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**Civics 101**

**Episode 109: The Fourth Amendment**

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[00:00:05] Who is the current speaker of the House? Don't even know. Will they rule in the president's favor or will they send to the Supreme Court? You can't be referred to a senator directly by their name. Congressional redistricting. Separation of powers. Executive orders. The national security council. Civics, civics, civics, 101!

**Virginia Prescott:** [00:00:21] I'm Virginia Prescott and this is Civics 101. The Constitution protects us against unreasonable search and seizure. but what do those words actually mean, and how did they affect us? Bringing us through it today is Cynthia Lee. She's professor at George Washington University Law School and author of several books on the Fourth Amendment including Searches and Seizures: The Fourth Amendment. Cynthia, welcome.

**Cynthia Lee:** [00:00:48] Thank you Virginia. Thank you so much for having me.

**Virginia Prescott:** [00:00:50] So what does the Fourth Amendment say?

**Cynthia Lee:** [00:00:52] The fourth amendment basically protects people against having the government search their homes and private property without a search warrant issued in advance from a court.

**Virginia Prescott:** [00:01:02] So why do we have it? Why was this put into the Bill of Rights?

**Cynthia Lee:** [00:01:06] Well the colonists felt that it was really important to include a specific provision in the Bill of Rights protecting people against having their homes easily searched by government officials because back in the 1700s, the king of England would issue what were called Writs of Assistance which gave government agents really broad discretion to go into people's homes and rummage around searching for evidence of criminal activity and they didn't have to get permission in advance from a neutral party. They didn't have to show any kind of justification in advance.

[00:01:42] So the framers of the Constitution wanted to make sure that the newly formed Federal Government wouldn't be able to just come into people's homes and rummage around through people's papers and effects without having to jump through some hoops in advance. Like getting a warrant, a search warrant, from a judge or a magistrate.

**Virginia Prescott:** [00:02:03] So search and seizure. Let's focus on those and I know that there are broader definitions that have changed in many ways throughout the years. But could you quickly define each of those and give us an example of what a search or seizure might be.

**Cynthia Lee:** [00:02:16] Certainly. So let's take searches for starters. The Supreme Court has held that aiming a thermal imager, a device that can sense relative amounts of heat, aiming a thermal imager at a house constitutes a search. It has held that placing a GPS tracking device under someone's vehicle and monitoring that vehicle for 28 days, that constitutes a search within the meaning of the Fourth Amendment. The court has held that bringing a drug detection dog to the front porch of a home, to see if the drug detection dog can smell marijuana, odors of marijuana, emanating from the home. The court has said that constitutes a search within the meaning of the Fourth Amendment. A frisk of a person. That is when the police officers stop someone and does a frisk of the outer clothing to search for weapons. That's an example of a search of a person.

**Virginia Prescott:** [00:03:15] How about seizure, through the ages and up to now?

**Cynthia Lee:** [00:03:18] So the court recognizes two kinds of seizures: seizures of property and seizures of persons. A seizure of property, the court says, occurs when the government has meaningfully interfered with one's possessory interests in the property. So for example if the government impounds your car and takes it away from you they've seized your car. A seizure of the person for fourth amendment purposes is a little more complicated than that and the court has said that a seizure of the person occurs when an officer accosts an individual and by means of physical force or show of authority restrains his liberty. So basically the officer has to apply physical force to the person like touch the person or tackle the person or the individual has to submit to the officers show of authority. And the test for a seizure of the person, the court has stated, is whether in view of all the circumstances a reasonable person would have believed he was not free to leave or terminate the encounter with the officer. But on the other hand the court has said that an officer can walk up to anybody on the street, ask him questions, and if a reasonable person in that person's shoes would have felt free to leave, that is not a seizure and the Fourth Amendment is not implicated.

**Virginia Prescott:** [00:04:48] Those of us who have watched cop shows have seen that moment when the judge throws out all the evidence because the police gathered it improperly. This actually comes from the exclusionary rule of the Fourth Amendment. What is that?

**Cynthia Lee:** [00:05:01] So the exclusionary rule is a rule of, sort of like a rule of evidence and it basically says if the police violate the Fourth Amendment then any evidence that they find through that violation must be excluded at trial. That's why it's called the exclusionary rule. It's the remedy for a Fourth Amendment violation.

**Virginia Prescott:** [00:05:22] There have been through history a number of cases that redefined or or were groundbreaking and helping us understand the Fourth Amendment. One of those was called Katz versus the United States, I think 1967, if I have that right. What happened? This reinterpreted the very concept of a search.

**Cynthia Lee:** [00:05:44] So Charles Katz was a fellow who lived in Los Angeles in the 1960s and he made money by placing bets for interstate gamblers and keeping a share of their winnings. Since interstate gambling was a federal crime Mr. Katz used the public telephone booths to try to avoid detection while he was conducting his business. Nonetheless the FBI became aware of his illegal activities and they somehow were able to identify the three public telephone booths that Mr. Katz tended to use to conduct his business. So the FBI worked with the telephone company to put one of the phone booths out of commission and they put wiretaps or listening devices, electronic listening devices, on the outside of the other two phone booths and listened in to Mr. Katz's conversations and based on incriminating statements that Mr. Katz made during conversations he had while in a public telephone booth that was bugged by the federal government, the government was able to arrest Katz and charge him with transmitting wagering information by the telephone.

**Virginia Prescott:** [00:06:56] What happened with that case and how did it change the way we think of the Fourth Amendment?

**Cynthia Lee:** [00:07:01] Mr. Katz complained about his conviction. He appealed his conviction and he appealed it all the way to the Supreme Court. And the Supreme Court not only took his case but ruled in his favor and replaced the trespass doctrine that had been in effect prior to 1967 with something, with a totally different test that relied, that looked to expectations of privacy. And under the trespass doctrine a search would occur only if the government physically intruded upon a constitutionally protected area: a person, house, paper, or affect. The things that are listed in the fourth amendment. So for example if government agents listened in on a telephone conversation by bugging a person's phones but they didn't have to physically intrude upon the person's home or property to do this that would not constitute a search under the trespass doctrine. But in Katz, the court adopted a test that focused on privacy rather than on whether or not there was a trespass.

**Cynthia Lee:** [00:08:16] And under what's called the reasonable expectation of privacy test, a search within the meaning of the fourth amendment takes place if the defendant manifests an actual or subjective expectation of privacy and that expectation of privacy is one that society is prepared to recognize as reasonable.

**Virginia Prescott:** [00:08:40] Reasonable I guess is the key word here isn't it?

**Cynthia Lee:** [00:08:43] Yeah it is.

**Virginia Prescott:** [00:08:45] So once the Supreme Court decided to protect this reasonable expectation of privacy, what kinds of things now count as searches that would not have before that case?

**Cynthia Lee:** [00:08:57] So in the example that I used before when discussing the trespass doctrine: if the government wiretaps your phones, your phone lines, and listens into your conversations without physically intruding into your property, your home or your property, that under the trespass doctrine would not constitute a search. But under the Katz expectation, reasonable expectation of privacy test, that would constitute a search and indeed the whole issue in Katz was whether the wiretapping of the public telephone booth that Katz went into and made his phone calls in, whether that constituted a search.

**Cynthia Lee:** [00:09:37] And the court in Katz said yes. That Mr. Katz when he went into that phone booth and closed the door behind him, had manifested not only an actual expectation of privacy in his phone conversations but that expectation of privacy was one that was legitimate justifiable and reasonable and therefore the government wiretapping of the phonebooth constituted a search.

**Virginia Prescott:** [00:10:12] What about stop and frisk? This is the tactic used by some police departments, most notably the NYPD, where officers stop someone on the street who they suspect may have or are about to commit a crime and can pat them down to see if they're armed. This is also called a Terry Stop. Why is that allowed under the Fourth Amendment?

**Cynthia Lee:** [00:10:33] So the Terry stop and frisk doctrine is allowed basically for two reasons. One is officer safety and that's the frisk part of it. The officer under Terry is allowed to do a limited pat-down search of the outer clothing of the person he stopped and it's a search for weapons and that's to protect officer safety. The officer under Terry Stop-and-Frisk is also allowed to briefly detain individuals based on reasonable suspicion that criminal activity is afoot. And that's, the rationale behind that is crime prevention. Giving officers the ability to nip crime in the bud before crime comes to fruition.

**Virginia Prescott:** [00:11:20] The criticism here of stop-and-frisk is it was used primarily in minority communities or on black and brown men as a tool for racial profiling by police officers. Of course the officers would say for preventing crimes. The case did go to federal court. So in this case how do you parse out: was this a Fourth Amendment case or was this an equal protection clause case?

**Cynthia Lee:** [00:11:43] You're talking about the Floyd versus City of New York case. And in 2008 there was a class action lawsuit filed against the New York City Police Department claiming that its stop-and-frisk policy violated the rights of black and brown individuals under both the Fourth Amendment and the Equal Protection Clause of the 14th Amendment. And in the course of this lawsuit the interesting thing was that the plaintiffs presented findings from an empirical study by a Columbia law professor Jeffrey Fagan showing that between January 2004 and June 2012 the New York City Police Department conducted over 4.4 million Terry stops and over 80% of these 4.4 Million stops were of blacks or Hispanics. And despite this massive effort contraband was seized in only 1.06% of the stops of black individuals and in only 1.25% percent of the stops of Hispanic individuals.

**Virginia Prescott:** [00:12:57] How did the attacks of 9/11 change the role of the Fourth Amendment?

**Cynthia Lee:** [00:13:04] So the attacks on the World Trade Center and the Pentagon on 9/11, September 11, 2001, didn't necessarily change the doctrine surrounding the Fourth Amendment that the Supreme Court had developed prior to 9/11 but it did have an impact on people's willingness to give up privacy for increased national security and likely spurred both legislative and executive actions that curtailed privacy protections in the name of national security. Shortly after 9/11 Congress passed the what is known as the Patriot Act.

[00:13:44] One of its provisions allowed what are called sneak and peek warrants whereby the government can search homes and seize property without giving the person notice of the search until long after the search has taken place, as long as a court finds reasonable cause to believe that providing immediate notification of the search or immediate notification of the execution of the warrant would have an adverse effect.

**Virginia Prescott:** [00:14:13] Where do protections of the Fourth Amendment not apply? Say, in prisons. Any prisoner can be searched, correct?

**Cynthia Lee:** [00:14:20] That's correct. The Fourth Amendment only applies if there's been a government search or seizure. So it doesn't apply if there's no government action. It also doesn't apply if what the government did is not considered a search or a seizure. And you're absolutely right that a search of a prison cell is not considered a violation of the Fourth Amendment because the Supreme Court has ruled that prisoners have no reasonable expectation of privacy in their prison cells. So prison guards can search their cells without a warrant, without probable cause, without any reasonable suspicion.

**Virginia Prescott:** [00:15:01] Professor Lee, we are no longer ducking into phone booths like Charles Katz. Instead we are now heaping massive amounts of personal information and communication records onto our phones. So what are the current rules about searching cell phones? Do police need some kind of warrant as they would say for searching a home?

**Cynthia Lee:** [00:15:22] So, in 2014, the Supreme Court actually dealt with a case involving the search of a cell phone that was found on the person of a man who had been pulled over for driving with expired license tags and then arrested for being in possession of concealed and loaded firearms. And the government argued that the police officer had the right to search the person of the arrestee and any items found on his person under what's known as the search incident to arrest doctrine.

**Cynthia Lee:** [00:15:56] So the search incident to arrest doctrine, Or exception to the warrant requirement, says that if an officer makes a lawful custodial arrest he has the right to contemporaneously search the person of the arrestee and the wingspan, or the grabbing area, the area from which the arrestee can grab a weapon or destroy evidence. So in 2014 the court had to decide whether this rule that it had previously established when an officer makes a lawful custodial arrest of a person that he has the right to search, do a full search of the person, including any containers found on the, on the arrestee's person. The Supreme Court had to decide well does this rule apply when the officer finds a cell phone on the person of the arrestee. And in Riley vs. California the Supreme Court, to many court observers' surprise, held that when an officer finds a cell phone they need a warrant. They cannot search that cell phone without getting a warrant first.

**Virginia Prescott:** [00:17:07] Cynthia Lee, thank you so much for speaking with us.

**Cynthia Lee:** [00:17:10] Great thank you, Virginia.

**Virginia Prescott:** [00:17:15] This episode of Civics 101 was produced by Ben Henry and Justine Paradis. Executive producer is Erica Janik. Music from Broke for Free. If you'd like to know more about your constitutional rights check out our newsletter. It's called Extra Credit. At civics101podcast.org. Civics 101 is a production of New Hampshire Public Radio.