

1 MICHAEL F. HERTZ
 Deputy Assistant Attorney General
 2 DOUGLAS N. LETTER
 Terrorism Litigation Counsel
 3 JOSEPH H. HUNT
 Director, Federal Programs Branch
 4 VINCENT M. GARVEY
 Deputy Branch Director
 5 ANTHONY J. COPPOLINO
 Special Litigation Counsel
 6 MARCIA BERMAN
 Trial Attorneys
 7 U.S. Department of Justice
 Civil Division, Federal Programs Branch
 8 20 Massachusetts Avenue, NW, Rm. 6102
 Washington, D.C. 20001
 9 Phone: (202) 514-4782
 Fax: (202) 616-8460

10 *Attorneys for the Government Defendants*
 11 *Sued in their Official Capacity*

12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **SAN FRANCISCO DIVISION**

15 Case No. C:08-cv-4373-VRW

16 _____)
 17 CAROLYN JEWEL, TASH HEPTING,)
 GREGORY HICKS, ERIK KNUTZEN, and)
 18 JOICE WALTON,)

19 *Plaintiffs,*)

20 v.)

21 NATIONAL SECURITY AGENCY (“NSA”);)
 KEITH B. ALEXANDER, Director of the NSA;)
 22 UNITED STATES OF AMERICA;)
 BARACK OBAMA, President of the United)
 States; UNITED STATES DEPARTMENT OF)
 23 JUSTICE; ERIC HOLDER, Attorney General)
 of the United States; DENNIS C. BLAIR,)
 24 Director of National Intelligence.)

25 *Government Defendants*)
 26 *Sued in Their Official Capacity.*)

**GOVERNMENT DEFENDANTS’
 RESPONSE TO PLAINTIFFS’
 SUPPLEMENTAL BRIEF (Dkt 38-1)**

Chief Judge Vaughn R. Walker

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INTRODUCTION

1 The central issue in this case is whether plaintiffs' challenge to alleged surveillance
2 activities undertaken following the 9/11 attacks can be adjudicated without the disclosure of
3 sensitive intelligence sources and methods over which the Director of National Intelligence has
4 asserted the state secrets and related statutory privileges. Relying on a prior ruling by the Court,
5 plaintiffs contend that the DNI's state secrets privilege assertion must be disregarded, and that
6 the case must proceed under procedures set forth in Section 106(f) of the Foreign Intelligence
7 Surveillance Act ("FISA"), 50 U.S.C. § 1806(f) (hereafter "Section 1806(f)"). *See In re NSA*
8 *Telecomm. Records Litig., Al-Haramain Islamic Found. v. Bush*, 564 F. Supp. 2d 1109 (N.D.
9 Cal. 2008); *see also* Pls. Opp to Defs. Mot. to Dismiss and for Summ. Judgment (Dkt. 29) at 23-
10 29. As set forth below, that provision establishes procedures for judicial review in particular
11 circumstances of materials related to electronic surveillance where the Attorney General attests
12 that disclosure would harm national security. With leave of the Court (Dkt. 40), plaintiffs have
13 filed a supplemental brief setting forth arguments that Section 1806(f) preempts the state secrets
14 privilege to authorize motions seeking discovery of materials related to *any* alleged electronic
15 surveillance, even if such surveillance was not authorized by the FISA, and permits adjudication
16 of *any* claim challenging the lawfulness of such surveillance, including claims that are not based
17 on alleged violations of the FISA itself. *See* Pls. Suppl. Mem. (Dkt. 38-1).

18 The Government's position remains that Section 1806(f) of the FISA does not preempt
19 the state secrets privilege to any extent—even as to alleged violations of the FISA. Rather, as
20 we have previously set forth, Section 1806(f) applies where the use of evidence derived from
21 electronic surveillance acknowledged by the Government is at issue in judicial or other
22 proceedings against an "aggrieved" person (someone who "is the target of" or "subject to"
23 electronic surveillance). In that circumstance, Section 1806(f) establishes procedures to be
24 invoked by the Attorney General in order to protect national security information in an
25 adjudication of whether such evidence was lawfully obtained or should be suppressed.
26 Plaintiffs' contention that the *scope* of FISA's purported preemption of the state secrets privilege
27

extends beyond FISA-authorized surveillance thus proceeds from an erroneous foundation.

1 Assuming, *arguendo*, Section 1806(f) preempts the state secrets privilege to any extent, plaintiffs
2 offer only a scant basis on which to conclude that this provision extends to non-FISA
3 surveillance and claims, and present no grounds for concluding that Section 1806(f) clearly and
4 directly preempt the state secrets privilege for matters outside of FISA’s purview.

5 ARGUMENT

6 Before addressing plaintiffs’ specific contentions, two overarching maxims applicable to
7 the question at hand should be noted. First, plaintiffs disregard the applicable standard of review
8 for resolving the question at hand, namely that “[t]he common law . . . ought not to be deemed
9 repealed, unless the language of a statute be clear and explicit for this purpose.” *Norfolk*
10 *Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983); *see*
11 *also United States v. Texas*, 507 U.S. 529, 534 (1993) (“[i]n order to abrogate a common-law
12 principle, the statute must ‘speak directly’ to the question addressed by the common law.”);
13 *Kasza v. Browner*, 133 F.3d at 1159, 1167 (9th Cir. 1998) (applying same standard to whether a
14 statute preempts the state secrets privilege).¹ Thus, the question is not merely whether a
15 particular construction of Section 1806(f) is possible, but whether the statute speaks clearly and
16 directly to supplanting the state secrets privilege in the circumstances presented here—*i.e.*,
17 where plaintiffs seek a determination as to whether alleged electronic surveillance has occurred
18 and to adjudicate its lawfulness, including as to claims concerning alleged electronic surveillance
19 arising outside of the FISA. While plaintiffs’ reading of Section 1806(f) may be a conceivable
20 one, the scope of Section 1806(f) is at best ambiguous and, thus, reflects no clear intent to
21 preempt the state secrets as to non-FISA surveillance or claims.

22
23 ¹ The Supreme Court has consistently applied the “evident purpose” and “direct
24 statement” standards to decide if Congress has preempted federal common law. *See United*
25 *States v. Texas*, 507 U.S. at 534; *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-
26 37 (1985). Also, the mere fact that a statutory scheme is “comprehensive” does not resolve
27 whether its particular provisions specifically preempt the common law. *See County of Oneida*,
470 U.S. at 236-37 (“As we stated in [*City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)]
federal common law is used as a ‘necessary expedient’ when Congress has not ‘spoken to a
particular issue.’”) (original emphasis).

1 Second, plaintiffs' analysis disregards "a fundamental canon of statutory construction
 2 that the words of a statute must be read in their context and with a view to their place in the
 3 overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)
 4 (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). This Court itself noted that "FISA
 5 does not preempt the state secrets privilege as to matters that are not within FISA's purview; for
 6 such matters, the lack of comprehensive federal legislation leaves an appropriate role for this
 7 judge-made federal common law privilege." *Al-Haramain*, 564 F. Supp. 2d at 1118; *see also id.*
 8 at 1124 (FISA would preempt the state secrets privilege "only in cases within the reach of its
 9 provisions."). Thus, the role that Section 1806(f) plays within the FISA is critical to
 10 understanding whether it may reach matters that "are not within FISA's purview."

11 **I. SECTION 1806(f) DOES NOT CLEARLY APPLY TO INFORMATION
 12 RELATED TO ELECTRONIC SURVEILLANCE OUTSIDE OF THE FISA.**

13 Plaintiffs first contend that the plain text of Section 1806(f) authorizes discovery to
 14 obtain applications, orders, or other materials related to *any* electronic surveillance on the ground
 15 that the relevant clause of Section 1806(f) is not linked to whether such surveillance was "under"
 16 the FISA. *See* Dkt. 38-1 at 3-7. But this conclusion is not plainly evident from the statute.

17 To begin with an overview of the statutory provision itself, Section 1806(f), entitled "In
 18 camera and ex parte review by district court," resides within a broader section of the FISA that
 19 governs the "[u]se of information," *see* 50 U.S.C. § 1806, and which includes several subsections
 20 that relate to and establish requirements governing the use of information obtained from
 21 electronic surveillance against persons in judicial and other proceedings. *See id.* § 1806(a)-(e).²

22 ² In brief, subsection (a) of Section 1806 requires that information acquired from
 23 electronic surveillance conducted "pursuant to this subchapter" (*i.e.* FISA provisions on
 24 electronic surveillance) may be used and disclosed only in accord with minimization procedures
 25 required by this subchapter; subsection (b) provides that information acquired "pursuant to this
 26 subchapter" may not be disclosed for law enforcement purposes unless accompanied by a
 27 statement that it may only be used in a criminal proceeding with the advance authorization of the
 28 Attorney General; subsection (c) requires notice by the United States if it intends to use
 information obtained or derived from an electronic surveillance of an aggrieved person "pursuant
 to the authority of this subchapter"; subsection (d) imposes a similar notice requirement on states
 and political subdivisions; and subsection (e) allows an "aggrieved" person against whom
 evidence obtained or derived from an electronic surveillance is used in a proceeding to move to

1 Within this framework, Section 1806(f) establishes procedures that may be invoked in three
 2 general circumstances: (i) when notice of the use of evidence derived from electronic
 3 surveillance is provided pursuant to Sections 1806(c) and (d); (ii) when an “aggrieved person”
 4 that “is the target of” or “subject to” electronic surveillance (*see id.* §1801(k)) brings a motion to
 5 suppress pursuant to Section 1806(e); or

6 (iii) whenever any motion or request is made by an aggrieved person pursuant to
 7 any other statute or rule of the United States or any State before any court or other
 8 authority of the United States or any State to discover or obtain applications or
 9 orders or other materials relating to electronic surveillance or to discover, obtain,
 10 or suppress evidence or information obtained or derived from electronic
 11 surveillance *under this chapter*

12 *See* 50 U.S.C. § 1806(f) (emphasis added).³ When Section 1806(f) is invoked by the Attorney
 13 General in these circumstances, through an affidavit indicating that disclosure of the information
 14 sought or an adversary hearing would harm the national security of the United States, the district
 15 court is required to review *in camera* and *ex parte* materials related to the surveillance as
 16 necessary to determine whether surveillance of the aggrieved person was lawful. *See id.*

17 The parties’ dispute in this case centers on the third circumstance outlined above
 18 (hereafter referred to as the “motions clause”). Plaintiffs contend not only that this provision
 19 preempts the state secrets privilege generally, but that it specifically encompasses electronic
 20 surveillance that does not arise under the FISA and authorizes the use of Section 1806(f)
 21 procedures to adjudicate claims challenging alleged electronic surveillance that do not arise

22 suppress that evidence on the ground that the information was unlawfully obtained or the
 23 surveillance did not conform with an order of authorization. *See* 50 U.S.C. § 1806(a)-(e).

24 ³ The words “this chapter” referred to in subsection (f) were originally “this Act”—
 25 meaning Pub. L. 95-511, Oct. 25, 1978, 92 Stat. 1783, known as the Foreign Intelligence
 26 Surveillance Act of 1978, which enacted this chapter (36) of the U.S. Code. *See* 50 U.S.C.
 27 § 1806(f) (historical and statutory notes). The words “this subchapter” referred to in subsections
 28 (a) to (d), were originally “this title”—meaning Title I of Pub. L. 95-511. When subsequent
 amendments added additional titles to the FISA (*see* Pub. L. 103-359, Title VIII, § 807(3), Oct.
 14, 1994, 108 Stat. 3443), Title I of Pub. L. 95- 511 became “subchapter I” of chapter 36, and
 thus the word “title”—originally translated as “chapter”—was re-translated as “subchapter” to
 conform the text to the amendments enacted by Pub. L. 103-359. *See id.*

1 under the FISA.⁴ But the scope of the motions clause is, at best, unclear and thus cannot be
2 construed to preempt the state secrets privilege as to non-FISA surveillance and claims.

3 First, as plaintiffs acknowledge, it is only by inserting line breaks and numbering into the
4 statutory language that plaintiffs can create two distinct “prongs” in the motion clause—of which
5 only one is qualified by the phrase “under this chapter.” But of course there are no “Prongs [1]
6 and [2]” in the motions clause. The words “under this chapter” can be construed to limit the
7 entire motions clause to surveillance authorized under the FISA—not merely the latter aspect of
8 the clause (concerning the discovery of evidence or information obtained or derived from
9 electronic surveillance). This is not a circumstance where Congress included particular language
10 in one section but omitted it from another, or where the Court is being asked to “read an absent
11 word into the statute” as plaintiffs’ contend. *See* Dkt. 38-1 at 5-7. The motions clause contains
12 the words that appear to limit Section 1806(f) to FISA-authorized surveillance. It is plaintiffs
13 who have re-written the statute to make it appear that one aspect of Section 1806(f) is unmoored
14 from FISA-authorized surveillance.

15 In addition, plaintiffs’ so-called “Prong [1]” of the motions clause pertains to the
16 discovery of “applications or orders or other materials” related to electronic surveillance. This
17 aspect of the clause—which plaintiffs assert preempts the state secrets privilege as to claims
18 concerning non-FISA surveillance—appears to relate to the discovery of information described

19 ⁴ Again, we focus herein on plaintiffs’ position as to the *scope* of the motions clause, and
20 otherwise reserve our threshold position that Section 1806(f) does not preempt the state secrets
21 privilege to any extent. *See* Defs. 2d MSJ at 22-32 (Dkt. 17, 07-cv-109-VRW); and Defs. 2d
22 MSJ Reply at 13-27 (Dkt. 29, 07-cv-109-VRW). We note simply that Section 1806(f) was
23 intended to address circumstances that arose in *Alderman v. United States*, 394 U.S. 165
24 (1969)—a case where the surveillance at issue had been acknowledged, *see id.* at 170 n.3, and
25 where the “ultimate issue” was “whether the evidence against any petitioner” violated the Fourth
26 Amendment, *see id.* at 181. In this context, *Alderman* required the Government to disclose
27 transcripts of unlawfully intercepted conversations so that an aggrieved party could determine if
28 any evidence admitted against it was derived from that unlawful surveillance. *See id.* at 182.
Through Section 1806(f), Congress established procedures that the Attorney General may invoke
in similar circumstances involving the use of evidence derived from foreign intelligence
surveillance under the FISA so that a determination could be made as to whether such
surveillance was lawful or should be suppressed without disclosures that would harm national
security. *See* S. Rep. No. 95-701 at 64, 65, 1978 U.S.C.C.A.N. 4033, 4034.

1 in Section 1804 of the FISA. *See* 50 U.S.C. § 1804. Section 1804 pertains to “applications for
2 an order approving electronic surveillance *under this subchapter . . .*”, *see id.* (emphasis added),
3 and describes various categories of information and materials that must be included in such an
4 application, including minimization procedures and certifications relating to the electronic
5 surveillance to be approved. *See id.* Thus, the information discoverable under “Prong [1]”
6 appears to concern the applications, orders, and materials described in Section 1804 which, in
7 turn, is limited to electronic surveillance under the FISA. *See, e.g., Al-Kidd v. Gonzales*, 2008
8 WL 5123009 (D. Idaho Dec. 2008) (when examining FISA applications under Section 1806(f),
9 the court “is directed to examine whether or not the FISA requirements for submission under §
10 1804 were met.”).

11 A further indication that Section 1806(f) is limited to surveillance authorized by the FISA
12 may be found in its interplay with subsections (c), (d), and (e). The “notice” requirements in
13 subsections (c) and (d) apply to the use of evidence derived from electronic surveillance
14 “pursuant to the authority of this subchapter.” *See* 50 U.S.C. § 1806(c), (d). Motions to discover
15 materials related to electronic surveillance under Section 1806(f) would naturally arise after such
16 notice was provided, including in connection with any motion to suppress. *See id.* §1806(e). For
17 this reason as well, the motions clause can reasonably be construed as limited to circumstances
18 where the use of FISA-authorized electronic surveillance is at issue. There certainly is no clear
19 indication anywhere in Section 1806(f) that a person may use those procedures to obtain a
20 determination of *whether* they are “aggrieved”—the target of, or subject to, electronic
21 surveillance—in the face of a state secrets privilege assertion. *See In re Sealed Case*, 310 F.3d
22 717, 741 (For. Intel. Surv. Rev. 2002) (FISA does not require notice to persons whose
23 communications were intercepted unless the government intends to enter such communications
24 into evidence).⁵

25 ⁵ Plaintiffs ascribe great meaning to the fact that other provisions of the FISA that
26 establish procedures similar to Section 1806(f)—applicable to physical searches and pen register
27 devices—include the words “authorized by this subchapter” twice in the same comparable
28 sentence, *see* 50 U.S.C. §§ 1825(g) and 1845(f). *See* Dkt. 38-1 at 5-6. But the fact that the
words “under this chapter” appear only once in the motions clause of Section 1806(f) is too
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1 Finally, plaintiffs' discussion of legislative history on the differences between the House
2 and Senate versions of the legislation, *see* Dkt. 38-1 at 6, does not support their reading of the
3 motions clause.⁶ As we have previously explained, the House-passed FISA legislation contained
4 two provisions that established special procedures to be invoked by the Attorney General for
5 review of the legality of surveillance being used against a person, and those provisions were
6 melded into a single provision (which became Section 1806(f)) of no pertinent difference. *See*
7 Defs. 2d MSJ Reply (Dkt. 29, 07-cv-109-VRW) at 19-22. Indeed, the conference report to the
8 1978 FISA indicated that it was adopting the Senate version of what became Section 1806(f)
9 with only "technical changes," *see* H.R. Conf. Rep. No. 95-1720, at 31-32, 1978 U.S.C.C.A.N.
10 4060-61, and does not indicate that the final provision was intended to apply more broadly than
11 the House bill to authorize discovery not related to FISA surveillance or claims. This is
12 especially so where the motions clause, as enacted, included the same kind of limitation reflected
13 in the House provisions to surveillance authorized "in this chapter"—*i.e.*, under the FISA.

14 For the foregoing reasons, the motions clause of Section 1806(f) appears to be limited
15 solely to electronic surveillance under the FISA and, in any event, does not clearly reflect an
16 intent by Congress to preempt the state secrets privilege as to allegations concerning any other
17 electronic surveillance. The statutory issue is at best unclear, and this cannot serve to preempt
18 the privilege as to non-FISA surveillance.

19 **II. SECTION 1806(f) DOES NOT CLEARLY APPLY TO THE ADJUDICATION OF**
20 **CLAIMS THAT ARISE OUTSIDE OF THE FISA.**

21 Plaintiffs' related contention that Section 1806(f) procedures may be applied to litigate
22 claims that do not raise alleged violations of the FISA itself is likewise unsupported. Plaintiffs
23 again cite language in the motions clause indicating that Section 1806(f) applies "whenever any

24 tenuous a basis on which to conclude that it extends beyond FISA-authorized surveillance, let
25 alone to find a clear and direct abrogation of the state secrets privilege in this circumstance.

26 ⁶ Indeed, the legislative history of Section 1806(f) firmly supports the Government's
27 reading of that provision as limited to circumstances involving the use of acknowledged
28 surveillance. *See* Defs. 2d MSJ (Dkt. 17, 07-cv-109-VRW) at 29-31; *see, e.g.* S. Rep. No. 95-
701 at 62, 1978 U.S.C.C.A.N. 4031; *see also* Amicus Curiae Brief of Telecommunications
Carrier Defendants (Dkt. 442 in M:06-cv-1791-VRW) at 7-20.

1 motion or request is made by an aggrieved person pursuant to *any* other statute or rule of the
2 United States” *See* Dkt. 38-1 at 7. But this text indicates no more than that discovery
3 motions governed by Section 1806(f) include those brought under any statute—not that any
4 cause of action outside of the FISA can be litigated under Section 1806(f) procedures. The
5 legislative history of Section 1806(f) addresses this issue, noting that the motions clause was
6 written to “prevent the carefully drawn procedures in [Section 1806(f)] from being bypassed by
7 the inventive litigant using a new statute, rule or judicial construction” to seek discovery of FISA
8 surveillance information. *See* S. Rep. No. 95-701 at 63, 1978 U.S.C.C.A.N. 4032. Thus, the
9 motions clause does not seek to expand the scope of Section 1806(f) to permit adjudication of
10 claims arising outside of the FISA, but to ensure that Section 1806(f) would apply whenever
11 discovery is sought under any authority to obtain information related to electronic surveillance
12 evidence being used against a party.

13 Plaintiffs’ specific contention that Section 1806(f) applies to claims arising under Title 18
14 also rests on a weak foundation. Plaintiffs first argue that 18 U.S.C. § 2712(b)(4) purports to
15 apply Section 1806(f) to Title 18 claims. But plaintiffs fail to note that Section 2712(a) creates a
16 cause of action for alleged violations of three provisions of the FISA itself (not at issue in this
17 case). *See* 18 U.S.C. § 2712(a).⁷ In this context, Section 2712(b)(4) refers to Section 1806(f)
18 procedures (and to similar procedures in §§ 1825(g) and 1845(f)) located in the very same
19 section of the FISA to which the cause of action relates. Thus, it is again unclear at best whether
20 Section 1806(f) applies beyond the FISA claims specifically listed in Section 2712(b)(4). In
21 addition, Section 2712(b)(4) states only that Section 1806(f) would apply to the materials
22 “governed by” that section, *see* 18 U.S.C. § 2712(b)(4), which brings the matter back to the very
23 question of *how* Section 1806(f) operates.

24 Plaintiffs’ reliance on 18 U.S.C. § 2511(2)(f), which provides that FISA and the Wiretap
25 Act set forth the “exclusive means” by which surveillance may be conducted, is also misplaced.

26 ⁷ These provisions establish requirements and prohibitions on the use and disclosure by
27 Federal officers of information acquired from electronic surveillance, physical searches, or
28 through a pen register and trap and trace device. *See* 50 U.S.C. §§ 1806(a), 1825(a), 1845(a).
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1 “All this section [§ 2511(2)(f)] means . . . is that [FISA] is intended to be exclusive in its
2 domain and [the Wiretap Act] in its.” *United States v. Koyomejian*, 970 F.2d 536, 541 (9th Cir.
3 1992 (en banc) (citation omitted). There is no basis on which to conclude from this provision
4 that the FISA would apply to adjudicate any cause of action authorized by Title 18.⁸

5 Finally, the cases cited by plaintiffs do not support their contention that Section 1806(f)
6 applies to non-FISA causes of action. *United States v. Johnson*, 952 F.2d 565, 571-73 (1st Cir.
7 1992), reflects a standard application of Section 1806(f) to determine a criminal defendants’
8 claim that FISA surveillance being used against him had been obtained in violation of the FISA
9 and the Constitution. This scenario falls precisely within Section 1806(f), and does not remotely
10 indicate that Section 1806(f) would otherwise apply to adjudicate a separate cause of action
11 challenging alleged electronic surveillance.

12 *Al-Kidd v. Gonzales*, 2008 WL 5123009 (D. Idaho Dec. 4, 2008), involved another
13 straightforward application of Section 1806(f) to obtain discovery of materials related to
14 surveillance authorized under the FISA and to determine the lawfulness of that surveillance. *See*
15 *id.* at **3-6. The parties in *Al-Kidd* did not dispute that Section 1806(f)’s procedures applied to
16 the discovery request, or that Mr. Al-Kidd was an “aggrieved person” under the FISA. *See id.* at
17 *5. In fact, the Government triggered Section 1806(f) procedures by filing the requisite
18 affidavit. Thus, unlike in this case, *Al-Kidd* did not involve an attempt to use Section 1806(f) to
19 determine *whether* surveillance had occurred and *whether* the plaintiff was aggrieved, nor to
20 obtain discovery of information related to alleged non-FISA electronic surveillance. And,
21 notably, in addition to applying Section 1806(f), the court in *Al-Kidd* reviewed and upheld the
22 Government’s simultaneous state secrets privilege assertion over the same materials and
23 specifically declined to apply this Court’s ruling on FISA preemption in the *Al-Haramain* action.

24 ⁸ The Wiretap Act contains its own provisions that, like Section 1806(f), require notice
25 of surveillance, *see id.* § 2518(8)(d), (9), and for judicial review of motions by an aggrieved
26 person to suppress evidence derived from a communication was unlawfully intercepted, *see id.*
27 § 2518(10)(a). The Wiretap Act also provides that its remedies and sanctions “with respect to
28 the interception of electronic communications are the only judicial remedies and sanctions for
non-constitutional violations of this chapter involving such communications.” *Id.* § 2518(10)(c).
These provisions are a further indication that FISA procedures would not apply within Title 18.

See id. at **6-7.⁹

1 Lastly, and again contrary to plaintiffs’ assertion, the court in *Mayfield v. Gonzales*, 2005
 2 WL 1801679, at * 17 (D. Or. July 28, 2005), did not “us[e] section 1806(f) to review
 3 constitutional claims for injunctive relief.” *See* Dkt. 38-1 at 7. Rather, the court merely held that
 4 “before plaintiffs can adequately fashion their claim for injunctive and declaratory relief . . . ,
 5 they first need to determine the extent to which data and information [collected pursuant to
 6 FISA] have been retained by the federal government, and the extent to which [such] data and
 7 information have been disseminated throughout the federal government.” *Id.* at * 18. The court
 8 noted that plaintiffs were entitled to conduct normal discovery on these issues. *Id.* The court did
 9 not hold a Section 1806(f) proceeding or use Section 1806(f)’s review procedures in any way.
 10 The Government had also advised Mayfield that he had been subject to searches pursuant to
 11 FISA, thus it was clear that Mayfield was an aggrieved person, unlike plaintiffs here. *Id.* at * 17.

CONCLUSION

13 In sum, while, in the Government’s view, Section 1806(f) does not preempt the state
 14 secrets privilege to any extent, it certainly does not clearly and directly preempt the privilege to
 15 permit use of its procedures to adjudicate claims that are not within the purview of the FISA.

16 September 4, 2009

Respectfully Submitted,

MICHAEL F. HERTZ
 Deputy Assistant Attorney General

DOUGLAS N. LETTER
 Terrorism Litigation Counsel

JOSEPH H. HUNT
 Director, Federal Programs Branch

VINCENT M. GARVEY
 Deputy Branch Director

24
 25 ⁹ This is consistent with legislative history indicating that where the need to determine
 26 legality of surveillance arises “incident to discovery in a civil trial,” the court should grant the
 27 discovery motion only in accordance with the requirements of law” which would include law
 28 “respecting civil discovery.” *See* H.R. Rep. No. 95-1283, at 90-94. Thus, even as Section
 1806(f) operates, any disclosure of information under that provision would continue to be
 governed by evidentiary privileges in discovery.

s/ Anthony J. Coppolino
ANTHONY J. COPPOLINO
Special Litigation Counsel

s/ Marcia Berman
MARCIA BERMAN
Trial Attorney

U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
Phone: (202) 514-4782
Fax: (202) 616-8460

*Attorneys for the Government Defendants
Sued in their Official Capacity*

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