## Citizen standing cases left out from the previous questions

### Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)

#### What was plaintiff challenging?

#### What constitutional provision does this violate?

#### What is the separation of powers problem?

#### Putting aside the court's ruling, do the plaintiffs have a valid constitutional argument?

#### What was the problem with their standing?

#### Does it matter that the action may be illegal but there is no one with standing to contest it?

#### Could congress allow standing for this case?

#### Why is that unlikely?

#### What could congress do if it wanted to fix this?

### Ange v. Bush, 752 F Supp 509 (1990)

#### Military personnel challenging the legality of a deployment can get standing.

#### They then usually get dismissed because of the political question doctrine.

#### It could get interesting if Congress has passed a law banning the military action.

##### Would this become a political question because of the commitment of the military/foreign affairs power to the president, or a question of the president violating a law?

## State Secret Privilege – A New Nonjusticiability?

### Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (2010), cert. denied, 131 S. Ct. 2442 (2011)

#### Plaintiffs’ claims

##### What was the extraordinary rendition program?

##### Why do plaintiffs claim the US used the program?

##### Did they allege that they were interrogated in ways that violated US and international law?

##### Are these serious allegations?

#### Who is Jeppesen Dataplan, Inc., and what was its involvement in the program?

#### What law did the plaintiffs use for jurisdiction?

#### What was the general nature of their claims?

#### Did the court ever reach the question of whether they had jurisdiction?

#### What happened before Jeppeesen answered the complaint?

Before Jeppesen answered the complaint, the United States moved to intervene and to dismiss plaintiffs’ complaint under the state secrets doctrine.

#### What did the public declaration from the CIA say about the information at issue in the case?

#### What did it say about allowing the information to be discovered in this lawsuit?

#### What did it ask the court to do?

#### Totten v. United States, 92 U.S. 105 (1876)

##### What was the suit about?

##### Why was the case dismissed?

##### What is the *Totten* Bar?

##### Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 146-47 (1981).

###### Why did the Navy say it could not comply with NEPA?

##### Tenet v. Doe, 544 U.S. 1 (2005)

###### What does this case, combined with Toten tell you as a lawyer representing a spy who is negotiating with the government?

##### How do plaintiffs argue that Totten is limited?

##### How does Al-Haramain v. Bush, 507 F.3d 1190 (9th Cir. 2007) expand the Totten Bar?

the bar ‘‘has evolved into the principle that where the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence.’’

##### United States v. Reynolds, 345 U.S. 1 (1953)

###### What are the facts?

###### What was the state secret issue?

###### Was the case dismissed?

###### What did the United States Supreme Court do?

###### What are the three Reynolds factors?

First, we must ‘‘ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.’’

Second, we must make an independent determination whether the information is privileged. . . .

Finally, ‘‘the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.’’

(The lower court did not allow the discovery. When the records were eventually unclassified it turned out that the government had lied. There were no national security issues in the report, it just documented that negligence in flying the plane.)

###### Who must assert the privilege?

###### Plaintiffs argue that the government cannot assert the privilege until there is a request for privileged information. Does the court accept this?

###### Why not? How can privileged information be released ahead of discovery?

###### What is the standard for reviewing a claim of privilege?

###### Is the privilege balanced against the plaintiff’s need?

###### Why must state secret claims by very critically reviewed?

###### What is the potential for abuse?

###### What if the information is classified Top Secret?

###### Must the court accept the classification?

###### NB – there are no statutory standards or administrative regulations for classifying secret documents.

###### If the court accepts the privilege, what is the procedural effect on the evidence?

###### What if it is impossible to separate the privileged information from non-privileged information?

###### What is the mosaic theory of state secrets? (This is heart of the controversy over the SEAL’s book on the bin Laden raid)

###### What if the plaintiff cannot prove the elements of the prima facie case without the evidence?

###### What if a defendant cannot put on a defense without the evidence?

###### What about this case, where it might be possible to litigate around the excluded information?

###### Which of plaintiffs’ claims seems to directly implicate *Totten* and *Tenet*?

###### Which claim might be litigated without implicating state secrets?

###### Applying the Reynolds factors – what information does the government want to protect?

###### Does this meet the test for privilege?

###### Does the government have to prove a high probability of damage from release of the information?

###### Does the court explain why the information is privileged?

###### Does the court find that the plaintiffs and defendant could present their cases without the privileged information?

###### Does the court let the case proceed?

###### What is the key problem with the case?

###### How does the court distinguish the Totten Bar from the Reynolds Privilege?

###### Why does the dissent resist applying the Reynolds privilege at the pleading stage?

###### Does the majority accept this?

###### What does the majority see as the proper application of the Reynolds Privilege?

###### Is the extraordinary rendition program a secret?

###### What is the secret, as much as the court can say?

###### What information might still be a secret, with consequences if it is released?

###### What did DOJ assert about invoking the privilege in the 2009 Holder memo?

#### Notes

##### What happened in Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982)?

“As a categorical bar, Totten applies at the front of a lawsuit, as soon as the court is able to identify its subject matter as ‘‘inherently secret.’’ It does not turn on a proffer-by-proffer evaluation of the evidence. The state secrets privilege, on the other hand, like other evidentiary privileges, has until recently been invoked as evidence is sought or offered during the course of litigation. Insofar as its application turns on specific evidence, it would ordinarily be inappropriate to invoke in a motion to dismiss, before an answer is filed, discovery has been taken, and any specific evidence has been sought or offered.”

###### Why do think the court did not apply Totten to this case?

##### What have courts used to try to avoid dismissing cases that involve state secrets?

##### What issues are raised by secret trials, even if the parties agree to them?

#### How deferential should the courts be in these cases?

#### What if the court orders the government to produce information that the government really thinks implicates national security?

#### What might the government do, and where does that leave the courts?