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Privacy, new technology and constitutional adjudication in the light of Antonin Scalia's originalist interpretation

Antonin Gregory Scalia (1936 –2016) was an Associate Justice of the Supreme Court of the United States (USSC) serving from his appointment by President Ronald Reagan in 1986 until his death on February 13, 2016. His judicial and academic legacy made him a figure associated with originalist or textual interpretation of the United States Constitution, a concept he described briefly in his 1997 essay *A matter of interpretation*[1]. Originalism was not Scalia's invention and it enjoyed a long tradition of argumentation in U.S. but it had not created so much controversy until „President Ronald Regan and his attorney general, Edwin Meese, made originalist argument a centerpiece of their conservative constitutional philosophy"[2]. The two-term presidency (1981-1989) made it possible for President Reagan to turn his philosophy into practice by appointing four Supreme Court Justices (Sandra Day O'Connor, William Rehnquist, Antonin Scalia, Anthony Kennedy) but among these four distinguished personalities, Antonin Scalia probably became the most expressive one. According to *Paweł Laidler* Justice Scalia's singularity „was not a matter of his contribution to the Court's jurisprudence, but of fact he had become a reassurance of an ideological pattern established in the United States Supreme Court in the 90's"[3]. However it may be well beyond dispute that Antonin Scalia did play a role in making originalist arguments a subject of „interest to scholars across the political spectrum"[4].

Antonin Scalia's death and following speculation on possible candidates soon to be proposed by President Barrack Obama echoed across daily news worldwide stressing the role of United States Supreme Court and contemporary global position of the United States themselves. A major shift in American politics after the 2016 presidential election and an opposition in Republican-controlled Senate prevented President Obama from

[1] A. Scalia, *A Matter of Interpretation. Federal Courts and The Law*, Princeton University Press, Princeton, New Jersey 1997.

[2] M.A. Graber, *A New Introduction to American Constitutionalism,* Oxford University Press*,* New York 2013, p. 30

[3] P. Laidler, *Prawno-polityczny spór wokół wyboru sędziego Sądu Najwyższego USA po śmierci Antonina Scalii,* „Przegląd Sejmowy", 3(134)/2016, p. 29.

[4] M.A. Graber, *A New Introduction...*, p. 76.

filling this vacancy with Justice Merrick Garland[5] whose candidacy was never formally reviewed by Senate. Eventually the over a year-long vacancy was filled by President Donald Trump who nominated *Neil McGill Gorsuch* on 1st February 2016. Neil Gorsuch received the Senate's confirmation on April 7th 2016 and three days later was sworn into office. Neil Gorsuch's successful nomination can be read as a continuum to his predecessor's legacy, although Antonin Scalia avoided this expression publicly calling his views modestly a „contribution". On the other hand Scalia admitted how influential this contribution was since the set of arguments in favour of „originalist" interpretation had become a part of academic discourse in law schools across the United States. Scalia's approach to constitutional interpretation is often associated with two separate but similar approaches: textual interpretation and the „original understanding". The foundational principle of textual interpretation lies in the explication of the constitutional text simply on the basis of the words found there. As Ralph A. Rossum and G. Alan Tarr put it „if the constitution is to control the outcome of a case, and its unadorned text is plain, then the constitutional interpretation should stop right there"[6] invoking the passage from the USSC opinion in *United States v. Hartwell* (1867): „If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace, but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject"[7]. Original understanding is based on a premise that „constitutional interpretation must proceed on the basis of what the Constitution was understood to accomplish by those who initially drafted and ratified it"[8] which centers the whole process on pursuit of the ends declared by the Framers of the U.S. Constitution to achieve. It also requires a thorough historical background and undisputed evidence of that intent which documents (including the famous Federalist papers) often fail to provide. Somewhere in between those two concepts lies Scalia's idea called „original meaning" or „the original intention approach". However, Scalia's writings harshly criticize legislative intention taken from the documentary evidence of the legislative process rather than from the text of the law itself. By invoking Chief Justice Tanney's passage from *Aldridge v. Williams*[9] („The only mode in which that will [of the majority of both houses of Congress - M.B., M.F.] is spoken is in the act itself; we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject and looking, if necessary, to the public history of the times in which it was passed") Scalia strongly objected to the use of legislative history as the proper criterion of the law[10]. Instead, he proposed the textual approach to constitutional

[5] https://www.whitehouse.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme [last visited: 30th June 2016].

[6] R. A. Rossum, G. A. Tarr, *American Constitutional Law. The Structure of Government*, tom I, Westview Press 2010, p. 3.

[7] *United States v. Hartwell*, 73 U.S. 385 (1867).

[8] R. A. Rossum, G. A. Tarr, *American Constitutional Law. The Structure of Government*, tom I, Westview Press 2010, p. 3

[9] 44 U.S. (3. How.) 9, 24 (1845).

[10] A. Scalia, *A matter of interpretation...*, p. 30-31.

text („What I look for in the Constitution is precisely what I look in a statute: the original meaning of the text, not what original draftsmen indented") in which writings in *The Federalist* merely display „how the text of the Constitution was originally understood" and definitively not because the authors were framers or their intent is authoritative and must be the law[11]. On the other hand it was hard to notice how little attention Scalia gave to rules of construction and the special object they were supposed to be applied to, although by invoking this subject he somehow admitted the „traditional" canon of interpretation may be influenced by the unique features of the written constitution: „The problem [of constitutional interpretation – M.B.] is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text"[12]. Meanwhile, in the very same year of Scalia's published aforementioned essay, Polish jurisprudence struggled with the same problem. The Constitution of The Republic of Poland of April 2, 1997 was about to transform Poland into modern constitutionally-based state but the doctrine signalled the lack of concept necessary to interpret it or at least inapplicability of the traditional statutory canon to the constitutional provision[13].

Scalia tried to avoid a conversion problem by an assumption that „in textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail and to give words and phrases an expansive rather than narrow interpretation – though not an interpretation that the language will not bear"[14]. The critics however pointed out that despite the concept of fixed set of rights established by a supposed original understanding, Scalia failed to explain what constitutes a context (especially how to distinguish an original meaning from an original intent whenever history and a wording of a provision itself tells us little about its meaning, substance, e.g. „amendment", „ratification") and more importantly, „what constitutional provision (...) requires, or even supports such supposition [e.g., that the First Amendment should be read as a XVIII century still-photo command prohibiting Congress from abridging „rights of Englishmen as were then extant]"[15]. Moreover, it has been suggested that Justice Scalia, „despite his protestations, implicitly accepts some notion of evolving constitutional principles is apparent from his application of the doctrine of stare decisis". A similar claim was aimed at Scalia's flagship example of the possible forms of speech under First Amendment which – in light of his writings – „does not list the full range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction"[16]. Keeping in mind that

[11] A. Scalia, *A matter of interpretation*..., p. 38.

[12] A. Scalia, *A matter of interpretation*..., p. 37.

[13] P. Tuleja, *Zasady konstytucyjne* [in:] *Konstytucjonalizacja zasad i instytucji ustrojowych* edited by P. Sarnecki, Warszawa 1997, p. 26.

[14] A. Scalia, *A matter of interpretation*..., p. 37.

[15] See polemic comment delivered directly in response to Scalia's essay by L. H. Tribe [in:] A. Scalia, *A matter of interpretation*..., p. 80.

[16] A. Scalia, *A matter of interpretation*..., p. 38.

Justice Scalia voted with the majority to strike down state prohibition of non-verbal forms of expression (flag burning in *Texas v. Johnson*[17] or cross-burning based on the racist views in *R.A.V. v. City of Saint Paul*[18]), *Laurence H. Tribe* rebuts Scalia's claim of „dated" constitutional provision: „the extension of 'freedom of speech' to encompass flag burning or cross burning, or to include anything like contemporary theory that content-based and especially viewpoint based proscriptions of conduct are constitutionally suspect, would to a Scalia originalist – entail most ambitious exercise in attributing modern ideas of free speech principle to our predecessors"[19]. Ronald Dworkin also doubted Scalia's consistency when he expressed (a doctrinal majority) view that landmark decision in *Brown v. Board of Education* striking down the racial segregation in public schools could not be reached if the USSC were to apply the originalist's method of interpretation, no matter what factor played a crucial role (original semantics or framer's expectation)[20].

A discussion on the originalist approach to constitutional interpretation often overshadows its relation to a structure of federal government, whose existence and power in a balanced and divided form, had become crucial to preserve guarantees of the Bill of Rights. Ralph A. Rosum observations suggest that Antonin Scalia had little modesty when it came to assess the scale of his interest in separations of power doctrine[21]. We may safely assume that this component was a shared belief, along with primacy of the legal text as a binding force not limited to an instrument of power. Probably it also gave Justice Scalia the opportunity to join other United States Supreme Court Justices who had discreetly crossed their professional paths with Polish history or jurisprudence (most notably Justice Robert H. Jackson (1892-1954)[22] or Justice Anthony Kennedy[23]).

In August 2009, invited by the Polish Ombudsman (*The Commissioner for Citizens' Rights*) Mr. Janusz Kochanowski (1940-2010), Antonin Scalia visited Poland and delivered a lecture (*Mullahs of the west: judges as moral arbiters*[24]) which might be viewed as his concise creed on both constitutional interpretation and judicial deference in matters of – what he called – a moral adjudication. His appearance in Poland was not coincidental. A year earlier Scalia received the prestigious Pawel Wlodkowic 2008 award, an annual commendation from the Ombudsman of The Republic of Poland commemorating both

[17] 491 U.S. 397 (1989).

[18] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[19] A. Scalia, *A matter of interpretation...*, p. 82.

[20] See R. Dworkin's comment [in:] A. Scalia, *A matter of interpretation...*, p. 119.

[21] R. A. Rosum, *Antonin Scalia's Jurisprudence. Text and tradition,* University of Kansas Press, Lawrence 2006, p. 52.

[22] From Polish perspective Robert H. Jackson is being recognised as a prosecutor in the famous Nuremberg trials, an important symbol of condemnation and punishment of the Nazi Germany atrocities committed during World War II in Poland and other Nazi occupied countries. Robert H. Jackson also received a doctorate *honoris causa* from University of Warsaw on 26th June 1946, http://www.uw.edu.pl/o_uw/historia/dhcuw.html [last visited: 9.02.2018].

[23] Justice Kennedy visited Poland in September 2004 invited The Polish Constitutional Tribunal http://trybunal.gov.pl/wiadomosci/uroczystosci-spotkania-wyklady/art/6455-18-22-wrzesnia-2004-roku-wizyta-w-polsce-sedziego-sadu-najwyzszego-usa-anthony-kennedyego/ [last visited: 9.02.2018].

[24] A. Scalia, *Mullahs of the west: judges as moral arbiters,* Warszawa 2009, bilingual text available at Polish Ombudsman site: https://www.rpo.gov.pl/pliki/12537879280.pdf [last visited: 9.02.2018]

the proclamation of the U.N. Universal Declaration of Human Rights and „a stance defending basic values and truth, against majority views and opinions"[25]. The choice of candidate for this honorable award was not a surprise for somebody who saw a political bias as the primary criterion. Mr. Kochanowski's figure was associated with support he received from right wing politicians[26], not to mention he personally contributed to a conservative image by proclaiming his support for capital punishment, the rights of an unborn life or his dream of a „Fourth Polish Republic"[27]. It is hard not to trigger the superficial connection with Antonin Scalia's public perception whose political description often made him „a conservatist"[28] rather than liberal judge or – if a famous, provocative Arthur M. Schlesinger, Jr. categorization[29] were to be followed – „a passivist" rather than „an activist" judge. Nor it is easy to resist a sense of irony because a decade later, the very same political party who granted a support necessary to appoint Mr. Kochanowski became a primary actor accused of abusing the constitutional separation of power and judicial impartiality in Poland and creating a massive criticism from the European Union and the Council of Europe[30]. And none other than Justice Scalia had sought opportunity to publicly warn against a „wolf" threatening the separation of powers coming dressed in „sheep's clothing"[31]. However if political connotation should be set aside, both gentlemen shared a common appreciation for the rule of law as an ultimate quality of a legal system. Mr. Kochanowski, acting as The Commissioner for Citizens' Rights, often stressed the instrumental connection between the need for preserving human dignity and the quality of the law in its formal aspect (e.g. transparency, predictability of possible applications)[32], no matter what political agenda is being pursuit by the current government. Such formal feature of the law is the third pillar of the rule law concept in modern constitutionalism[33] so this could be an objective feature which prompted the Scalia's recognition in Poland.

[25] https://www.rpo.gov.pl/pl/content/nagroda-im-pawla-wlodkowica [last visited: 9.02.2018].

[26] According to Polish Constitution of 1997 an Ombudsman shall be appointed by the Sejm (the first chamber of the Polish bicameral parliament), with the consent of the Senate (the second chamber of the Polish bicameral parliament), for a 5 year term. Obviously, the choice of a candidate requires a political support but once the vacancy has been filled, the Constitution requires that „The Commissioner for Citizens' Rights shall be independent in his activities, independent of other State organs and shall be accountable only to the Sejm in accordance with principles specified by statute".

[27] „Fourth Republic" was a political slogan used by the right-leaning party Law and Justice party (*Prawo i Sprawiedliwość*) in the 2005 Polish parliamentary election.

[28] P. Laidler argues a nomination process became highly political due to the Senate's nature and so called 'nomination game' played by both President and the Senate, P. Laidler, *Prawno-polityczny spór wokół wyboru sędziego Sądu Najwyższego USA po śmierci Antonina Scalii,* „Przegląd Sejmowy", 3(134)/2016, p. 26-30.

[29] Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, XXXV Fortune, January 1947.

[30] European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP))

[31] R. A. Rosum, *Antonin Scalia's Jurisprudence. Text and tradition,* University of Kansas Press, Lawrence 2006, p. 52 quoting Scalia's remark in USSC 1988 decision *Morrison v. Olson*, 487 U.S. 654.

[32] J. Kochanowski, *Wystąpienie dr Janusza Kochanowskiego, Rzecznika Praw Obywatelskich na konferencji naukowej „Język polskiej legislacji, czyli zrozumiałość przekazu a stosowanie prawa"* https://www.rpo.gov.pl/pliki/1165502902.pdf [dostęp: 15.09.2016].

[33] The specific elements of the Anglo-Saxon rule of law may differ from e.g. widely influential German *Rechtsstaat* in a way the various components have been highlighted but they share a same substance. Compare M.A. Graber, *A New Introduction to American Constitutionalism,* Oxford University Press, New York

Antonin Scalia's written statement for the Polish audience posed a paradox due to the criticism delivered in his public performance. Scalia's message was crystal clear and illustrated by the European Court of Human Rights privacy case-law in *A. D. T. v. United Kingdom* of 31 July 2000[34] which declared prohibition of a homosexual sexual acts between more than two consenting adults in private (unlike its application in the prosecution and conviction of A. D. T), as „necessary in a democratic society" as required by the limitations clause to one's right to private and family life, home and correspondence protected by article 8 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms: „I take no position, of course, on whether the prohibition of sex orgies is necessary for the protection of morals. I do assert, however, that in a democratic society the binding answer to that value-laden question should not be provided by 7 unelected judges"[35]. The choice of case seemed to serve as the example of the power vested in supreme courts or tribunals but if the substance of the case was brought under scrutiny, it became highly intellectually provocative on Scalia's side. The United States Constitution does not explicitly recognize right to privacy unlike the ECHR or the Polish Constitution of 1997 (the latter express this right on several occasions in articles 47-51). We could argue that European constitutional and international law offers more grounds to affect people's daily life by the judiciary in the controversial field of privacy than the U.S. Constitution. Putting „the right to privacy" in a century-long retrospective we can find that the American and the European approach to the „right to privacy" share a common denominator in the freedom from intrusion by other people and government into privately owned areas, often embodied by some physical forms offering the individual the expectation of seclusion. This is the reason why American constitutional law associates the oldest right to privacy with the Fourth Amendment protecting against unwarranted search and seizure. Post-war democratic Europe chose to extend the privacy of an individual to a certain decisional aspects which resulted e.g., in recognition of a right to self-determination by German Federal Constitution Court[36] or as the ECHR puts it „a right to personal development"[37]. Similar approach occurred in American constitutional law when the USSC began to deploy the First Amendment to protect some rights in speech or association or discovered „the right to privacy" in terms of due process and equal protection of a right to engage in certain highly personal activities (freedom of choice in marital, sexual and reproductive matters)[38]. However the proliferation of new technology in both private and public sector put the ability to protect the privacy of American people via constitutional means at question. The opponents of Scalia's originalist interpretation may easily show *Louis Brandeis's* prophetic predictions in his famous dissent

2013, p. 30 and M. Krygier, *Rule of law* [in:] *The Oxford Handbook of Comparative Constitutional Law,* Oxford University Press 2012, p. 234.

[34] Judgment, Merits and Just Satisfaction, App No 35765/97, ECHR 2000-IX.

[35] A. Scalia, *Mullahs of the west: judges as moral arbiters,* Warszawa 2009, p. 12.

[36] See judgment in so called *Microcensus* case, 27 BVerfGE 1 (1969):

[37] Bensaid v. United Kingdom, App no 44599/98, (2001).

[38] J. E. Nowak, R. D. Rotunda, Constitutional Law, Thomson-West 2004, p. 915.

in *Olmstead v. United States*[39] and undermine this doctrinal ability to recognize new aspects of human behaviour, especially when they occur in non-physical dimension of digital technology. It took the USSC almost 40 years to introduce the idea that „the Fourth Amendment protects people, not places"[40] but the circumstances of the case still upheld the connection between the conduct of an individual in a secluded physical area (an enclosed telephone booth). This physical aspects, relatively easy to grasp in American and various constitutions across Europe, was quickly challenged by the application of less intrusive (than physical) technology in the 2001 case *Kyllo v. United States*[41] where the Court found illegal a warrantless infrared thermo-imaging of a house. Law enforcement equipment helped to track down unusual heat emission from the private premises which eventually led to successful raid and discovery of illegal indoor marijuana plantation. Justice Scalia often used this particular example during various public appearances to debunk the claim that the originalist approach to 18th Century Constitution does not help to resolve legal problems resulting from the application of 21st Century technology and social changes.

Taking into consideration factors such as Antonin Scalia's (1936-2016) active role in shaping the constitutional doctrine of interpretation and a contemporary technological challenges to privacy, the U.S. Supreme Court opinion in *United States v. Antoine Jones*[42] should not go unnoticed. *United States v. Jones* is the case decided on January 23, 2012 related to FBI's unwarranted search via GPS tracker which eventually the U.S. Court found unconstitutional. In this 5-4 case, Associate Justice Antonin Scalia delivered the opinion of the majority making it one of the most important 21st century cases involving privacy and the application of modern technology under the Fourth Amendment of the U.S. Constitution.

Although the case draws our attention due the legal restriction on electronic surveillance it also shows how the particular judge and his or her method of interpretation may influence the scope of constitutional rights. This case might be also viewed as a clash between the philosophy of interpretation known as „textualism" and the concept of „the living constitution". The standard argument for textualism is relatively straightforward: the role of the judge is to say what the Constitution does mean, not what it ought to mean, therefore the extra-textual indications (e.g., legislative history, legislative intent) are not to be taken into consideration since they lead to judicial lawmaking – an outcome strongly opposed by Antonin Scalia in the sphere of statutory federal law[43]. While the textual

[39] 277 U.S. 438 (1928). In his dissent to this decision Brandeis wrote: „The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions".

[40] *Katz v. United States*, 389 U.S. 347 (1967).

[41] 533 U.S. 27 (2001).

[42] 132 S. Ct. 945, 565 U.S.

[43] A common misconception among European lawyers occurs when they assume that U.S. Supreme Court contributes to common law by precedent while there is no such thing as common-law in a federal

interpretation involves explicating the constitutional text simply on the basis of the wording found there, the opposite concept embodied by „The Living Constitution doctrine" treats the U.S. Constitution more as a political than a legal document and holds that legal interpretation can and must be influenced by present-day values and the sum of total of the American experience in which each generation has a right to adapt the Constitution to its own needs[44]. Of course, it should be noted that American legal doctrine recognizes a middle ground approach based on the premise that constitutional interpretation must act also on the basis of what the Constitution was understood to accomplish by those who initially drafted and ratified it[45].

Antonin Scalia's approach to interpretation of the U.S. Constitution has been widely regarded as the support for textualism. Among constitutional scholars there's no doubt that Scalia openly sympathized with this idea[46]. Even during his visit in Poland in 2009, he publicly criticized dynamic interpretation of the U.S. Constitution claiming he „felt sorry for his Court" whenever the latter applied such method[47]. In 1997 Scalia declared his support for Oliver Wendell Holmes' famous remark – „We do not inquire what the legislature meant; we ask only what the statute means" – and added one on his own: „To be a textualist in good standing, one need not to be dull to perceive the broader social purpose that statue is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write new laws. (...) I am not a strict constructionist, and no one ought to be – though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means"[48].

It has been widely recognized that Scalia's approach might be difficult to apply, especially to various cases concerning application of digital media in 21st century. Such devices and the potential implications for privacy were simply unthinkable at the moment when the U.S. Constitution was adopted. Moreover, the U.S. Bill of Rights had not literally recognized right to privacy until the U.S. Supreme Court's issuance of various opinions on the issue in the early 1920s. *United States v. Jones* allows us to see how Scalia's opinion try to resolve the conflict between law enforcement digital surveillance and the right to privacy without abandoning the textual approach to the Fourth Amendment. This however may come with a certain price and potentially reduce the scope of privacy protection since the original, reasonable meaning of the text may not stand up to the 21st century challenges.

structure of law and government (see: M. Bernaczyk, *Prawo do informacji w Polsce i na świecie*, Wyd. Sejmowe, Warszawa 2014, p. 143 with reference to *Erie Railroad Co. v. Tompkins*).

[44] R.A. Rossum, A. G. Tarr, *American Constitutional Law. The Bill of Rights and Subsequent Amendments*, Vol. II, Westview Press 2010, p. 8.

[45] R.A. Rossum, A. G. Tarr, *op. cit.*, p. 12.

[46] M. Bernaczyk, [in:] B. Banaszak, M. Bernaczyk, *Aktywizm sędziowski we współczesnym państwie demokratycznym*, Wyd. Sejmowe, Warszawa 2012, p. 23 with reference to A. Scalia, *A Matter of Interpretation. Federal Courts and The Law*, Princeton University Press, Princeton, New Jersey 1997, p. 23-25.

[47] A. Scalia, *Mułłowie Zachodu: sędziowie jako arbitrzy moralni*, Lectured delivered on 24th September 2009, available at http://www.rpo.gov.pl/pliki/12537879280.pdf, p. 13 [last visited: 30th June 2016]

[48] A. Scalia, *A Matter of Interpretation...*, p. 23.

The Fourth Amendment established in 1791 protects the „right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". In 2004, defendant Antoine Jones was suspected of drug trafficking. The joint forces of the Federal Bureau of Investigation and Metropolitan D.C. Police obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment[49]. The United States Supreme Court found police actions (attachment of the GPS device to the vehicle and its use of that device to monitor the vehicle's movements) as constituting a search under the Fourth Amendment. Depending on the warranted or unwarranted search, the evidence obtained might be considered as inadmissible (in the light of „the fruit of the poisonous tree doctrine" established in *Silverthorne Lumber Co. v. United States*[50]).

Scalia's argument against the warrantless GPS tracker attachment (and therefore illegal) was based on the concept of physical interference in a Jones' wife's car („personal effect") which preceded electronic data gathering. And since the constitutional text covered the personal effects and – by Scalia's standard – meant (or could have reasonably meant) a right to be secured from common-law trespass, the warrant should have been obtained[51].

However, privacy advocates may claim that such approach may not be sufficient in the 21st century whenever the federal government implements measures of surveillance without physical interference. In a digital age a shocking scale of interference might occur without the knowledge, consent or the slightest form of physical intrusion (e.g. remote access to intimate data stored on personal computer, in a data cloud or in a smartphone). Antonin Scalia's reasoning might be perceived as a very narrow holding, especially given that five justices in concurring opinions suggested a much broader approach, holding that people in public had a reasonable expectation of privacy in not being exposed to very extensive surveillance. The latter concept dates back to late 1960s[52] when the Court deviated from physical intrusion typical for common-law trespass by adding an alternative and simultaneous approach – „reasonable expectation of privacy", a criterion hardly derived from the Constitution by strict textual approach[53]. For some people Scalia's

[49] https://www.law.cornell.edu/supremecourt/text/10-1259 [last visited: 30th June 2016].

[50] 251 U.S. 385 (1920).

[51] „The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to «the right of the people to be secure against unreasonable searches and seizures»; the phrase «in their persons, houses, papers, and effects» would have been superfluous".

[52] *Katz v. United States*, 389 U. S. 347, 351 (1967)

[53] See majority opinion in *United States v. Jones*: „Our later cases, of course, have deviated from that exclusively property-based approach. In Katz v. United States, 389 U. S. 347, 351 (1967), we said that «the Fourth Amendment protects people, not places», and found a violation in attachment of an eavesdropping

opinion in *United States v. Jones* might be seen as contradictory and logically inconsistent with his previous findings in the 2001 case *Kyllo v. United States*. Justice Scalia justified protection against non-physical intrusion by transferring burden of argumentation on a fact that heat sensor was used on a home – the quintessential private place to the Founders of the Constitution and the „similarity" of the intrusion. The argumentation of the court was backed by possible „original meaning" in the light of „what was deemed an unreasonable search and seizure when it [The Fourth Amendment – M.F.] was adopted"[54]. It was worth noting that the opinion in *Kyllo* carried also a reference to a device that is not in „general public use" but by the time (2001) this opinion was delivered, most of the „sophisticated" technologies inaccessible for the public – from unmanned aerial vehicles equipped with sensors or video cameras, remotely operated data cloud storages, biometrically activated smartphones or smart meters began their expansion to the consumer markets.

Taking into consideration the current composition of the Court, with the passing of Justice Antonin Scalia and the successful nomination of Justice Neil Gorsuch, it would be unreasonable to expect a shift in favor of more dynamic approach to relatively firm constitutional text. This however does not marginalize the fact that Antonin Scalia's substantial contribution – often categorized as conservative one and associated with his Republican nomination – coexisted with the quite progressive approach reaching the same result: protection of constitutional rights and human dignity. *United States vs. Jones* shall be considered a fine example since majority opinion could have been reached thanks to the concurring opinion[55] of Democrat nominee Associate Justice Sonia Sotomayor. Although a constitutional law plays a crucial role in conflict resolution, it does not explore only the dark side of conflicting human nature. We must not forget that applying the constitution is also an art of compromise, especially in troubled times.

device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's «reasonable expectation of privacy», id., at 360. See, e.g., Bond v. United States, 529 U. S. 334 (2000); California v. Ciraolo, 476 U. S. 207 (1986); Smith v. Maryland, 442 U. S. 735 (1979)".

[54] See opinion in *Kyllo v. United States*: „We have said that the Fourth Amendment draws «a firm line at the entrance to the house,» Payton, 445 U. S., at 590. That line, we think, must be not only firm but also bright – which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no «significant» compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward. «The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.» Carroll v. United States, 267 U. S. 132, 149 (1925). Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a «search» and is presumptively unreasonable without a warrant". https://scholar.google.com/scholar_case?case=15840045591115721227&hl=en&as_sdt=6&as_vis=1&oi=scholarr [last visited: 30th June 2016]

[55] See: https://www.law.cornell.edu/supremecourt/text/10-1259#writing-10-1259_CONCUR_4. [last visited: 30th June 2016]