Twitter Thread by Peter Van Valkenburgh



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1/ Here's a thread on the constitutional challenges to the midnight rulemaking that @coincenter is holding in reserve. They boil down to your rights against warrantless search and seizure (4th amendment) and your rights to assemble anonymously (1st amendment).

2/ 4th Amendment. In theory any government search and seizure of personal information should occur only after government obtains a warrant from a judge. To get a warrant they'll need to specifically describe the thing to be searched and explain why they've suspicion of crime.

3/ The Bank Secrecy Act is a bulk financial record surveillance law that forces banks and other financial institutions (crypto exchanges included) to collect personal information from customers and report it to government without any warrant or individual suspicion.

4/ The BSA's constitutionality as a warrantless search was challenged in the 1970s and the court narrowly upheld the law (and this is important) as it was applied by Treasury at the time. Since then its application has been significantly expanded and that's been unchallenged.

5/ the cases were Shultz https://t.co/BtAfdXMSBh and Miller https://t.co/nngic7231N. The Court said that warrants are not required if government searches information bank customers have already handed over to a third party (bank). This became known as the third party doctrine.

6/ The reasoning was that if someone voluntarily hands information to a third party and if that party retains it as part of a legitimate business purpose, then the person no longer has a reasonable expectation of privacy with respect to that information.

7/ More recently, in Carpenter https://t.co/pzxASPWxKB the court found that cell phone subscribers do not voluntarily hand over their location data to their providers and providers do not have a legitimate business purpose retaining that information.

8/ Therefore subscribers retain a reasonable expectation of privacy over their location data and government needs a warrant to obtain that data from cellular providers. This is a severe weakening of the third party doctrine.

9/ We would argue that unlike the searches in Shultz and Miller this proposed rule obligates financial institutions to collect information about persons who are not their customers (the customer counterparty recording requirement).

10/ That data is very private because it is a list of names and physical addresses for people who control keys for bitcoin addresses. It endangers them (extortion and kidnapping) and it reveals their entire transaction history (blockchain + linked name and physical address).

11/ And, critically, that data is not provided voluntarily by the person being searched simply because she is receiving a bitcoin transactions from a regulated exchange. The law would force the exchange or the exchange's customer to obtain that information in order to transact.

12/ When an exchange obtains that information it will have retained private info that was not voluntarily provided by the person being searched and is not required for a legitimate business purpose (an exchange only needs to know the bitcoin address in order to make a payment)

13/ As with Carpenter, the subject of the search (the person whose wallet is being surveilled in this process) retains reasonable expectation of privacy over that information. Accordingly, the BSA, which operates without warrants, cannot be used to collect that data.

14/ 1st Amendment. In NAACP v. Alabama the Court overturned a requirement for the NAACP to report a list of its members to the state government. In effect, the Court found that people have some protected rights to assemble anonymously under the 1st amendment.

15/ In Shultz (the 4th amendment case I mentioned earlier) the ACLU challenged the BSA saying that the reporting requirements would create government lists of their donors and therefore impinge on their members' 1st amendment rights to assemble anonymously.

16/ Unfortunately, the ACLU's arguments were rejected by the Court in Shultz but NOT because they thought they were bad arguments, rather the court said the ACLU could not prove that any of its members had actually been the subject of a BSA report.

17/ So this potential challenge remains open to any advocacy organization who can show that the BSA mandated that government collect a list of their members.

18/ The proposed rule would require records for every $3k+ payment from an exchange to a self-custodied wallet (Coin Center has one) and reports for every payment above $10k. In other words, we'll be able to prove our donors are being listed under the new rule...

19/ and we'll have standing to challenge that data collection as a violation of our supporter's 1st amendment rights to assemble anonymously.

20/ so that's our con-law reserve challenges should process arguments fail. There's also a super secret 60 page paper about the unconstitutional delegation of legislative authority inherent in the Bank Secrecy Act that's our reserve in reserve. ...

for another day.