

1 ELECTRONIC FRONTIER FOUNDATION  
 CINDY COHN (SBN 145997)  
 2 cindy@eff.org  
 LEE TIEN (SBN 148216)  
 3 KURT OPSAHL (SBN 191303)  
 KEVIN S. BANKSTON (SBN 217026)  
 4 JAMES S. TYRE (SBN 083117)  
 454 Shotwell Street  
 5 San Francisco, California 94110  
 Telephone: (415) 436-9333; Facsimile: (415) 436-9993  
 6 KEKER & VAN NEST, LLP  
 RACHAEL E. MENY (SBN 178514)  
 7 rmeny@kvn.com  
 PAULA L. BLIZZARD (SBN 207920)  
 8 pblizzard@kvn.com  
 MICHAEL S. KWUN (SBN 198945)  
 9 mkwun@kvn.com  
 AUDREY WALTON-HADLOCK (SBN 250574)  
 10 awaltonhadlock@kvn.com  
 710 Sansome Street  
 11 San Francisco, California 94111-1704  
 Telephone: (415) 391-5400; Facsimile: (415) 397-7188  
 12 LAW OFFICE OF RICHARD R. WIEBE  
 RICHARD R. WIEBE (SBN 121156)  
 13 wiebe@pacbell.net  
 425 California Street, Suite 2025  
 14 San Francisco, California 94104  
 Telephone: (415) 433-3200; Facsimile: (415) 433-6382  
 15 THE MOORE LAW GROUP  
 THOMAS E. MOORE III (SBN 115107)  
 16 tmoore@moorelawteam.com  
 228 Hamilton Avenue, 3<sup>rd</sup> Floor  
 17 Palo Alto, California 94301  
 18 Telephone: (650) 798-5352; Facsimile: (650) 798-5001  
 19 Attorneys for Plaintiffs

20 UNITED STATES DISTRICT COURT  
 21 NORTHERN DISTRICT OF CALIFORNIA

22 CAROLYN JEWEL, TASH HEPTING,  
 GREGORY HICKS, ERIK KNUTZEN and  
 23 JOICE WALTON, on behalf of themselves  
 and all other similarly situated,

24 Plaintiffs,

25 v.

26 NATIONAL SECURITY AGENCY, et al.,

27 Defendants.  
 28

Case No. C-08-4373-VRW  
CLASS ACTION

**PLAINTIFFS' SUPPLEMENTAL BRIEF  
 ON THE SCOPE OF THE FISA ACT'S  
 PREEMPTION OF THE STATE  
 SECRETS PRIVILEGE**

Judge: The Hon. Vaughn R. Walker  
 Date Comp. Filed: September 18, 2008

## I. Introduction

1  
2 At the July 15, 2009 hearing, for the first time, a question arose about the scope of the  
3 preemption of the state secrets privilege by the Foreign Intelligence Surveillance Act of 1978  
4 (FISA Act), the set of statutory changes adopted by Congress in response to revelations of  
5 extensive domestic spying by the executive branch. The Court specifically inquired about the  
6 reach of a procedural mechanism created by the FISA Act—namely section 1806(f).<sup>1</sup>

7 The FISA Act defined the exclusive means by which electronic surveillance could be  
8 conducted. Congress determined that the combined procedures of the Wiretap Act (18 U.S.C. §  
9 2510 et seq.) and the FISA Act “shall be the exclusive means by which electronic surveillance  
10 as defined [in title 50] and the interception of domestic wire, oral and electronic  
11 communications may be conducted.” *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d  
12 1109, 1116 (N.D. Cal. 2008) (quoting 18 U.S.C. § 2511(2)(f)). Later, Congress added the  
13 Stored Communications Act (“SCA”) portion of the Electronic Communications Privacy Act  
14 (18 U.S.C. § 2701 et seq.) as one of the FISA Act’s “exclusive means.” While the FISA Act  
15 was a single Congressional Act, it was codified in multiple places—including title 50, and two  
16 places in title 18 (the Wiretap Act and the Electronic Communications Privacy Act).<sup>2</sup>

17 The FISA Act’s procedural mechanism for adjudication, section 1806(f), is at least as  
18 broad as the comprehensive solution Congress established as the “exclusive means” to address  
19 widespread problems with electronic surveillance. On its plain language, the relevant portion  
20 of section 1806(f) reaches any “materials relating to electronic surveillance,” regardless of  
21 whether that electronic surveillance was done for foreign intelligence purposes or authorized by  
22 title 50, and regardless of whether the claims at issue are brought under the provisions of title  
23 50, one of the other “exclusive means” defined by the FISA Act, or the Constitution itself. The  
24

25 <sup>1</sup> The government has never argued that section 1806(f) applies to some of Plaintiffs’ claims but  
not others, and thus Plaintiffs have never had occasion to address this question.

26 <sup>2</sup> Title 50 of the United States Code, at chapter 36, codifies only a portion of the FISA Act.  
27 Although title 50 is sometimes referred to as “FISA,” other portions of the FISA Act were  
28 codified in title 18. To avoid confusion, Plaintiffs will refer to the Congressional Act as the  
“FISA Act” and the portion codified in Title 50 as “title 50.”

1 FISA Act’s structure and legislative history confirm the text’s plain meaning, as does the case  
2 law construing section 1806(f)’s scope.

3 Although section 1806(f)’s procedure is not limited to surveillance authorized by title 50  
4 or to claims for violation of title 50, its scope is strictly cabined by four limiting principles:

- 5 • the materials at issue must relate to “electronic surveillance;”
- 6 • those materials may be sought only by an “aggrieved person,” i.e., someone who  
7 was subjected to the electronic surveillance;
- 8 • the government must assert that disclosure of the materials would harm national  
9 security; and
- 10 • the court may only review those materials “as may be necessary to determine  
whether the surveillance of the aggrieved person was lawfully authorized and  
conducted.”

11 50 U.S.C. § 1806(f). Section 1806(f) thus represents the balance Congress struck between the  
12 needs of national security and the need for judicial oversight in a narrow category of cases  
13 meeting these four requirements. This is such a case.

14 **II. The relevant provision of Section 1806(f) applies to any “materials relating to  
15 electronic surveillance.”**

16 Applying section 1806(f) to all of Plaintiffs’ claims is fully consistent with the FISA  
17 Act’s fundamental purpose of preventing unrestrained surveillance abuse by the executive  
18 branch of government. The FISA Act was the result of “a period of intense public and  
19 Congressional interest in the problem of unchecked domestic surveillance by the executive  
20 branch.” *In re NSA*, 564 F. Supp. 2d at 1115. The Senate Select Committee to Study  
21 Governmental Operations with Respect to Intelligence Activities (known as the Church  
22 Committee), found widespread abuse of the government’s intelligence gathering capabilities:

23 Through the use of a vast network of informants, and through the uncontrolled or illegal  
24 use of intrusive techniques – ranging from simple theft to sophisticated electronic  
25 surveillance – the Government has collected, and then used improperly, huge amounts  
of information about the private lives, political beliefs and associations of numerous  
Americans.

26 *Id.* (quoting Senate Select Comm. to Study Governmental Operations with Respect to  
27 Intelligence Activities, Book II: Intelligence Activities and the Rights of Americans, S. Rep.  
28 No. 94-755, at 290 (1976)). Congress enacted the FISA Act in response to these abuses.

1 Section 1806(f) of the FISA Act is a key element of Congress’s plan to rein in executive  
 2 abuse through judicial oversight. It sets forth a procedure for determining the legality of  
 3 electronic surveillance where the government claims that disclosure of related materials would  
 4 harm national security. The portion of section 1806(f) that applies here reaches any “materials  
 5 relating to electronic surveillance,” whenever at issue under “any other statute or rule of the  
 6 United States”—without regard to whether the surveillance is authorized under title 50 or  
 7 whether any legal claim pursued by the aggrieved person arises under title 50. 50 U.S.C. §  
 8 1806(f).

9 In relevant part, section 1806(f) reads:

10 [W]henver **any** motion or request is made by an aggrieved person pursuant to  
 11 **any other statute or rule** of the United States or any State before any court or  
 other authority of the United States or any State

12 [1] to discover or obtain applications or orders or other materials relating  
 to **electronic surveillance** or

13 [2] to discover, obtain, or suppress evidence or information obtained or  
 derived from **electronic surveillance under this chapter**,

14 the United States district court or, where the motion is made before another  
 15 authority, the United States district court in the same district as the authority,  
 shall, notwithstanding any other law, if the Attorney General files an affidavit  
 16 under oath that disclosure or an adversary hearing would harm the national  
 security of the United States,

17 review in camera and ex parte the application, order, and such other materials  
 18 relating to the surveillance as may be necessary to determine whether the  
 surveillance of the aggrieved person was lawfully authorized and conducted.

19 50 U.S.C. § 1806(f) (line breaks, emphasis and numbering added).

20 The clauses numbered [1] and [2] above—hereafter Prong [1] and Prong [2]—address  
 21 requests for two different types of electronic surveillance materials. Plaintiffs here seek to  
 22 discover the applications and orders (or lack thereof) and other materials relating to  
 23 Defendants’ electronic surveillance of Plaintiffs, in order to stop that illegal surveillance, not to  
 24 discover or suppress evidence obtained or derived from it. *See* Complaint ¶¶ 13-14. Therefore,  
 25 Prong [1] of section 1806(f) applies, and that prong reaches any “materials relating to electronic  
 26 surveillance.” 50 U.S.C. § 1806(f). “Electronic surveillance” is defined in FISA to include,  
 27 *inter alia*, any “acquisition by an electronic, mechanical, or other surveillance device of the  
 28

1 contents of any wire communication to or from a person in the United States.” 50 U.S.C.  
2 § 1801(f)(2).

3 Unlike Prong [2], Prong [1]’s applicability is not limited to materials relating to  
4 electronic surveillance “under this chapter” (*i.e.* chapter 36 of title 50). Nor is Prong [1] limited  
5 to electronic surveillance that is “pursuant to this subchapter” or “pursuant to the authority of  
6 this subchapter,” a limitation found elsewhere in § 1806, 50 U.S.C. § 1806(a-d), or even to  
7 electronic surveillance undertaken “under color of law,” as in the criminal and civil causes of  
8 action in title 50, *id.* at §§ 1809-10.<sup>3</sup> “Where Congress includes particular language in one  
9 section of a statute but omits it in another section of the same Act, it is generally presumed that  
10 Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v.*  
11 *United States*, 480 U.S. 522, 525 (1987) (quotation and brackets omitted); *Fortney v. United*  
12 *States*, 59 F.3d 117, 120 (9th Cir. 1995); *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th  
13 Cir. 1991). Thus, Prong [1] applies to any materials relating to “electronic surveillance” as  
14 defined in title 50, even if the surveillance was not authorized under title 50.

15 Other sections of title 50 directly analogous to section 1806(f) help confirm this reading.  
16 Section 1845(f), which concerns pen register and trap and trace devices, has a provision  
17 providing for court review that is almost identical to section 1806(f). Specifically, it includes  
18 two prongs that parallel Prongs [1] and [2] of section 1806(f) except for one important  
19 difference: both prongs in section 1845(f) are limited to surveillance “authorized by this  
20 subchapter.” These parallel prongs of section 1845 read as follows:

21 [1] to discover or obtain applications or orders or other materials relating to the  
22 use of a pen register or trap and trace device **authorized by this subchapter** or  
23 [2] to discover, obtain, or suppress evidence or information obtained or derived  
24 from the use of a pen register or trap and trace device **authorized by this**  
25 **subchapter....**

26 50 U.S.C. §1845(f) (line breaks, emphasis and numbering added). Similarly, section 1825(g)  
27 concerning physical searches limits its two prongs to activities “authorized by this subchapter.”  
28

<sup>3</sup> Other provisions of title 50 beyond section 1806(f) further bolster this conclusion. For  
example, section 1802(a)(1) refers to “electronic surveillance . . . under this subchapter to  
acquire foreign intelligence information” and section 1804(a) refers to “electronic surveillance

1 For sections 1825(g) and 1845(f) of title 50, Congress chose to limit *both* prongs to activities  
2 *authorized by the respective subchapters*. Because Congress included no such limitation in  
3 Prong [1] of section 1806(f), it is not so limited. *See Keene Corp. v. United States*, 508 U.S.  
4 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

5 Section 1806(f)'s legislative history also demonstrates Congress' intent to leave  
6 "electronic surveillance" unmodified in Prong [1], thereby making its scope broader than Prong  
7 [2]'s. The Senate and the House of Representatives in 1978 passed two different FISA bills,  
8 each with a different version of the provision that became section 1806(f). Wiebe Decl., Ex. A  
9 at 23-25; *id.*, Ex. B at 28430-31; *id.*, Ex. D at 4060. The Senate bill provided a single protocol  
10 for determining the legality of electronic surveillance in both criminal and civil cases, and that  
11 protocol applied to all "electronic surveillance" without limitation.<sup>4</sup> Wiebe Decl., Ex. A at 23-  
12 25. The House bill had two separate protocols in separate subsections, one for criminal and one  
13 for civil cases. Wiebe Decl., Ex. B at 28431; *id.*, Ex. D at 4060. The House bill's civil protocol  
14 included a version of the language that eventually became Prong [1] and Prong [2]. In the  
15 House bill's civil protocol, however, *both* Prong [1] and Prong [2] were limited to "surveillance  
16 pursuant to the authority of this title." Wiebe Decl. Ex. B at 28431 (at subpart (g)).

17 When the Conference Committee harmonized the two bills into the final version of the  
18 FISA Act, it decided to use a single protocol for both criminal and civil cases. Wiebe Decl.,  
19 Ex. D at 4061, H. R. Conf. Rep. 95-1720, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N 4048,  
20 4061 (single protocol of section 1806(f) applies "in both criminal and civil proceedings"). In  
21 putting Prong [1] and Prong [2] into their final form in section 1806(f), the Conference  
22 Committee retained the limitation that the House version imposed on Prong [2] (modifying its  
23 language slightly), but rejected the House's limitation for Prong [1]. The difference between

24 \_\_\_\_\_  
25 under this subchapter." Neither of these limitations is present in Prong [1].

26 <sup>4</sup> The Senate bill, like the original House bill, would have codified all of the FISA Act in title 18.  
27 Wiebe Decl., Ex. A. The Conference Report makes clear that the final decision to codify  
28 portions of the FISA Act in title 50 was not intended to have any substantive significance, and  
to limit the scope of section 1806(f): "the purpose of the change is solely to allow the placement  
of Title I of the Foreign Intelligence Surveillance Act in that portion of the United States Code  
(Title 50) which most directly relates to its subject matter." Wiebe Decl., Ex. D at 4048.

1 the two prongs was thus intentional and the result of a compromise between the House and  
2 Senate. The Court must give effect to this deliberate difference in wording and cannot read  
3 “under this chapter” into Prong [1]. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also*  
4 *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (courts should not “read an absent  
5 word into the statute”). Therefore, the portion of section 1806(f) relevant here is not limited to  
6 surveillance within the scope of title 50, but applies broadly to any “materials relating to  
7 electronic surveillance.”

8 **III. Section 1806(f)’s procedure applies to materials related to electronic surveillance**  
9 **regardless of the type of legal claim at issue.**

10 The plain language of section 1806(f) applies in any civil or criminal case, regardless of  
11 whether the claims in those cases are brought pursuant to title 50. Specifically, section  
12 1806(f)’s procedure applies “whenever *any* motion or request is made by an aggrieved person  
13 pursuant to *any* ... statute or rule of the United States ... before *any* court or other authority of  
14 the United States” to discover materials related to electronic surveillance. 50 U.S.C. § 1806(f)  
15 (emphasis added). As one district court recently and correctly concluded, nothing in this  
16 language limits section 1806(f)’s applicability to claims brought under the civil cause of action  
17 at 50 U.S.C. § 1810. *See Al-Kidd v. Gonzales*, No. CV 05-093-EJL-MHW, 2008 WL 5123009,  
18 \*4 n.1 (D. Idaho Dec. 4, 2008). Consistent with this result, other courts’ *in camera* and *ex parte*  
19 review of surveillance’s legality has encompassed not only whether the surveillance was  
20 properly authorized under title 50, but also whether the surveillance was constitutional.  
21 *Mayfield v. Gonzales*, No. Civ. 04-1427-AA, 2005 WL 1801679, \*17 (D. Or. July 28, 2005)  
22 (using section 1806(f) to review constitutional claims for injunctive relief); *see United States v.*  
23 *Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (finding, upon § 1806(f) review, that FISA  
24 application did not evidence any government intent to gather criminal evidence in violation of  
25 Fourth Amendment).

26 Just as courts may use section 1806(f)’s procedures to consider whether electronic  
27 surveillance was constitutional, they may also consider whether that surveillance violated other  
28 elements of Congress’s exclusive and comprehensive statutory system regulating domestic

1 electronic surveillance. Section 1806(f) reaches at a minimum all the “exclusive means”  
2 defined in the FISA Act—namely the Wiretap Act (18 U.S.C. § 2510 et seq.), the Stored  
3 Communications Act (“SCA”) portion of the Electronic Communications Privacy Act (18  
4 U.S.C. § 2701 et seq.), and title 50 (50 U.S.C. §1801 et seq.). 18 U.S.C. § 2511(2)(f).

5 This “exclusive means” provision confirms that, with the combined authorizations for  
6 and limitations upon electronic surveillance set forth in the FISA Act, the Wiretap Act, and the  
7 SCA, Congress “intended to displace entirely the various warrantless wiretapping and  
8 surveillance programs undertaken by the executive branch and to leave no room for the  
9 president to undertake warrantless surveillance in the domestic sphere.” *In re NSA*, 564 F.  
10 Supp. 2d at 1116. In other words, the FISA Act—“along with the existing statute dealing with  
11 criminal wiretaps”—“blankets the field.” *Id.* at 1117 (quoting Senator Gaylord Nelson); 18  
12 U.S.C. § 2511(2)(f). Indeed, the House report on the FISA Act notes that the same surveillance  
13 can violate both the Wiretap Act and section 1809 of title 50. Wiebe Decl., Ex. C, H. R. Rep.  
14 95-1283, at 97 (1978).

15 Accordingly, 18 U.S.C. § 2712, which provides a civil cause of action against the  
16 United States for violations of the Wiretap Act, the SCA, and particular provisions of FISA,  
17 mandates that courts *must* use title 50’s procedures to review materials related to electronic  
18 surveillance in such cases: “Notwithstanding any other provision of law, the procedures set  
19 forth in section 106(f)...of the Foreign Intelligence Surveillance Act of 1978 [*i.e.*, 50 U.S.C. §  
20 1806(f)] shall be the *exclusive means* by which materials governed by those sections may be  
21 reviewed.” 18 U.S.C. § 2712(b)(4) (emphasis added). By providing for section 1806(f)’s use  
22 in 18 U.S.C. § 2712 as well as in title 50 itself, Congress made clear that section 1806(f)’s  
23 procedures are not limited to claims brought under title 50.

24 In sum, just as section 1806(f)’s procedure covers materials relating to electronic  
25 surveillance that was not conducted under title 50, it applies where an aggrieved party has  
26 brought claims under laws other than title 50.

27  
28

1 **IV. Section 1806(f) has four limiting principles.**

2 While section 1806(f) is not restricted to surveillance authorized under title 50 nor to  
 3 claims brought pursuant to 50 U.S.C. §1801, *et seq.*, it does include four limiting principles that  
 4 tie the statute to the problem Congress sought to fix—unlawful domestic surveillance hidden  
 5 behind a cloak of national security. Section 1806(f) only comes into play when the government  
 6 asserts that national security interests are at stake. Section 1806(f) is further limited to activity  
 7 concerning electronic surveillance, in a request brought by an aggrieved person, seeking  
 8 information necessary to determine whether the surveillance was lawfully authorized and  
 9 conducted. These requirements form the four cabining walls of section 1806(f).

10 **A. The government must assert that disclosure would harm national security.**

11 In order for section 1806(f) to apply, the “Attorney General files an affidavit under oath  
 12 that disclosure or an adversary hearing would harm the national security of the United States.”  
 13 50 U.S.C. § 1806(f). Without the government’s sworn statement that harm to national security  
 14 is at stake, section 1806(f) cannot be used. Wiebe Decl., Ex. E at 4032, S. Rep. No. 95-701, at  
 15 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4032 (“The special procedures ... cannot be  
 16 invoked until they are triggered by a Government affidavit that disclosure or an adversary  
 17 hearing would harm the national security...”); Wiebe Decl., Ex. D at 4061, H.R. Rep. No. 95-  
 18 1720, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4061 (“The in camera and ex parte  
 19 proceeding is invoked if the Attorney General files an affidavit under oath.”). This limitation to  
 20 matters of national security is in keeping with Congress’s perception of the problem—not all  
 21 electronic surveillance, but surveillance hidden behind a veil of executive privilege tied to  
 22 national security.<sup>5</sup>

23  
 24  
 25 <sup>5</sup> The government may not subvert the process by refusing to submit a formal section 1806(f)  
 26 affidavit. If the government refuses to invoke section 1806(f), ordinary discovery procedures  
 27 apply, and the Court remains free to require disclosure, including under a protective order that  
 28 could incorporate 1806(f)-like procedures. The Court has described that approach as the Court  
 invoking section 1806(f) on its own initiative. *See In re NSA Telecomm. Records Litig.*, 595 F.  
 Supp. 2d 1077, 1088-89 (N.D. Cal. 2009) (“*In re NSA II*”).

1 **B. The materials at issue must relate to “electronic surveillance” as defined in Title**  
 2 **50.**

3 Section 1806(f)’s procedure provides for review only of materials “relating to electronic  
 4 surveillance.” Here, Plaintiffs have specifically alleged “electronic surveillance” of Plaintiffs’  
 5 communications. *See, e.g.*, Complaint ¶¶ 143-167. Plaintiffs have also described how all of the  
 6 conduct alleged relates to that electronic surveillance. *See, e.g.*, Complaint ¶ 11 (describing the  
 7 relationship between the government’s acquisition of Plaintiffs’ communications records and its  
 8 electronic surveillance of Plaintiffs’ communications).<sup>6</sup>

9 **C. The request must be made by an “aggrieved person” as defined in Title 50 .**

10 Section 1806(f) also requires that the request for disclosure of materials be made by an  
 11 “aggrieved person” under title 50. An “[a]ggrieved person” is someone “who is the target of an  
 12 electronic surveillance or any other person whose communications or activities were subject to  
 13 electronic surveillance.” 50 U.S.C. § 1801(k). Mere speculation about surveillance cannot  
 14 trigger section 1806(f)’s procedures, however; rather, the law requires specific, definite, and  
 15 detailed allegations that raise a substantial claim. *See In re NSA Telecomm. Records Litig.*, 595  
 16 F. Supp. 2d 1077, 1087 (N.D. Cal. 2009) (“*In re NSA II*”) (quoting *United States v. Alter*, 482  
 17 F.2d 1016, 1025 (9th Cir. 1973)). Plaintiffs have presented such allegations here.

18 **D. The Court’s review is limited to information necessary to determine whether the**  
 19 **surveillance was lawfully authorized and conducted.**

20 Finally, the fourth cabining wall of section 1806(f) is that the court is permitted to  
 21 review materials relating to the surveillance *in camera* and *ex parte* only “as may be necessary  
 22 to determine whether the surveillance of the aggrieved person was lawfully authorized and  
 23 conducted.” 50 U.S.C. § 1806(f). The court must focus on the materials relevant to the  
 24 objective: determining whether the surveillance was “lawfully authorized and conducted.” *Id.*

25 <sup>6</sup> Indeed, even the government’s acquisition of Plaintiffs’ communications records, by itself,  
 26 constitutes “electronic surveillance;” the communication “contents” protected by title 50 include  
 27 “any information concerning the *identity of the parties* to such communication or the *existence*  
 28 “... of that communication,” which encompasses the records at issue here. 50 U.S.C. § 1801(n)  
 (emphasis added); Complaint ¶¶ 91-92 (describing Defendants’ acquisition of Plaintiffs’  
 records).

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28**V. CONCLUSION**

Section 1806(f) was part of Congress's comprehensive effort to limit executive authority to conduct domestic electronic surveillance behind a veil of national security. Finding that section 1806(f) does not reach the very type of surveillance Congress wanted to bring under the check of the judicial branch would turn the law on its head. The plain language of section 1806(f) requires that its procedures extend to *any* materials related to "electronic surveillance," whether or not the surveillance or legal claims at issue arose under title 50 or other laws. Congress established a careful balance between executive accountability and legitimate national security concerns by confining section 1806(f) within four cabining walls: the government must certify that national security would be harmed by disclosure, the materials must relate to electronic surveillance as defined by title 50, the request must be made by an aggrieved person, and the court must review only to the extent necessary to determine whether the surveillance was legal.

While "FISA preempts or displaces the state secrets privilege . . . only in cases within the reach of its provisions," *In re NSA*, 564 F. Supp. 2d at 1124, the FISA Act occupied the field of electronic surveillance by establishing the surveillance-related provisions of title 18 and title 50 together as the "exclusive means" by which electronic surveillance may be conducted. It is thus no surprise that Congress extended the provisions of section 1806(f) to all the claims brought by plaintiffs in this case, under both section 1810 of title 50 and other laws.

Respectfully submitted,

Dated: August 3, 2009

By: \_\_\_\_\_/s/\_\_\_\_\_

ELECTRONIC FRONTIER FOUNDATION  
CINDY COHN (SBN 145997)  
LEE TIEN (SBN 148216)  
KURT OPSAHL (SBN 191303)  
KEVIN S. BANKSTON (SBN 217026)  
JAMES S. TYRE (SBN 083117)  
454 Shotwell Street  
San Francisco, California 94110  
Telephone: (415) 436-9333  
Facsimile: (415) 436-9993

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KEKER & VAN NEST, LLP  
RACHAEL E. MENY - #178514  
PAULA L. BLIZZARD - #207920  
MICHAEL S. KWUN - #198945  
AUDREY WALTON-HADLOCK - #250574  
710 Sansome Street  
San Francisco, California 94111-1704  
Telephone: (415) 391-5400  
Facsimile: (415) 397-7188

RICHARD R. WIEBE (SBN 121156)  
LAW OFFICE OF RICHARD R. WIEBE  
425 California Street, Suite 2025  
San Francisco, California 94104  
Telephone: (415) 433-3200  
Facsimile: (415) 433-6382

THOMAS E. MOORE III (SBN 115107)  
THE MOORE LAW GROUP  
228 Hamilton Avenue, 3<sup>rd</sup> Floor  
Palo Alto, California 94301  
Telephone: (650) 798-5352  
Facsimile: (650) 798-5001

Attorneys for Plaintiffs