The Infrastructure Bill Should Not Target Cryptocurrency

By **James Burnham**

Congress is not known for its legislative care and the pending infrastructure bill is no exception. This legislation has been delayed, and Congress should use the extra time to make it better. In particular, it should excise a tucked-away provision that, if passed, might smother the booming cryptocurrency industry.

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Right now, people who buy, sell or transfer cryptocurrency generally have no obligation to report the specifics of their transactions to the government.

But if Congress passes the infrastructure bill in its current form, any person who receives a digital asset worth $10,000 or more in the course of doing business will be required to gather extensive information about the person who sent the asset, complete a complicated tax form and transmit everything to the Internal Revenue Service.

This mandate could reach anyone who accepts cryptocurrency for goods or services, leaving those who fail to properly complete their paperwork facing ruinous fines and even prison. Imposing it is unnecessary, ill-advised and possibly unconstitutional.

The ostensible purpose of this requirement is to enhance tax collection. But the law already requires people to pay their taxes and the IRS already has access to a wealth of information about cryptocurrency transactions.

For one thing, many cryptocurrency exchanges — where the bulk of crypto transactions take place — are registered with the federal government and many are subject to the sorts of rules that govern traditional financial institutions. Those exchanges thus already gather personal information about their users and report large transactions to the government.

Cryptocurrency is also uniquely transparent because each crypto transaction is recorded in a public blockchain, and those who own cryptocurrency often store their assets in so-called wallets that are linked to these public blockchains.

Law enforcement agencies have had great success tracing cryptocurrency through the marketplace via this public information.

That public information is less comprehensive than what the proposed mandate would require collecting, of course, but indiscriminately flooding federal filing cabinets with information about already-public transactions is unlikely to enhance enforcement efforts. And besides, law enforcement has tools — warrants, subpoenas — to gather targeted information when necessary.

Nor would this proposed reporting requirement be a mere inconvenience. Person-to-person cryptocurrency transactions will not be possible if every recipient must collect and report the sender's sensitive personal information.

Want to sell used cars or other goods for bitcoin? Only if you can persuade buyers to tell you their Social Security number, occupation and home address, among other things. Many people will stop using cryptocurrency before suiting up as ersatz IRS agents.

In addition to being bad policy, this proposed reporting requirement may well violate the Fourth Amendment. Federal law has long required the reporting of certain cash transactions, but those requirements — and the U.S. Supreme Court decisions approving them — originated with personal bank accounts.

There is a strong argument that what the Constitution tolerates in the context of banking, it forbids in the context of person-to-person crypto transactions.

People who open bank accounts necessarily share detailed information with their banks. The bank knows your name, your Social Security number, your address and so forth — in addition to knowing everything about the money you've deposited there.

Recognizing as much, Congress in 1970 enacted the Bank Secrecy Act, which requires that banks report certain information about their customers' transactions to the IRS.

The Supreme Court's 1976 decision in U.S. v. Miller blessed this regime.[1] The court recognized that people have a reasonable expectation of privacy in information they keep private — say, by sealing the envelope that contains a letter — but not in information they divulge to a third party.

Those who share detailed personal and financial information with their bank cannot complain, the court reasoned, when the bank shares some of that information with the government.

Person-to-person crypto transactions are fundamentally different. They involve no third party. Recipients of cryptocurrency have no reason to gather the sender's personal information and senders have no reason to offer it.

The two participants are not forging a comprehensive or ongoing financial relationship, and indeed sometimes go to great lengths to preserve their privacy. There is thus a solid argument that the Fourth Amendment forbids the government from mass collecting their personal information.

Recent legal developments support that conclusion. In a 2018 decision, Carpenter v. U.S.,[2] the Supreme Court held that the government needed a warrant to obtain a person's location information from his or her cellular provider.

In doing so, the court rejected the notion that because cellular providers have perpetual access to their customers' locations, the government may also have warrantless access to that information. With private cryptocurrency transactions between two people, the reasonable expectation of privacy would seem even higher.

Federal law currently requires many businesses that receive physical cash in sums over $10,000 to report detailed personal information about their customers. But Congress imposed that requirement much later, the Supreme Court has never considered its constitutionality, and a reporting requirement for physical cash is arguably more justified.

Physical cash transactions typically take place in person, diminishing their privacy. Transfers of physical cash are ephemeral whereas the blockchain is forever, making records more important for the former. And physical cash transactions of over $10,000 are rare, making them less burdensome to report and perhaps more suspicious. With the value of cryptocurrency skyrocketing and its use exploding, the same is hardly true here.

Stopping tax evasion is important, but the usual Beltway solution of intrusive mandates backed by criminal prosecution is the wrong one. Rather than fill IRS coffers, a reporting mandate will simply deter many private citizens from engaging in direct crypto transactions in the first place.

If Congress' goal is actually to enhance tax collection — rather than destroy a fast-growing marketplace — it needs to change course.

Correction: A previous version of this article's headline misidentified the infrastructure bill. The error has been corrected.

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[1] U.S. v. Miller, 425 U.S. 435 (1976).

[2] Carpenter v. U.S., 138 S. Ct. 2206 (2018).