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The Cover
Lincoln Memorial photograph courtesy the National Archives. Quote from address before the Young Men's Lyceum of Springfield, Ill., Jan. 27, 1837.

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Katz in the Trash Barrel

Seizure of Abandoned Personal Property (Part 1)

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Perhaps the late master spy Rudolph Ivanovich Abel was an accomplished student of the arcane ways of international espionage. As a common criminal, however, he gets failing grades. Consider his less than effective response to arrest and search.

The events leading to Abel's arrest began some weeks earlier. A defected Soviet spy, Hayhanen, informed the FBI that he had worked for several years with Abel in an effort to commit espionage. The FBI thereupon began an investigation of Abel. It was soon clear, however, that successful prosecution of Abel would depend heavily upon the statements of Hayhanen, who was reluctant to testify should the case go to trial. The U.S. Department of Justice concluded that without his testimony, the evidence was insufficient to justify arrest and indictment on espionage charges.

A decision was made to furnish the FBI's information to the Immigration and Naturalization Service (INS), with a view toward deporting Abel as an illegal alien. With such information, the INS decided to arrest Abel on an administrative arrest warrant, a common practice in alien cases. INS officers, accompanied by FBI Agents, went to Abel's hotel on June 21, 1957.

The first move was made by FBI Agents, who had no warrant for Abel's arrest. They knocked on the door, and when Abel opened it, they made entry and began efforts to solicit his cooperation relative to the espionage investigation. They were unsuccessful. At this point, they called into the room the INS officers, who immediately executed the arrest warrant by taking Abel into custody. Abel, with his captors, remained in the room for about an hour. INS agents undertook a search of Abel and all of his belongings in the room and in an adjoining bath. During this INS search, which was aimed at uncovering evidence of "alienage" and which lasted for 15 to 20 minutes, certain evidentiary items were found and later admitted at Abel's espionage conspiracy trial. The FBI Agents did not participate in this search.

Upon completion of the INS search, Abel was told to dress, gather his belongings, and prepare to leave. Almost all items of personal property in the room were packed into Abel's bag. A few things were left on a windowsill, as Abel did not wish to take them. He put certain other items into the wastebasket.

Abel agreed to check out of the hotel. FBI Agents obtained the bill, Abel paid it, and he was handcuffed and driven to INS headquarters in New York City. As soon as he was gone, an FBI Agent secured from the hotel management permission to search the room vacated by Abel. A warrantless 3-hour search of the room was made. The Agent found in the wastepaper basket a hollow pencil containing microfilm and a block of wood containing a cipher pad. Both were introduced in evidence at Abel's espionage trial.

Abel was convicted and appealed to the U.S. Supreme Court on grounds, among others, that his fourth amendment right against unreasonable search was infringed by the warrantless seizure of the pencil and cipher pad from the wastebasket. The Court disagreed with Abel and held the evidence admissible. *Abel* v. *United States,* 362 U.S. 217 (1960). Speaking for the majority, Justice Frankfurter observed:

"Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner [Abel] had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia [abandoned goods]. There can be

nothing unlawful in the Government's appropriation of such abandoned property." Abel v. *United States, 362 U.S. at 241* [*emphasis added*].

Abel's case draws attention to the potential of finding highly relevant evidence amid the trash or rubbish disposed of daily in wastebaskets, garbage cans, trash barrels, and the like. It is one of the few decisions in which the Supreme Court has considered the constitutional problem of the seizure of abandoned property. It is ironic that this leading case on abandoned personal property should grow out of a foreign counter-intelligence investigation, when the issue arises almost invariably in more mundane criminal cases—gambling, narcotics, extortion, and counterfeiting.

The Katz Decision

Seven years after *Abel* was decided, the Supreme Court delivered an opinion which radically modified the traditional approach to fourth amendment analysis. Justice Stewart, speaking for the Court in *Katz* v. *United States,* 389 U.S. 347 (1967), declared:

". . . the premise that property interests control the right of the Government to search and seize has been discredited . . . . [I]t becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Id. at 353 [*quoting from Warden* v. *Hayden, 387 U.S. 294, 1967*].

Prior to *Katz,* property concepts governed the application of fourth amendment law. Such considerations as trespass, entry, protected areas, and curtilage were critical in deciding whether a constitutional right against unreasonable search had been infringed. It became apparent, however, that in *Katz* a broader approach to protected fourth amendment interests had been fashioned. The Court concluded that a person's reasonable expectation of privacy is the controlling principle. The constitutional protection attaches whenever and wherever an individual harbors a privacy expectation under circumstances wherein the expectation is reasonable. Justice Harlan's oft-quoted concurrence puts it most succinctly:

"As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual [*subjective*] *expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." Id. at 361.*

"Simply formulated, in the years since *Katz,* abandonment of personal property is defined as the relinquishment of the right of privacy in the place searched or the property seized."

Abel, Katz, and the Concept of Standing

The *Abel* decision stands for the proposition that there is "nothing unlawful" in the Government's seizure of abandoned property. *Katz* articulates the reason *why* there is no impropriety in its seizure. A person who voluntarily abandons property surrenders what right of privacy he or she formerly possessed in it. Simply formulated, in the years since *Katz,* abandonment of personal property is defined as the relinquishment of the right of privacy in the place searched or the property seized. *United States* v. *Kahan,* 350 F. Supp. 784 (S.D.N.Y. 1972), affirmed in part, reversed in part, 479 F. 2d 290 (2d Cir. 1973), reversed on other grounds, 415 U.S. 239 (1974). The relinquishment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. *United States* v. *Cella,* 568 F. 2d 1283 (9th Cir. 1977).

Having defined abandonment in the post-*Katz* sense, the final analytical step is reached. Many courts hold the former possessor of the abandoned property is stripped of his "standing" to object to a search or seizure of the property discarded. A person with standing is one against whom an unlawful search or seizure is directed, one who has a relationship to the place searched or the property seized sufficient to justify a finding that he or she has been victimized by the search or seizure. *Jones* v. *United States,* 362 U.S. 257, 261 (1960); *Alderman* v. *United States,* 394 U.S. 165 (1969). One who abandons property severs his relationship with that property. The result is that he thereafter may not claim his fourth amendment protection has been violated. *Parman* v. *United States,* 399 F. 2d 559, 565 (D.C. Cir. 1968), cert. denied 393 U.S. 858 (1968).

Understanding *Abel, Katz,* and the principle of standing is one thing; applying these rules to the practical matter of seizing and inspecting garbage and trash is quite another. Recall the reasoning: A person who abandons property gives up his reasonable expectation of privacy in the items discarded; having done so, he is deprived of the right to complain.

The critical question thus becomes, "At what point or under what circumstances has a possessor of property divested himself of his privacy right so as to bar a future assertion of fourth amendment interest?" The answer to this question is the key that unlocks the trash search cases, and can be found in a review of Federal and State court decisions.

The Approach of Federal Courts

Constitutional challenges to the warrantless search or seizure of trash have been generally unsuccessful when made in Federal courts. While factual patterns may be somewhat distinguishable, and the language of the courts slightly different, recent Federal decisions agree that personal property discarded in a common trash pile or garbage can placed out for collection has been abandoned. No privacy interest remains in the property; no standing may be claimed by the prior possessor.

In *Magda* v. *Benson,* 536 F. 2d 111 (6th Cir. 1976), one Magda was suspected of burglarizing a U.S. Post Office. He was placed under surveillance by postal inspectors, who observed him at 2:35 a.m. placing a plastic garbage bag on a treelawn next to the street adjacent to his residence. It was near some other garbage bags. An inspector retrieved the bag without warrant and found evidence therein incriminating Magda in the burglary. Furthermore, the evidence found led to the issuance of a search warrant for Magda's apartment, which yielded additional incriminating materials offered in evidence at his trial.

Following a judgment of conviction, Magda appealed, claiming that the warrantless seizure of the garbage bag violated his fourth amendment right of privacy. He argued that the evidence from the bag and from the subsequent apartment search should have been excluded. His claim was rejected.

The court agreed with the finding of the trial judge that the garbage was abandoned when placed for collection beyond the curtilage of Magda's residence:

"Magda had no Fourth Amendment rights as to the garbage bag in question; therefore the search and seizure of its contents without a search warrant were not illegal, and a search warrant subsequently obtained in reliance upon the fruits of the said garbage search was not tainted." Id. at 113.

The court also dismissed with little comment Magda's contention that a city ordinance prohibiting unauthorized persons from rummaging through the garbage of another creates an expectation of privacy in the refuse. The court noted: "This is a matter of local municipal law, not federal constitutional law." *Id.* at 113 (citing *United States* v. *Dzialak,* 441 F. 2d 212, 2d Cir. 1971, cert. denied 404 U.S. 883, 1971).

The *Magda* decision reasoned that the trash was abandoned, and the defendant's privacy interest given up.

"Many courts hold the former possessor of the abandoned property is stripped of his 'standing' to object to a search or seizure of the property discarded."

Implicit is the recognition that the defendant had no standing to challenge the seizure. A more recent decision of the Eighth Circuit Court of Appeals supports the conclusion of *Magda* and states explicitly that standing is surrendered by a person who abandons property.

The St. Louis area had been plagued by a series of bank robberies committed by an agile felon who customarily vaulted over the tellers' counter in effecting the robbery. By virtue of his apparent athletic abilities, he was dubbed "the Bionic Bandit" by the local media.

Following an intensive investigation by FBI Agents and local police, and based in part on an informant's tip, the subject was found and arrested. True to form, he attempted to escape by leaping over a car and fence, but to no avail. He was captured and subdued.

Following the arrest, officers went to the subject's residence in an effort to locate and interview a woman whose husband was also a suspect in the bank robberies and who was still at large. The house was surrounded as a precaution against possible violence from armed accomplices. A patrolman positioned near a pile of partially burned trash in the yard noticed a piece of cardboard with radio scanner channels listed thereon. This was brought to the attention of an FBI Agent, who thereafter seized without warrant the cardboard and other evidence from the trash. At trial, some of the items were introduced into evidence over the defendant's objection. He was convicted and appealed.

Faced with the same issue raised in *Magda* v. *Benson, supra,* that seizure of the trash amounted to a fourth amendment violation, the appellate court held the items seized had been abandoned. The court pointed to trial testimony that the property taken had been placed in the trash pile for burning or other disposal. Further, there was no evidence that the defendant intended to retain anything in the trash pile. The court found the traditional test of abandonment, a combination of intent and action to renounce any reasonable expectation of privacy, had been met.

Having decided this question, the court logically concluded the defendant's "abandonment of the items in the trash pile deprived him of standing to challenge the introduction of those items into evidence." *United States* v. *Alden,* 576 F. 2d 772 (8th Cir. 1978).

The result reached in the recent Federal decisions of *Magda* and *Alden* is not new. It follows a line of cases that began before *Katz.* See *United States* v. *Mustone,* 469 F. 2d 970 (1st Cir. 1972) (defendant renounced any reasonable expectation of privacy in trash bags placed on the sidewalk near garbage cans); *United States* v. *Jackson,* 448 F. 2d 963 (9th Cir. 1971), cert. denied sub nom. *Willis* v. *United States,* 405 U.S. 924 (1972) (persons placing items in trash can outside motel room surrender their fourth amendment right of privacy with respect to

such articles); *United States* v. *Dzialak, supra* (trash left between sidewalk and street in front of defendant's home has been abandoned); *United States* v. *Stroble,* 431 F. 2d 1273 (6th Cir. 1970) (no right of privacy, hence no fourth amendment protection, accorded trash left by garbage cans adjacent to the curb); *United States* v. *Minker,* 312 F. 2d 632 (3d Cir. 1962) cert. denied 372 U.S. 953 (1963) (user of common trash receptacle for apartment house has insufficient interest therein to give him standing to assert constitutional right against its search); *United States* v. *Wolfe,* 375 F. Supp. 949 (E.D. Pa. 1974) (warrantless search of trash in backyard of business premises and removal therefrom of empty paper carton did not violate protection against unreasonable search); *United States* v. *Harruff,* 352 F. Supp. 224 (E.D. Mich. 1972) (warrantless search of community trash container located at the curb and used by all residents of apartment complex did not violate any fourth amendment protection).

The rationale in the foregoing cases varies, but only slightly. Most of the decisions, either expressly or impliedly, agreed with *Magda* and *Alden* (property abandoned, no expectation of privacy, no standing). An exception is the recent case of *United States* v. *Shelby,* 573 F. 2d 1971 (7th Cir. 1978).

In *Shelby,* the defendant was employed as a supervisor by a company rendering janitorial services to a number of banks. When he left this employment, the defendant retained keys to these banks, which he later burglarized of some $3000 in coins. He became a suspect when he attempted to exchange the coins for bills at a non-victim bank.

Having been alerted to the defendant's unusual activities, the FBI and local police requested the city sanitation department to advise the trash collectors serving his residence to watch for coin wrappers and trays when picking up the trash. As was the customary procedure, the workers reached over defendant's back fence, removed his garbage cans, carried them to a truck, dumped them, and returned the empty cans to their previous location. The contents of the cans included incriminating evidence, which was later turned over to the police and used against the defendant at his trial.

On appeal from a judgment of conviction, the Federal court held that the person from whose premises the trash was removed had standing to object to the search and seizure. However, having recognized the defendant's standing, the court concluded that he possessed no reasonable expectation of privacy in the refuse and therefore his constitutional claim must fail. The court, while disagreeing on the question of standing, nevertheless cited with approval the *Magda* and *Alden* decisions on the expectation of privacy problem.

Thus, running through all the Federal decisions on trash seizures are the ideas of abandonment and the relinquishment of privacy, and in many, the notion that standing is thereby forfeited.

Finally, the Federal courts recognize no significant difference between trash seizures made directly by law enforcement officers, and those in which a third party is recruited to take and secure the discarded items for later inspection by officers. Compare *United States* v. *Shelby, supra* (sanitation men) and *United States* v. *Dzialak, supra* (investigator employed by private corporation), with *United States* v. *Mustone, supra* (employee of Secret Service) and *United States* v. *Jackson, supra* (police). **FBI**

(Continued Next Month)

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