse, *supra* note 4; *see also* Cloud, *supra* note 4; *see also* NAT'L ARCHIVES, *supra* note 11; *see also* Cornell L. Sch., *supra* note 13.

24. *See* Katz v. U.S., 389 U.S. 347 (1967); *see also* Boyd v. U.S., 116 U.S. 616, 616 (1886); *see also* Krouse, *supra* note 4; *see also* Cloud, *supra* note 4.

25. *See Katz*, 389 U.S. at 348–49.

26. *See id*.; *see also* Olmstead v. U.S., 277 U.S. 438,455–57 (1928); *see also* Nicandro Iannacci, *Katz v. United States: The Fourth Amendment Adapts to New Technology*, NAT. CONST. CTR. (Dec. 18, 2018), https://constitutioncenter.org/blog/katz-v-united-states-the-fourth-amendment-adapts-to-new-technology/ [https://perma.cc/M6JA-QSJP].

27. *Katz*, 389 U.S. at 353.

intrusion,[28] something that defendants who had suffered unconstitutional searches and seizures and constitutional privacy activists had been arguing all along. [29]

The Supreme Court in *Katz* unambiguously stated that whether a governmental search or seizure is facilitated via electronic means or a physical intrusion has no "constitutional significance."[30] This was only one aspect of the *Katz* decision's impact.[31] The Court's real impact in *Katz* was its two-factor test to determine whether a governmental search or seizure is "reasonable" under the Fourth Amendment.[32] The Court considered the example of a conversation in a public telephone booth and determined that despite its public location and shared use, the content of a conversation between two individuals on such a telephone is protected by the Fourth Amendment because of the individuals' *expectation of privacy*.[33] The Court expounded on this concept and established a rule for determining whether a piece of evidence is protected by the Fourth Amendment. The Court stated that in order for evidence to be implicated by the language of the Fourth Amendment, ". . . a person [must] [exhibit] an actual (subjective) expectation of privacy and, second, the expectation [must] be one that society is prepared to recognize as 'reasonable.'"[34] In establishing this rule, the Supreme Court reversed course from its narrow interpretation of the Fourth Amendment in *Olmstead*[35] and successfully aligned its constitutional privacy rights jurisprudence with the goals of the Constitution, which were to give broad protection to citizens against unreasonable government behavior.[36] The two-part test of *Katz* has been the guiding star for courts considering

28. *See* Cornell L. Sch., *supra* note 13; *see generally* Iannacci, *supra* note 26.

29. *See generally* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 UNIV. PA. J. CONST. L. 581 (2008); *see also* Cloud, *supra* note 4; *see generally* Krouse, *supra* note 4.

30. Katz v. U.S., 389 U.S. 347, 353 (1967).

31. *See id.*; *see also* Iannacci, *supra* note 26; *see also* Michael B. Fusco, *Katz in the Era of Mobile Computing: How Society's Changing Expectations of Privacy Impact the Law*, SETON HALL UNIV. L. SCH. STUDENT SCHOLARSHIP (2010) https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1037&context=student_scholarship [https://perma.cc/MG6X-TMUZ]; *see also* Pesciotta, *supra* note 16.

32. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

33. *Id.* at 360–61 (Harlan, J., concurring).

34. *Id.*

35. *See generally* Katz v. U.S., 389 U.S. 347 (1967); *see* Olmstead v. U.S., 277 U.S. 438 (1928).

36. *Katz*, 389 U.S. at 347, 361; *see generally* Iannacci, *supra* note 26.

Fourth Amendment questions since 1967,[37] and it has also been the most significant obstacle for the U.S. government in its never-ending attempts to infringe on the privacy rights of its citizens.[38]

## II. FINCEN'S PROPOSED RULE AND CRYPTOCURRENCY ACTIVISM

Government surveillance and its ever-present constitutional tension with the Fourth Amendment has been called into question at various times since the *Katz* decision.[39] Statutes such as the PATRIOT Act[40] and the Foreign Intelligence Surveillance Act (FISA)[41] have gained widespread media attention and prompted numerous legal challenges by activist groups such as the American Civil Liberties Union (ACLU), with mixed success.[42] The latest bout between privacy activists and government over the expanding reach of government surveillance is set to take place in the realm of cryptocurrency.[43] Cryptocurrency is essentially digital currency secured on online ledgers using cryptography.[44] These online ledgers run on technology called "blockchain" and serve as decentralized databases that facilitate the recording of digital assets and transactions.[45] Cryptocurrency is attractive to users worldwide for many reasons — one of the most emphasized is its

37. *See* Iannacci, *supra* note 26; *see also Katz*, 389 U.S. at 347, 361; *see generally* Pesciotta, *supra* note 16.

38. *See generally* Pesciotta, *supra* note 16.

39. *See id.*; *see* U.S. v. Miller, 425 U.S. 435, 442 (1976).; *see also* Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 48 UNIV. CA. DAVIS L. REV. 977 (2008).

40. Andrew Morgan, *The Patriot Act and Civil Liberties*, JURIST LEGAL COMMENTARY (Jul. 20, 2013, 10:03 PM), https://www.jurist.org/archives/feature/the-patriot-act-and-civil-liberties/ [https://perma.cc/76WD-VTP6].

41. *See generally* Tyler Jr., *supra* note 1.

42. *Id.*; *see also* Morgan, *supra* note 40; *see also NSA Surveillance*, ACLU, https://www.aclu.org/issues/national-security/privacy-and-surveillance/nsa-surveillance [https://perma.cc/8RP2-DKYB](last visited Sept. 26, 2021).

43. *See* Sinclair, *supra* note 6.

44. *See* Kate Ashford & John Schmidt, *What is Cryptocurrency?*, FORBES (Dec. 18, 2020, 12:27 AM), https://www.forbes.com/advisor/investing/what-is-cryptocurrency/ [https://perma.cc/4CND-QFX6].

45. *See* Scott Likens, *Making Sense of Bitcoin, Cryptocurrency, and Blockchain*, PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html (last visited Sept. 26, 2021).

potential to facilitate anonymous, untraceable transactions between users. However, the actual privacy implications of using cryptocurrency are hotly debated.[46] Many activists also view cryptocurrency as a method for "banking the unbanked."[47] If an individual or household is "unbanked," it means they do not have access to a bank account.[48] The term "underbanked" similarly refers to those who, although they may have a bank account, are reliant on services outside the traditional banking system for their financial needs.[49] In a world where financial activity is increasingly institution-driven, living as an unbanked or underbanked person can be time-consuming, exhausting, and — paradoxically, expensive.[50] Yet, an estimated seven million households in the United States do not have a bank account,[51] while an estimated twenty-five percent of United States households are considered underbanked.[52] Proponents of cryptocurrency argue that since blockchain technology allows individuals to securely store and access their money on-demand, cryptocurrency can help bridge the gap between the un-banked, the under-banked, and the rest of society.[53] Cryptocurrency is not without detractors; however, with many who argue that

46. Nasser Alsalami & Bingsheng Zhang, *SoK: A Systematic Study of Anonymity in Cryptocurrencies*, INST. ELEC. & ELEC.S ENG'RS (Nov. 20, 2019), https://core.ac.uk/download/pdf/266984898.pdf.

47. Marco Lichtfous et al., *Can Blockchain Accelerate Financial Inclusion Globally?*, DELOITTE INSIDE MAG. 1, 70 (Oct. 2018), https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/about-deloitte/Inside/lu-inside19-full.pdf

48. Lauren Perez, *What Does it Mean to be Unbanked?*, MAGNIFY MONEY (May 13, 2020), https://www.magnifymoney.com/blog/banking/unbanked/ [https://perma.cc/B5MN-SLKU].

49. *Id.*; Steve Tanner, *Access to Banking: What Does Underbanked Mean?*, FREEDOM DEBT RELIEF (July 9, 2020), https://www.freedomdebtrelief.com/blog/access-to-banking-what-does-underbanked-mean/.

50. Justin Pritchard & Charles Potters, *How The Underbanked Handle Finance in the U.S.*, BALANCE (May 18, 2021), https://www.thebalance.com/how-the-underbanked-handle-finances-in-the-u-s-4175509 [https://perma.cc/74LD-DGRT]; Emily Guy Birken, *The Costs of Being Unbanked or Underbanked*, FORBES ADVISOR (July 28, 2020, 12:03 AM), https://www.forbes.com/advisor/banking/costs-of-being-unbanked-or-underbanked/.

51. Megan Leonhardt, *7.1 Million American Households Didn't Have a Bank Account Last Year – The Lowest Rate Since 2009*, CNBC (Oct. 19, 2020, 1:27 PM), https://www.cnbc.com/2020/10/19/7point1-million-american-households-didnt-have-a-bank-account-last-year.html.

52. Erin Barry, *25% of US Households are Either Unbanked or Underbanked*, CNBC (Mar. 9, 2019, 11:01 AM), https://www.cnbc.com/2019/03/08/25percent-of-us-households-are-either-unbanked-or-underbanked.html.

53. Lichtfous et al., *supra* note 47.

these potential benefits are as-yet unproven[54] and that cryptocurrency is used to facilitate illegal activities.[55] Despite these debates, cryptocurrencies have gained significant popularity in the United States and abroad,[56] spurring a wave of activism dedicated to preserving the use of cryptocurrencies and the blockchain.[57]

In December 2020, FinCEN proposed a new rule with a host of reporting requirements for this burgeoning industry.[58] FinCEN's proposed rule would require cryptocurrency exchanges, banks, and "money service businesses" to maintain records of personal information, including individually identifying information, of cryptocurrency transactions over $3,000.[59] For cryptocurrency transactions over $10,000, the proposed rule would require the exchange to submit a full report of the transaction, including personally-identifying information, to FinCEN.[60]

FinCEN's proposed rule has provoked outrage among activists in the cryptocurrency industry[61] and has been decried as "unconstitutional" by various activist groups via public comments on the proposed rule.[62] Many of these groups, such as the Electronic Frontier Foundation, argue that the proposed rule "violates the Fourth Amendment's protections for individual privacy."[63] The New Civil Liberties Alliance, a U.S. nonprofit civil rights group, argues:

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54. *See* Yaya Fanusie, *Stop Saying You Want to Bank the Unbanked*, FORBES (Jan. 1, 2021, 6:12 PM), https://www.forbes.com/sites/yayafanusie/2021/01/01/stop-saying-you-want-to-bank-the-unbanked/?sh=3cf4ce42456a [https://perma.cc/UY2R-W7WF].

55. Sesha Kethineni & Ying Cao, *The Rise in Popularity of Cryptocurrency and Associated Criminal Activity*, 30 INT'L. CRIM. JUST. REV. 325, 326 (2019).

56. *Id.*; Jared Dean, *Cryptocurrency Popularity Continues to Rise*, KEYC NEWS NOW (last updated Feb. 11, 2021, 5:12 PM), https://www.keyc.com/2021/02/11/cryptocurrency-popularity-continues-rise/.

57. Robert Stevens, *How Cryptocurrency Activism is Trying to Change the World*, DECRYPT (Nov. 24, 2019), https://decrypt.co/11786/how-crypto-activism-is-trying-to-change-the-world.

58. 85 Fed. Reg. 83840 (Dec. 23, 2020).

59. *Id.*

60. *Id.*

61. Adrian Zmudzinski, *Opposition to FinCEN Rule Grows After a16z Promises Court Challenge*, MODERN CONSENSUS (Jan. 6, 2021), https://modernconsensus.com/regulation/opposition-to-fincen-crypto-rule-grows-after-a16z-promises-court-challenge/.

62. Sinclair, *supra* note 6; Kruckenberg, *supra* note 6.

63. Belcher, *supra* note 6.

> FinCEN's proposed rule [is an] unconstitutional power grab [in which FinCEN] unlawfully attempts to transform the agency's limited authority to regulate banks into permission to engage in the mass financial surveillance of innocent individuals who merely use digital assets . . . FinCEN ought to recognize that its proposal would be grossly unconstitutional and promptly scrap this rule.[64]

While such barebones constitutional arguments make up much of the scholarly outcry against FinCEN's proposed rule,[65] activist groups have relied more heavily on complex and nuanced arguments relating to the differences between cryptocurrency and traditional forms of currency in their opposition to this rule.[66] For example, the nonprofit cryptocurrency research and advocacy group, Coin Center, has stated that exchanges would face increased difficulty and costs in monitoring cryptocurrency transactions under the rule because of the technical barriers to identifying participants in a cryptocurrency transaction.[67] As the following section of this paper will show, the activism surrounding FinCEN's proposed rule and critiques by scholars (1) fails to address the legal basis for the rule and (2) fails to predict or counter obvious and predictable counterarguments by proponents of FinCEN's proposal.[68]

64. Kruckenberg, *supra* note 6.

65. *Id.*; *see also generally* Michael et al., *supra* note 7.

66. *See Michael et al., supra* note 7; *see also* Kruckenberg, *supra* note 6.

67. *See* Jerry Brito & Peter Van Valkenburgh, *Supplemental Comments to the Financial Crimes Enforcement Network on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, COIN CTR. (Jan. 7, 2020), https://www.coincenter.org/app/uploads/2021/01/Coin-Center-FinCEN-Second-Comment.pdf.

68. *See generally* Jessel, *supra* note 6; *see also* U.S. Dep't Treasury, *The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions*, U.S. DEP'T TREASURY (Dec. 18, 2020), https://home.treasury.gov/news/press-releases/sm1216.

## III. THE BANK SECRECY ACT AND *MILLER*

### *A. The Bank Secrecy Act*

The Bank Secrecy Act (BSA)[69] and the subsequent U.S. Supreme Court case upholding its constitutionality provide a strong basis for legal counterarguments to activists in the President Richard Nixon's "War on Drugs" and his broader war against organized crime were extremely popular policy initiatives among large swaths of American society in the 1960's and 1970's.[70] Through legislation such as the Controlled Substances Act (CSA)[71] and the Racketeer Influenced Corrupt Practices Act (RICO),[72] the Nixon administration and a friendly Congress continuously expanded the reach of law enforcement and prosecution.[73] With the passage of the BSA in 1970,[74] Congress aimed to further extend that reach to prosecute even more individuals who had avoided prosecution under legislation such as the CSA and RICO[75] by targeting transactions the government deemed to be "suspicious."[76] Title I and II of the BSA, which respectively contain requirements for recordkeeping and reporting for financial institutions,[77] raise the most significant Fourth Amendment issues and are the basis for FinCEN's proposed cryptocurrency rule.[78] Relevant provisions of Title I of the BSA require financial institutions to maintain separate records of identifying information, not only of all

69. 31 U.S.C § 5311 (2011).

70. Cigdem V. Sirin, *From Nixon's War on Drugs to Obama's Drug Policies Today: Presidential Progress in Addressing Racial Injustices and Disparities*, 18 RACE, GENDER & CLASS 82 (2011); Terence McArdle, *The 'Law and Order' Campaign that Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/ [https://perma.cc/FVU3-QB39].

71. 21 U.S.C. §§ 811–12.

72. 18 U.S.C. §§ 1961–68.

73. Sirin, *supra* note 70; McArdle, *supra* note 70.

74. 31 U.S.C. § 5311.

75. Wheeler, *supra* note 5; Office of the Comptroller of the Currency, *Bank Secrecy Act (BSA)*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html (last visited Sept. 26, 2021).

76. Wheeler, *supra* note 5; Office of the Comptroller of the Currency, *supra* note 75.

77. 31 U.S.C. §§ 5311–5330.

78. *The 1970 Bank Secrecy Act and the Right of Privacy*, 14 WM. & MARY L. REV. 929, 935 (1973).

account holders, but also of all individuals entering into transactions using a financial institution's services in a transaction of $5,000 or greater.[79] Title II of the BSA requires financial institutions to file "Suspicious Activity Reports" (SARs) with the government, including identifying information of all parties involved in a transaction.[80] Although this rule seems clearly violative of the Fourth Amendment as interpreted by the Supreme Court in *Katz,*[81] Congress argued in Congressional findings for the BSA that such records "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings."[82] Thus, the BSA was signed into law.[83]

### *B. Miller Upholds the Bank Secrecy Act*

The BSA was often a subject of litigation in various state and federal cases after its passage, and only six years after President Nixon signed it into law, the BSA was challenged before the Supreme Court. In its 1976 decision *United States v. Miller*, the Supreme Court determined the outcome of a challenge to the Bank Secrecy Act brought by a distiller who had been convicted of violating a whiskey tax.[84] In securing the distiller's conviction, the government relied upon deposits and other bank records obtained through a subpoena of the distiller's bank.[85] The Court, in a familiar exercise in doublethink, expressed that it wished to uphold and indeed relied upon *Katz* in its decision,[86] yet proceeded to effectively and completely undermine its holding in *Katz*.[87] The *Miller* Court first quoted *Katz* and stated that pieces of evidence an individual consciously reveals to the public do not receive Fourth Amendment protection.[88] The Court then attempted to equate information given to a financial institution during the course of normal

79. 31 U.S.C. §§ 5311–5330.

80. *Id.*

81. Katz v. U.S., 389 U.S. 347 (1967).

82. Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 26 (1974).

83. Wheeler, *supra* note 5; Office of the Comptroller of the Currency, *supra* note 75.

84. U.S. v. Miller, 425 U.S. 435, 436–38 (1976).

85. *Id.* at 442–44.

86. *Id.* at 442.

87. *See generally* Richard M. Thompson II, *The Fourth Amendment Third-Party Doctrine*, CONG. RSCH. SERV. 1, 1 (June 5, 2014), https://sgp.fas.org/crs/misc/R43586.pdf [https://perma.cc/86CD-JW68].

88. *Miller*, 425 U.S. at 442.

banking activities to public disclosure of information in an extraordinary feat of bending logic and language.[89] The Court never employed the two-part test from *Katz,*[90] and instead emphasized that "[a]ll 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."[91] This language preceded the Supreme Court's explicit adoption of the so-called "third party doctrine" by only a few sentences.[92] The *Miller* Court adopted this exceptionally expansive doctrine with the following deceptive passage:

> [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[93]

Even though the Court had ostensibly relied upon *Katz* as supporting authority for its decision,[94] in reality, the Court did away with the *Katz* decision's two-parts test,[95] leaving it virtually impotent in some of the most significant cases in which the scope of Fourth Amendment privacy protections have been challenged.[96] The third-party doctrine essentially means that whenever an individual shares a piece of evidence with a third party, whether during the course of banking activities or through some other interaction, they forfeit their Fourth Amendment privacy protection for that piece of evidence.[97]

89. *Id*. at 442–43.

90. U.S. v. Miller, 425 U.S. 435, 442–43 (1976).

91. *Id.* at 442.

92. *Id.* at 442–43; Thompson, *supra* note 87.

93. U.S. v. Miller, 425 U.S. 435, 443 (1976).

94. *Id.* at 442.

95. *See generally id.*; *see also* Sherry F. Colb, *The Third-Party Doctrine vs. Katz v. United States*, JUSTIA VERDICT (June 17, 2020), https://verdict.justia.com/2020/06/17/the-third-party-doctrine-vs-katz-v-united-states.

96. *See generally Miller*, 425 U.S. at 443; *see also Cal. Bankers Ass'n*, 416 U.S. 21, 88, 95–96 (Douglas, J., dissenting and Marshall, J., dissenting); *see also* Pesciotta, *supra* note 16.

97. *See generally Miller*, 425 U.S. at 443; *see* Thompson, *supra* note 87 at 9; *see also* Sherry F. Colb, *supra* note 95; *see also Cal. Bankers Ass'n*, 416 U.S. 21, 88, 95–96 (Douglas, J., dissenting and Marshall, J., dissenting).

While seemingly incompatible with its own ruling in *Katz,* the Supreme Court's decision in *Miller* upheld both *Katz* and the BSA as good law,[98] leaving the current landscape of Fourth Amendment privacy protections opaque in many situations.[99]

### *C. Cryptocurrency Activism Precluded by the Bank Secrecy Act*

The cryptocurrency industry activists discussed in Section II of this paper would be well served to familiarize themselves with the pertinent provisions of the Bank Secrecy Act (BSA) and the Supreme Court's subsequent *Miller* decision upholding the BSA's constitutionality. Even a cursory review of the BSA and *Miller* illustrates how the arguments put forth by cryptocurrency activist groups are obviated by the recordkeeping and reporting requirements contained in Titles I and II of the BSA.[100] Review makes clear that FinCEN's proposed rule is almost duplicative of the BSA[101] – which, again, has been ruled to be constitutional by the Supreme Court.[102] Indeed, FinCEN emphasized the duplicative nature of the proposed rule when it published its Notice of Proposed Rulemaking.[103] The notice stated that the "rule addresses substantial national security concerns in the CVC market, aims to close the gaps that malign actors seek to exploit in the recordkeeping and reporting regime, [and] is consistent with existing requirements." [104] Although its arguments may not be especially convincing as to the constitutionality of its proposed rule, FinCEN has an irrefutable point that all the proposed rule seeks to do is to close an extant loophole between unmonitored cryptocurrency transactions and more traditional forms of

98. *Miller*, 425 U.S. at 436–37, 442, 444–47.

99. U.S. v. Miller, 425 U.S. 435, 435, 446 (1976); *see generally* Colb, *supra* note 95; *see generally Cal. Bankers Ass'n*, 416 U.S. 22, 24, 42, 52, 54.

100. *See generally* 31 U.S.C. § 5311 (the Bank Secrecy Act); *see generally Miller*, 425 U.S. 435; *see also* Wheeler, *supra* note 5; *see also* Off. Comptroller Currency, *supra* note 75; *see also* Jessel, *supra* note 6 at 13–4 (because of Miller's holding, and the so-called third-party doctrine, the entire BSA regime, which mandated disclosures to FinCEN, even without any suspicion of wrongdoing, was viewed as simply outside the protection of the Fourth Amendment).

101. *See generally* U.S. Dep't. of the Treasury, *supra* note 68.

102. *See Miller*, 425 U.S. at 436–37, 444–47; *see also* Jessel, supra note 6 at 13–14.

103. 31 C.F.R. §§ 1010, 1020, 1022 (2010); *see generally* U.S. Dep't. Treasury, *supra* note 68.

104. U.S. Dep't. Treasury, *supra* note 68.

monetary transactions,[105] such as banking. Since *Miller* upheld the constitutionality of government surveillance of such traditional forms of transactions, FinCEN needs only to point to *Miller* for support for their proposed cryptocurrency monitoring rule.[106] Those in the cryptocurrency industry implicitly argue that the anonymized roots of cryptocurrency grant it rights not enjoyed by other industries.[107] Even leading cryptocurrency scholar-activists, such as Marta Belcher of Ropes & Gray and the Electronic Frontier Foundation, have been left without answers when faced with the seemingly obvious question: What makes FinCEN's proposed rule any different from existing monetary reporting requirements?[108] Lackluster responses from cryptocurrency activists, such as Ms. Belcher, that emphasize specific unique aspects of cryptocurrency and its users highlight the need for an approach to governmental financial surveillance that goes farther and is unrestricted by unnecessary focus on a particular industry.[109] FinCEN's proposed cryptocurrency reporting rule is problematic, but it is only an extension of the BSA and *Miller* decision,[110] which must be revisited to align Supreme Court Fourth Amendment jurisprudence with *Katz*.[111]

## IV. ANALYSIS: REVISITING THE BANK SECRECY ACT

Cryptocurrency industry activists, and those activists involved more broadly in the fight for proper recognition of Fourth Amendment privacy protections, should revisit the BSAwith an emphasis on the still-valid two-part test handed down by the Supreme Court in *Katz*.[112] Such a challenge to the BSA, and by extension the *Miller* decision, should stress that the *Miller* court erred in failing to properly apply the two-part

105. *Id.*; *see* Jessel, *supra* note 6.

106. *See generally* U.S. v. Miller, 425 U.S. 435, 436–37, 444–47 (1976).

107. Jessel, *supra* note 6.

108. *See generally* Brito & Valkenburgh, *supra* note 67; *see also* Sinclair, *supra* note 6.

109. *See generally* Michael et. al., *supra* note 7; *see generally* Jessel, *supra* note 6.

110. *See generally* 31 U.S.C. § 5111; *Miller*, 425 U.S. at 436–37, 444–47; *see also* U.S. Dep't. of the Treasury, *supra* note 68.

111. *See generally* Katz v. U.S., 389 U.S. 347 (1967); *see also* Colb, *supra* note 95.

112. *See Katz*, 389 U.S. at 354–59.

expectation of privacy test as outlined in its *Katz* decision.[113] In upholding the BSA, through the adoption of the third-party doctrine,[114] the *Miller* Court essentially created an exception to Fourth Amendment privacy protections where none should exist.[115] Even if the third-party doctrine is in some way constitutionally valid, it could be harmonized with the two-part test from *Katz*.[116] Such a balance could be struck by applying *Katz*'s two-part test in the context of third-party disclosures as follows: if an individual has an expectation of privacy in information given to a third-party *and* society is prepared to accept such an expectation as reasonable, then the information is protected by the Fourth Amendment.[117] There are clearly many third-party disclosures, often protected by their own statutes,[118] which society is prepared to accept as conferring a reasonable expectation of privacy under the Fourth Amendment. There are others that society is not as prepared to accept.[119]

Although activists in the industry have thus far been ineffective at challenging the reach of governmental financial surveillance in the U.S.,[120] the rise of cryptocurrency and the widespread outcry against FinCEN's proposed rule from both industry activists and those outside the industry is indicative that society *is* prepared to accept an expectation of privacy in a financial transaction as reasonable.[121] The *Katz* holding, including the two-prong test, is written so as to be interpreted in

113. *Id.*; *see generally* 31 U.S.C. § 5111; *see generally* U.S. v. Miller, 425 U.S. 435, 436–56 (1976).

114. *See generally Katz*, 389 U.S. at 347; *see generally* Thompson, *supra* note 87 at 9–11.

115. *See generally Miller*, 425 U.S. at 441–44; *see also* Colb, *supra* note 95.

116. *See generally Miller*, 425 U.S. at 435; *see also* Iannacci, *supra* note 26; *see also* Pesciotta, *supra* note 16.

117. *See generally* Colb, *supra* note 95; *see generally* Pesciotta, *supra* note 16, at 197–98.

118. *See* Thompson, *supra* note 87 at 26.

119. *See* Thompson, *supra* note 87 at 26; *see generally* Iannacci, *supra* note 26; *see* Pesciotta, *supra* note 16 at 199, 205.

120. *See generally* Shawn Bradstreet, *Reforming the Bank Secrecy act to Address Emerging Technology and Prevent Illicit Financing*, CTR. FOR HOMELAND DEF. & SEC. NAVAL POSTGRADUATE SCH. (Dec. 2019), https://www.hsdl.org/?view&did=834584; *see also* Wheeler, *supra* note 5; *see also* Off. Comptroller of the Currency, *supra* note 75.

121. *See generally Number of Daily Transactions in Bitcoin, Ethereum, and Nine other Cryptocurrencies from January 2017 to March 28, 2021*, STATISTA (Mar. 28, 2021), https://www.statista.com/statistics/730838/number-of-daily-cryptocurrency-transactions-by-type/ [https://perma.cc/3CDJ-JGT5]; *see also* Fusco, *supra* note 31.

light of *society's* belief of what constitutes a reasonable expectation of privacy at the present time.[122] Cryptocurrency has grown exponentially in popularity in the past decade,[123] and over three million estimated transactions take place per day using Bitcoin[124]–just one of myriad cryptocurrencies available for use in financial transactions today.[125] This move to anonymized, electronically secured forms of currency is illustrative of the fact that U.S. society desires privacy in its financial transactions,[126] therefore, society is prepared to accept an expectation of privacy in such circumstances as reasonable.[127] Under *Katz*, Title I and II of the BSA are violative of the privacy protections of the Fourth Amendment, and must be ruled unconstitutional.[128] It must be acknowledged that this line of reasoning invites a predictable counterargument: how can society be prepared to accept an expectation of privacy in cryptocurrency transactions when it is not prepared to accept the same expectation of privacy in traditional monetary transactions? However, by framing the argument for a societal expectation for privacy under *Katz* by using the rise of cryptocurrency as *supporting evidence*, activists could argue that society is indeed prepared to accept an expectation of privacy in traditional monetary transactions. By framing a challenge to the BSA and the Court's decision in *Miller* in this way, a court would likely consider ruling relevant provisions of the BSA unconstitutional.[129] By espousing this approach, cryptocurrency industry activists can expand their self-centered, dead-end arguments against FinCEN's proposed rule and help U.S.

122. Fusco, *supra* note 31; *see* Iannacci, *supra* note 26.

123. *See generally* STATISTA, *supra* note 121; *see also* Kethineni et. al., *supra* note 55*; see also Cryptocurrency Market Size, Share and COVID-19 Impact Industry Analysis, By Component, By Type, By End-Use, and Regional Forecast, 2020-2027*, FORTUNE BUS. INSIGHTS (May 2020), https://www.fortunebusinessinsights.com/industry-reports/cryptocurrency-market-100149 [https://perma.cc/4YUW-YTUQ].

124. *See* STATISTA, *supra* note 121.

125. STATISTA, *supra* note 121; *see* FORTUNE BUS. INSIGHTS, *supra* note 123.

126. *See generally* Geoff Goodell & Tomaso Aste, *Can Cryptocurrencies Preserve Privacy and Comply with Regulations,* FRONTIERS BLOCKCHAIN (May 28, 2019), https://www.frontiersin.org/articles/10.3389/fbloc.2019.00004/full [https://perma.cc/XM9Q-5JRS].

127. *Id.*; *see* Iannacci, *supra* note 26.

128. *See generally* Katz v. U.S., 389 U.S. 347 (1967); *see generally* Iannacci, *supra* note 26; *see generally* Fusco, *supra* note 31.

129. *See generally* Iannacci, *supra* note 26.

citizens reclaim their lost Fourth Amendment privacy protections under *Katz*.[130]

## CONCLUSION

The financial surveillance of United States citizens by their own government is not a new phenomenon,[131] and FinCEN's proposed rule for monitoring and reporting cryptocurrency transactions is seemingly a natural outreach of the ever-growing U.S. surveillance state.[132] Activists in the cryptocurrency industry have not been wrong to argue that FinCEN's proposed rule is unconstitutional,[133] but they have thus far failed to effectively engage with the supporting authority for the rule–the Bank Secrecy Act of 1970.[134] The BSA effectively overruled the Supreme Court's holding in *Katz*,[135] but the *Miller* decision ignored this fact and upheld the BSA on the basis of the third-party doctrine.[136] Cryptocurrency and privacy activists should push for the Court to revisit the BSA while adhering to the two-prong expectation of privacy test from *Katz*.[137] By emphasizing the ability of the third-party doctrine to survive in harmony with *Katz*'s two-part test and society's push for privacy as evidenced by the rise of cryptocurrency transactions, activists in the cryptocurrency industry can lead the modern charge for U.S. citizens' reclamation of their privacy rights under the Fourth Amendment.

130. *See generally Katz*, 389 U.S. at 347; *see generally* Iannacci, *supra* note 26.

131. *See generally* McCoy, *supra* note 1; *see also* Center for Reproductive Rights, *supra* note 1*; see also* Goodell & Aste, *supra* note 126.

132. *See* Goodell & Aste, *supra* note 126.

133. Belcher, *supra* note 6; Dr. Josephine Wolff, *Losing our Fourth Amendment Data Protection*, N.Y. TIMES PRIV. PROJECT (Apr. 28, 2019), https://www.nytimes.com/2019/04/28/opinion/fourth-amendment-privacy.html?auth=login-google [https://perma.cc/K9CN-JL3Z].

134. *See generally* U.S. v. Miller, 425 U.S. 435, (1976).

135. 31 U.S.C. § 5111; *Miller*, 425 U.S. at 435; Katz v. U.S., 389 U.S. 347 (1967).

136. *Miller*, 425 U.S. at 435, 445–46.

137. *See* Iannacci, *supra* note 26.