

## Supreme Court considers if state secrets claim can end Muslim men's lawsuit against FBI

*FBI v. Fazaga is the second state secrets case argued before the Supreme Court this term.*

By Robert Barnes

The new convert at an Islamic center in Southern California went from zealous to violent so quickly that alarmed members of the center sought a restraining order and contacted the FBI to warn them.

They learned later that Craig Monteilh, who took the name Farouk al-Aziz, was *from* the FBI, an undercover informant and part of a surveillance program in 2006 and 2007 called Operation Flex.

According to three men who sued the bureau, the purpose of the investigation was to gather information on Muslims. The government, they say, conducted illegal searches, secretly recorded sensitive therapy sessions and generally targeted members of their community because of their religion.

Their case reached the Supreme Court on Monday, and the question was whether the lawsuit could go forward, as a divided U.S. Court of Appeals for the 9th Circuit said it could.

After two hours of dense legal argument, it seemed the justices were looking for a narrow way to disagree with the appeals court and perhaps vacate its ruling, but also to allow some room for the case to proceed.

The government has asserted the state secrets privilege, and says much of the suit should be dismissed because the government cannot defend itself without revealing evidence that could threaten national security.

“The need for the executive [branch] to protect information pertaining to the nation’s security, as being part of the presidential prerogative and the executive branch necessity, goes all the way back to the founding,” said Deputy Solicitor General Edwin Kneedler.

But some justices were skeptical that the government could simply invoke state secrets and face no additional scrutiny.

The government’s argument, said Justice Neil M. Gorsuch, was that “we’re entitled to use that evidence in our possession without telling you anything about it as a basis for dismissing the suit more or less as a matter of routine.”

That would mean the government doesn't have to choose between defending itself or keeping the secret, he said.

“And in a world in which the national security state is growing larger every day, that's quite a power,” Gorsuch said.

But there was not much support among the justices for the 9th Circuit's view that a portion of the Foreign Intelligence Surveillance Act displaces the state secrets privilege and allows courts to examine the evidence in secret.

Ahilan Arulanantham, who is co-director of the Center for Immigration Law and Policy at UCLA and is representing the Muslim men, said his clients did not expect to see the government's evidence, nor did they need it to proceed on their claims of religious bias. But Arulanantham said the government should not be able to have the case dismissed simply by invoking the state secrets privilege.

He was representing Yassir Fazaga, an imam at the Orange County Islamic Foundation, and Ali Uddin Malik and Yasser Abdel Rahim, who attended the Islamic Center of Irvine.

In a call with reporters, Malik said he felt “betrayed” when he learned the intense young man at the center was an FBI informant.

“They promised our community, in a meeting I attended, that we could worship God without having to fear being incriminated by our own government, and I trusted them,” he said. “I felt betrayed by the very institutions that were supposed to protect and honor the Constitution of the United States.”

Monday's case, *FBI v. Fazaga*, is **the second state secrets case of the term for the court.** It earlier heard from a Guantánamo Bay detainee whose lawyers want to question CIA contractors about alleged torture.