



# Freedom: The Struggle for Civil Liberties Part IV

Those in power need checks and restraints lest they come to identify the common good as their own tastes and desires, and their continuation in office as essential to the preservation of the nation.

William O. Douglas (1898-1980)  
US Supreme Court Justice



# The Right to Bear Arms

- o 2nd amendment: *A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.*
- o US has 200 million or more firearms and one of the highest shooting-death rates in the world.
- o American people **have disagreed about gun laws** as long as we've had guns.
- o If you read the amendment one way, almost everybody has the right to carry an Uzi almost anywhere, almost anytime. But interpret it another way and that right is based on membership in a militia like a state's National Guard.





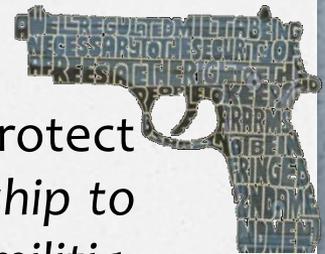
# The Right to Bear Arms

- o What makes things even trickier is that **each state has different laws** about background checks, waiting periods, right-to-carry permits, bans on types of weapons and ammo.
- o Supreme Court has ruled that the **right belongs to individuals**, while also ruling that the **right is not unlimited** and **does not prohibit all regulation** of either firearms or similar devices.
- o State and local governments are limited to the same extent as the national government from infringing on this right per the incorporation of the Bill of Rights.



# The Right to Bear Arms

- o *US v. Cruikshank* (1876): The right to bear arms is not granted by the Constitution and is not in any manner dependent upon that instrument for its existence ... limited the scope of the 2nd amendment's protections to the national government
- o *US v. Miller* (1939): 2nd amendment does not protect weapon types not having a *reasonable relationship to the preservation or efficiency of a well regulated militia*
- o *District of Columbia v. Heller* (2008): landmark decision that held the amendment protects an individual right to possess and carry firearms





# The Right to Bear Arms

- o *McDonald v. Chicago* (2010): Court clarified earlier decisions that limited the amendment's impact to a restriction on the national government, expressly holding that the due process clause of the 14th amendment incorporates the 2nd amendment against state and local governments
- o *Caetano v. Massachusetts* (2016): 2nd amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding ... its protection is not limited to only those weapons useful in warfare





# Right to Privacy

- o ...desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behavior to others (Westin, 1968)
- o concept that one's personal life and information is protected from public scrutiny ... Justice Louis Brandeis called it *the right to be left alone*.
- o The *right to privacy* often must be balanced against *the state's compelling interests*, including the promotion of public safety and improving the quality of life (seat belt and motorcycle helmet laws, for example).





# Right to Privacy

- o The freedom to be left alone in our private lives (the right to privacy) is not specifically mentioned in the Constitution but a **case can be made that it is inherent**.
- o 1st amendment: privacy of belief
- o 3rd amendment: privacy of home
- o 4th amendment: privacy of person and possessions
- o 5th amendment: privacy of personal information
- o 9th amendment: *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*
- o In 1960s and '70s this right was recognized by Court with regard to private sexual behavior and reproductive rights.





# Right to Privacy

- o The right to privacy is most often cited in the due process clause of the 14th amendment, which states: *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*
- o *Stanley v. Georgia (1969): the right to privacy protects person's right to possess and view pornography in his own home ... If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.*

**YOU ARE  
NOW ENTERING**



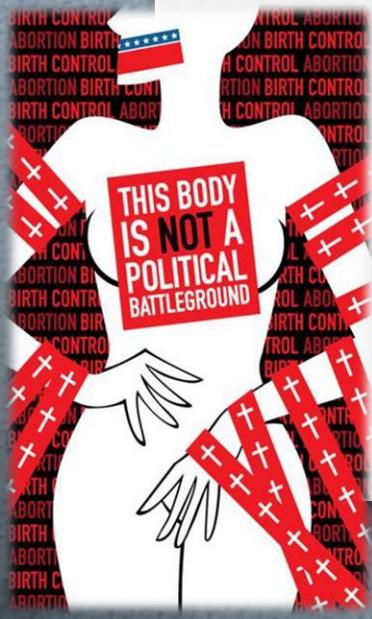
**A PRIVACY FREE  
COUNTRY**

*Thank you for obeying!*



# Right to Privacy: Reproductive Rights

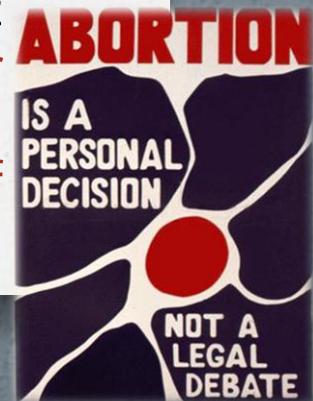
- o ...a judicially created doctrine encompassing an individual's decision to use birth control and to secure an abortion
- o *Griswold v. Connecticut* (1965): Constitution, through the Bill of Rights, implies a fundamental right to privacy, a right to protection from governmental intrusion ... right to use contraceptives ... an important precedent for *Roe v. Wade* (1973) and *Lawrence v. Texas* (2003)





# Right to Privacy: Reproductive Rights

- o *Roe v. Wade* (1973): Court found a woman's right to an abortion was protected by the right to privacy that could be implied from specific guarantees found in Bill of Rights applied to states through 14th amendment ... **required that any governmental infringement of right to privacy be justified by a compelling state interest**
- o *Webster v. Reproductive Health Services* (1989): upheld a Missouri law that imposed restrictions on the use of state funds, facilities and employees in performing, assisting with or counseling on abortions ... held that due process clause **does not require states to enter into business of abortion and does not create an affirmative right to governmental aid in pursuit of constitutional rights**





# Right to Privacy: Reproductive Rights



*Planned Parenthood of SE Pennsylvania v. Casey* (1992): reaffirmed *Roe* but imposed a **new standard to determine the validity of laws restricting abortions** (whether a state abortion regulation has the purpose or effect of imposing an **undue burden**, defined as a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability)

- *Stenberg v. Carhart* (2000): held that Nebraska's statute criminalizing the performance of partial birth abortion violated the Constitution as interpreted in *Casey* and *Roe* because it **placed an undue burden on a woman's right to have an abortion** and did not allow for exceptions in cases of threatened health



# Right to Privacy: Reproductive Rights

## Worst States for Reproductive Rights

### North Dakota

- o One functioning clinic
- o Bans abortions after 6 weeks
- o Biased counseling
- o Insurance restrictions
- o Defines life at fertilization
- o Doctors must have hospital admitting privileges
- o 2014 Ballot vote on personhood amendment

### Arkansas

- o Bans abortions after 12 weeks\*
- o Biased counseling
- o Insurance restrictions
- o Unnecessary, burdensome building requirements for clinics
- o Defines life at fertilization

### Mississippi

- o One functioning clinic
- o Biased counseling
- o Insurance restrictions
- o Mandatory ultrasound
- o Doctors must have hospital admitting privileges\*

### Kansas

- o Biased counseling
- o Insurance restrictions
- o Mandatory ultrasound
- o Defines life at fertilization
- o Blocks public funding for abortions

### Louisiana

- o Bans abortions after 20 weeks
- o Biased counseling
- o Insurance restrictions
- o Unnecessary, burdensome building requirements for clinics
- o Defines life at fertilization

### Texas

- o Defunded Planned Parenthood women's health program
- o Biased counseling
- o Insurance restrictions
- o Mandatory ultrasound

### South Dakota

- o One functioning clinic
- o Bans abortions after 24 weeks
- o Biased counseling
- o Insurance restrictions

### Arizona

- o Biased counseling
- o Insurance restrictions
- o Mandatory ultrasound



# Right to Privacy: Sexual Orientation

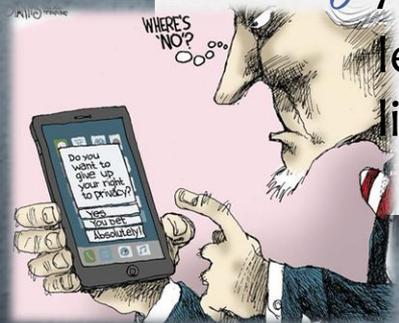
- *Bowers v. Hardwick* (1986): Georgia law prohibiting sodomy under which two homosexuals had been convicted ... behavior not supported by majority and Court held state could regulate
- In *Lawrence v. Texas* (2003): Court reversed itself saying *Bowers* should not be a binding precedent ...  
State sodomy laws found unconstitutional.

LGBTQ



# Right to Privacy: Sexual Orientation

- o *Obergefell v. Hodges* (2015): Due process clause of 14th amendment guarantees right to marry as one of the fundamental liberties it protects ... **applies to same-sex couples in the same manner as it does to opposite-sex couples** ... 1st amendment protects rights of religious organizations to adhere to their principles but **does not allow states to deny same-sex couples right to marry on same terms as those for opposite-sex couples**
- o Although included here, the right for gays and lesbians to marry is more a **civil rights issue** than a civil liberties issue.

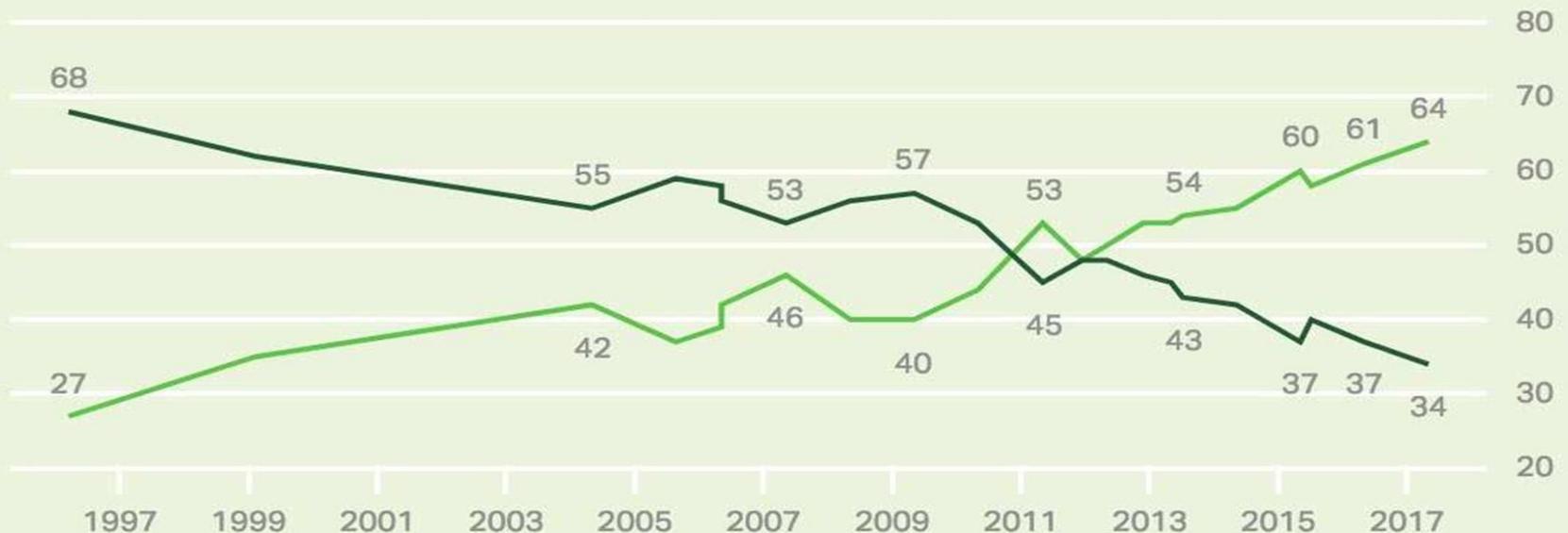




# Right to Privacy: Sexual Orientation

Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?

■ % Should be valid   ■ % Should not be valid



Note: Trend shown for polls in which same-sex marriage question followed questions on gay/lesbian rights and relations

1996-2005 wording: "Do you think marriages between homosexuals ..."

GALLUP



# Right to Privacy: The Right to Die

...underlying issues include a variety of legal concepts, including issues of suicide, passive euthanasia (allowing person to die by refusal or withdrawal of medical intervention), assisted suicide (providing person means of committing suicide), active euthanasia (killing another), palliative care (providing comfort care which accelerates death process), physician-assisted suicide (blend of assisted suicide or active euthanasia undertaken by a licensed physician)

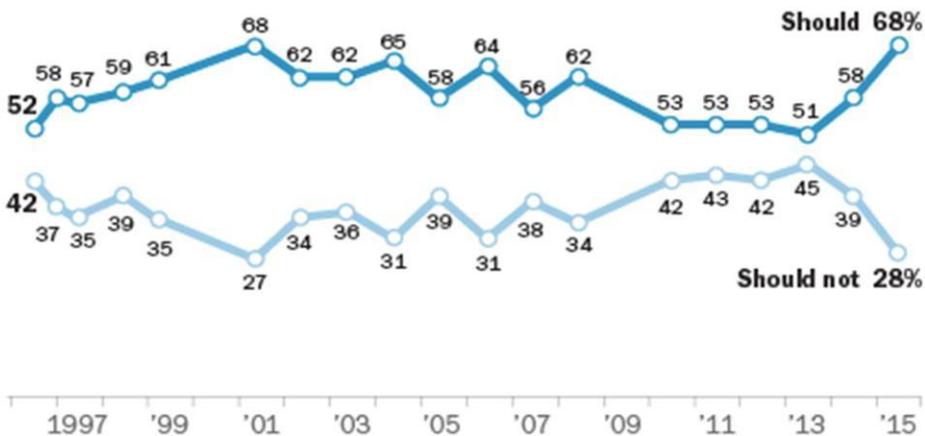




# Right to Privacy: The Right to Die

## Increasing Support for Doctor-Assisted Suicide

When a person has a disease that cannot be cured and is living in severe pain, do you think doctors should or should not be allowed by law to assist the patient to commit suicide if the patient requests it?



Source: Gallup

Note: Question wording varied from above between 1996-1999. It was "When a person has a disease that cannot be cured and is living in severe pain, do you think doctors should be allowed by law to assist the patient to commit suicide if the patient requests it, or not?"

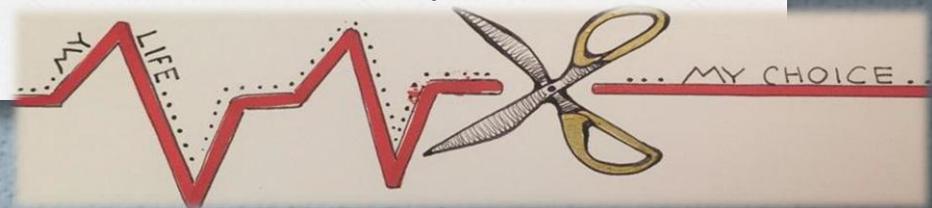
PEW RESEARCH CENTER

*Cruzan v. Director, Missouri Department of Health* (1990): Court upheld state requirement that there must be *clear and convincing evidence of patient's previously manifested wishes* before nutrition and hydration can be withdrawn. Court held that state is not required to follow the judgment of the family, the guardian or anyone but the patient in making decision.



# Right to Privacy: The Right to Die

- o Rehnquist Court rejected any attempts to expand right to privacy in this area.
- o *Washington v. Glucksberg* (1997): Court rejected argument that due process clause provides terminally ill individual right to seek and obtain physician's aid in committing suicide. Court noted that it moves with *utmost care* before breaking new ground in the area of liberty interests.
- o Court did note that individuals could terminate medical treatment if they were able to express, or had done so in writing via a living will, their desire to have medical treatment terminated in the event they became incompetent.





# Right to Privacy: The Right to Die

*Terri Schiavo case*: a right-to-die legal case from 1990 to 2005, involving a woman in an irreversible persistent vegetative state ... Schiavo's husband and legal guardian argued that Schiavo would not have wanted prolonged artificial life support without prospect of recovery and elected to remove her feeding tube. Schiavo's parents disputed husband's assertions and challenged Schiavo's medical diagnosis, arguing in favor of continuing artificial nutrition and hydration. The highly publicized and prolonged series of legal challenges presented by parents, which ultimately involved state and national politicians up to the level of president, caused a seven-year delay before Schiavo's feeding tube was ultimately removed.



# Right to Privacy: The Right to Die

- o Oregon voters approved a right to die law in 2001.
- o Attorney General issued legal opinion that this was not acceptable.
- o state vs. national conflict
- o Federal judge ruled that AG had overstepped his authority.
- o Gonzalez v. Oregon (2006): ruled that the US Attorney General cannot enforce the national Controlled Substances Act against physicians who prescribe drugs, in compliance with Oregon state law, to terminally ill patients seeking to end their lives (often referred to as medical aid in dying)





# Right to Privacy: Personal Information



- o ...concept that one's personal information is protected from public scrutiny ... privacy partially overlaps security (confidentiality), which can include concepts of appropriate use and protection of information
- o The right not to be subjected to unsanctioned invasion of privacy by government, corporations or individuals is part of many countries' privacy laws, and in some cases, constitutions.
- o invasion of privacy can include: **collecting** information, **aggregating** information, information **dissemination**



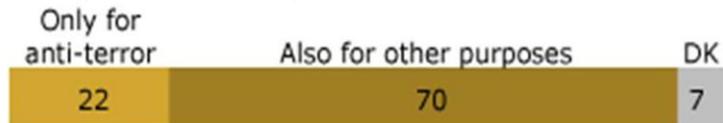
# Right to Privacy: Personal Information

## Perceptions of the Government's Data Collection Program

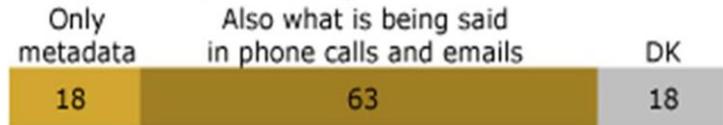
Do courts provide adequate limits on what is collected?



Is the government using this data ...



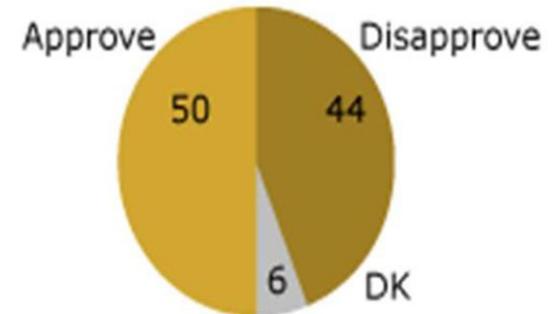
Is the government collecting ...



Has the government listened to  
YOUR calls or read YOUR emails?



## Overall view of the program

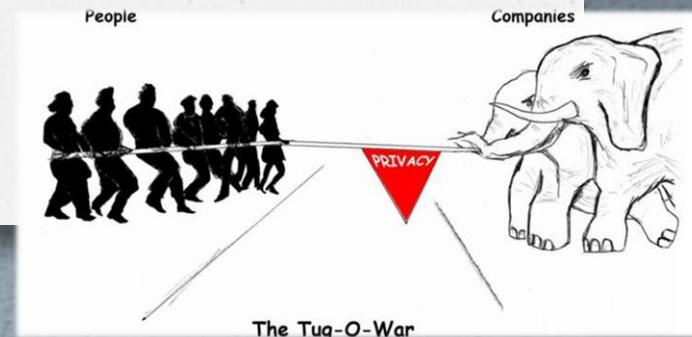


PEW RESEARCH CENTER July 17-21, 2013.  
Figures may not add to 100% because of rounding.



# Right to Privacy: Personal Information

- o In the US...
  - o right of freedom of speech has limited the effects of lawsuits for breach of privacy
  - o privacy rights have been established in the US via **legislation**: Privacy Act of 1974 (applies to some national agencies), Children's Online Privacy Protection Act, Financial Services Modernization Act of 1999, Health Insurance Portability and Accountability Act ... recognition of privacy rights by US corporations is mostly **voluntary**





# Right to Privacy: Personal Information

- o The [Electronic Privacy Information Center's](#) Privacy Index puts Brazil, Australia, Japan and South Africa in the higher level of privacy (around 2.2). On the [bottom of the list are the US](#) and UK (around 1.4).
- o Technology has created more dilemmas for protecting privacy of information.

- o [privacy paradox](#): Online users state their concerns about privacy but their behaviors are not consistent with their concerns.
- o [Supreme Court approaches right to privacy on a case-by-case basis.](#)





# Right to Privacy: Personal Information

**YOU'RE *not* GONNA NEED A WARRANT FOR THAT!**

Under the 1986 **Electronic Communications Privacy Act**, law enforcement can access all of the below – and more – without a warrant.

**It's time for a privacy update!**

- Search queries
- Dropbox accounts
- Chats older than 6 months
- Texts older than 6 months
- Private Facebook and Instagram photos
- Facebook messages & comments older than 6 months
- Cloud storage documents
- Comments in e-books
- Direct Twitter messages older than 6 months
- Digital address books and calendars
- Emails older than 6 months

To learn more, visit: [aclu.org/ECPA](http://aclu.org/ECPA)





# Right to Privacy: Other Issues

- o There are many other issues covered by the right to privacy, some of which the courts have not settled and some of which are left to the states. Among others, those include:
  - o right to drink alcohol
  - o right to use illegal substances
  - o right to engage in high-risk behavior
  - o right to choose personal behavior while pregnant
- o Finally, note that most of the protections in the Constitution don't apply to private corporations. The list of things a corporation can't do is a short one. In theory, workers can walk away from employers that violate their rights. In practice, most people just can't take that risk.





# Right to Own and Control Property

- o Right to private property authorizes persons to use what they own as they see fit, without regard for other persons. Use may be reckless as well as prudent provided it does not invade the rights of others. Such a right is unalienable and enjoys legal protection. Often considered the single most important condition for a free society.
- o Constitution gives tremendous respect to property ownership. It's one of the oldest and most fundamental rights of a free people.
- o empowers Congress to protect **intellectual property** by authorizing copyright and patent laws (1-8-8)





# Right to Own and Control Property

## o Constitution...

- o grants Congress authority to punish **piracy**, a crime directed principally against property (I-8-10)
- o 5th amendment prevents any person from being deprived of property, without **due process** of law, and requires **compensation** when property is taken for public use.
- o Article I, Section 10 has several provisions protecting **financial assets** against state governments.
- o grants national courts jurisdiction over interstate land claims and interstate debts to **limit the extent to which state courts can discriminate** against property rights of out-of-staters (III-2-1 and III-2-2)





# Right to Own and Control Property

- o Constitution...
  - o Full faith and credit clause (IV-1) partly requires state courts to **honor property records** in other states.
  - o Privileges and immunities clause (IV-2-1) protects **rights of citizens doing business and owning land in other states**, including rights of women and African-American citizens.
  - o 3rd amendment prevents government from quartering troops in **private homes**.
  - o 4th amendment protects persons, houses, papers and effects from **unreasonable search and seizure**.
  - o Originally, only property owners were allowed to **vote**.





# Right to Own and Control Property

- o Government can't take property for public use without paying fair price or take it as punishment until after a fair trial and conviction.
- o *Brandt v. US* (2014): thousands of miles of right-of-way were established across the US under 1875 General Railroad Right-of-Way Act in order for railroads to lay tracks ... easements would revert back to the property owner in the event railroads ever abandoned easements ... Congress passed 1988 rail-banking statute that upon abandonment, easements could be morphed into public recreational trails with landowner receiving no compensation ... Court found for property owners, affirming principle that **government cannot redefine previously recognized property rights out of existence.**



# Right to Own and Control Property

- o **eminent domain:** governmental power to take private property for public use as long as just compensation is paid
- o **disagreement over public use:** Courts have shown much deference to determinations of Congress, and even more so to the determinations of state legislatures, of what constitutes public use. Property need not actually be used by the public but only used or disposed of in such a manner as to benefit the public welfare or public interest. (*Kelo v. City of New London* (2005) upheld seizing privately owned land for private commercial development on behalf of private developers.)
- o **disagreement over just compensation:** Fair market value of the property determines just compensation (*US v. 50 Acres of Land*, 1984).



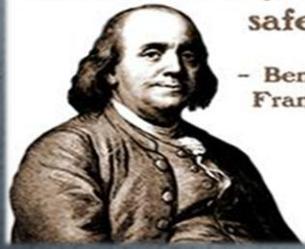


# Civil Liberties and the War on Terrorism

- Wars have almost always led to some restrictions on civil liberties in democratic countries.
- **USA Patriot Act**
  - wiretapping and electronic surveillance
  - access to customer, telephone and financial records
- **presidential executive orders**
  - use of military tribunals to try non-citizens
  - secret detentions, interrogations and deportations
  - eavesdropping on and data-mining communications of American citizens

“Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.”

- Benjamin Franklin





# Civil Liberties and the War on Terrorism

- Recently, some of these measures have been curtailed.
- actions by cities and states
- debate over renewal of the USA Patriot Act
- *Hamdi v. Rumsfeld* (2004): Court recognized the power of the US government to detain enemy combatants, including US citizens, but ruled that detainees who are US citizens must have the rights of due process and the ability to challenge their enemy combatant status before an impartial authority.

'Emergencies' have always been the pretext on which the safeguards of individual liberty have been eroded.

— F.A. Hayek

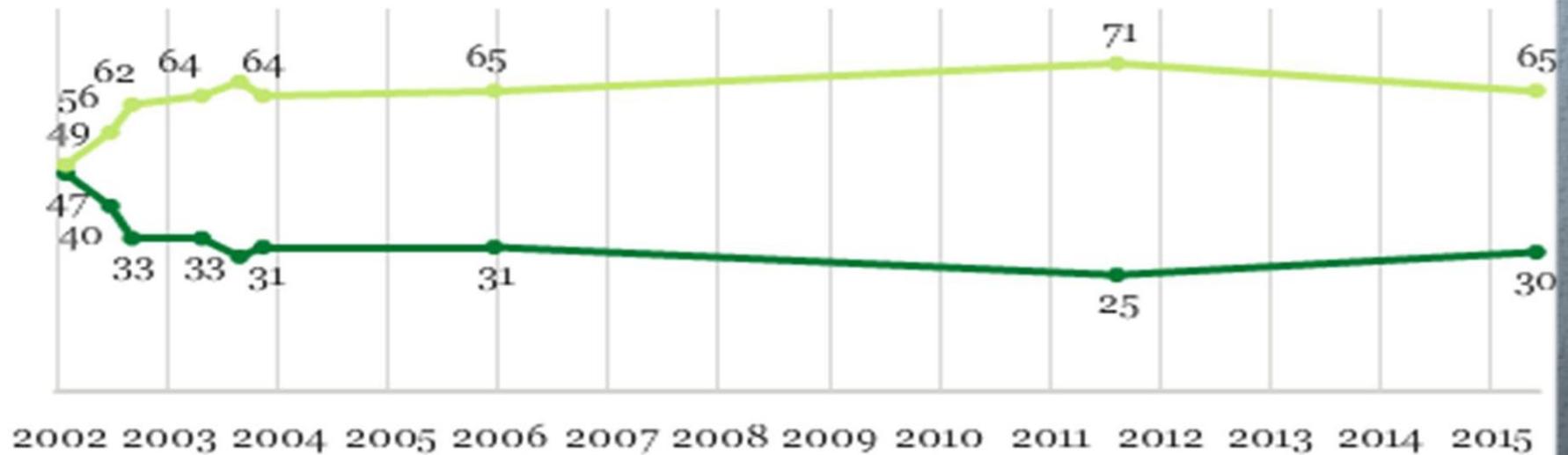




# Civil Liberties and the War on Terrorism

## *Americans' Views of Tradeoffs Between Anti-Terrorism Efforts and Respecting Civil Liberties*

- % Take all steps necessary to prevent terrorism even if civil liberties violated
- % Take steps to prevent terrorism but not violate civil liberties





# Civil Liberties and the War on Terrorism

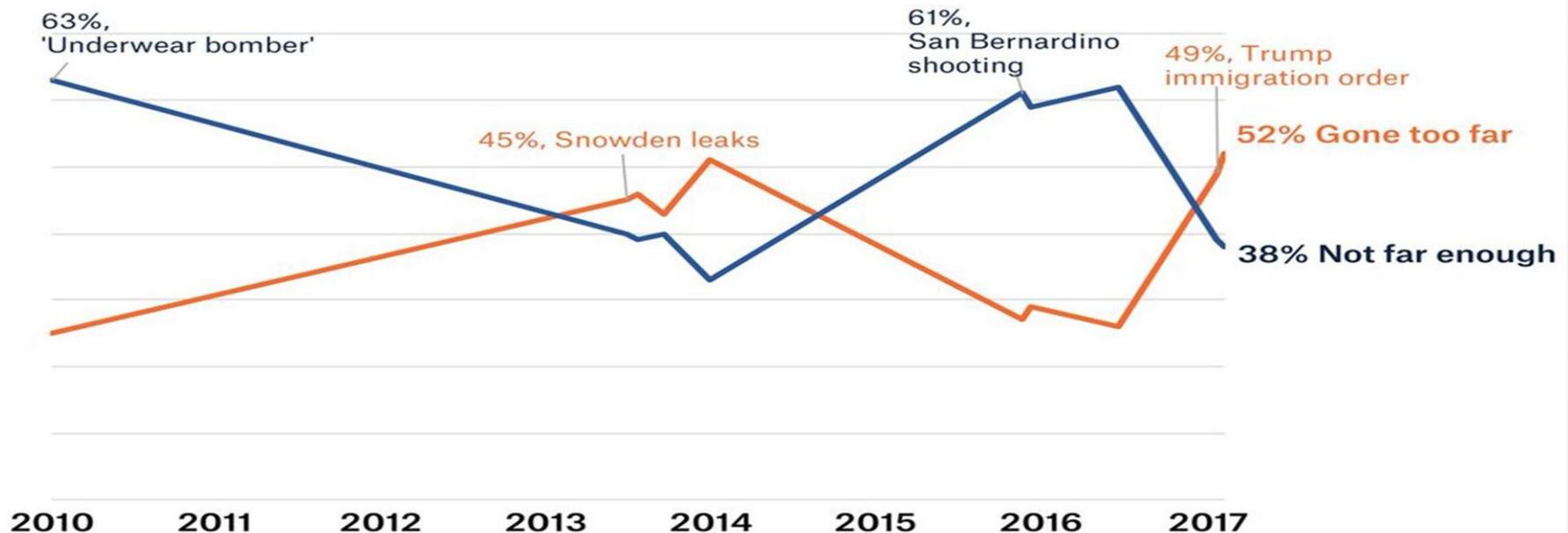
- o Chief Justice Charles Evans Hughes (1862-1948): *Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the national government and its limitations of the power of the states were determined in the light of emergency, and they are not altered by emergency.*
- o Still, some restrictions will exist for the duration of the war on terrorism.
- o The severity of these restrictions will be directly related to the degree to which the American people feel afraid that further attacks will occur.





# Civil Liberties and the War on Terrorism

The government's anti-terrorism policies:  
have gone too far in restricting the average person's civil liberties,  
or have not gone far enough to adequately protect the country?



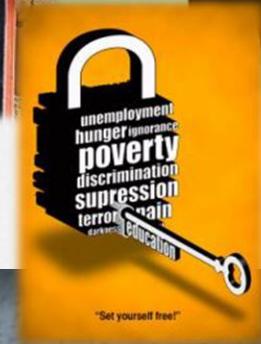


# The New Civil Liberties

- o original definition: Civil liberties are constitutional provisions, laws and practices that protect individuals from governmental interference.
- o modern definition: seem less concerned with *protection from government* and more concerned about *guarantees of government*
  - o right to an education
  - o right to gainful employment
  - o right to health care
  - o right to freedom from poverty



**JOB  
WANTED!!**





# The New Civil Liberties

- o It is true that amendments 1-8 do not include all possible rights of the people ... the Court has consistently upheld that idea.
- o And those rights espoused in modern times – education, health care, etc – may all be worthwhile goals for a democracy.
- o They are not, however, civil liberties and if treated as such they undermine the value of those basic civil liberties that are vital to a democracy.





# The End

