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The Supreme Court heard oral arguments Wednesday in a case brought by Abu Zubaydah, the Guantánamo prisoner who was the first subject of the CIA's torture program. Zubaydah's legal team has spent years trying to obtain testimony from two psychologists who helped the CIA design and implement his torture, and the Biden administration is continuing the Trump's administration strategy to keep key information about Zubaydah's torture in Poland classified despite the fact that the two psychologists are willing to testify. Several justices contradicted the Biden administration, suggesting Zubaydah, the only witness besides the psychologists to the torture in Poland, testify himself, and expressing frustration that Zubaydah is still being held incommunicado at Guantánamo. We speak with Abu Zubaydah's attorney, Joe Margulies, and Pulitzer Prize-winning journalist Raymond Bonner, who has long followed the case. "The legal justification for continuing to hold [Guantánamo detainees] has disappeared," says Margulies.

AMY GOODMAN: This is *Democracy Now!*, [democracynow.org](#), *The War and Peace Report*. I'm Amy Goodman.

We turn now to look at the Biden administration's attempts to keep secret information about the U.S. torture program following the September 11th attacks. On Wednesday, the Supreme Court heard a case brought by Abu Zubaydah, a Guantánamo prisoner who was waterboarded over 80 times while being held at a CIA black site. His legal team has spent years trying to obtain testimony from two psychologists, doctors James Mitchell and Bruce Jessen, who helped the CIA design and implement its torture program. The U.S. government is also trying to keep secret the location in Poland of the CIA black site where Abu Zubaydah was tortured.

Wednesday's hearing took a surprising turn when several justices asked why the United States is refusing to allow Abu Zubaydah to testify himself in an ongoing inquiry in Poland. This is Justice Stephen Breyer questioning Abu Zubaydah's attorney, David Klein.

JUSTICE STEPHEN BREYER: Why don't you ask Mr. Zubaydah? Why doesn't he testify? Why doesn't Mr. Zubaydah? He was there. Why doesn't he say this is what happened? And they won't deny it, I mean, I don't think, if he's telling the truth.

DAVID KLEIN: You're talking about Mitchell or Jessen, when you say —

JUSTICE STEPHEN BREYER: No, I'm not. I'm saying the person who was there was — I don't know if he's your client. Isn't he your client? His name is on this thing.

DAVID KLEIN: Well, Abu Zubaydah —

JUSTICE STEPHEN BREYER: Yes.

DAVID KLEIN: Abu Zubaydah cannot testify.

JUSTICE STEPHEN BREYER: Why not?

DAVID KLEIN: Because he is being held incommunicado. He has been held in Guantánamo incommunicado.

JUSTICE STEPHEN BREYER: Why? Why? Just out of — I mean, I'm not sure this is relevant, but, I mean, in *Hamdi*, we said you could hold people in Guantánamo. The words were "active combat operations against Taliban fighters," apparently, are going on in Afghanistan. Well, they're not anymore.

DAVID KLEIN: Mr. —

JUSTICE STEPHEN BREYER: So — so, what's the — why is he there?

DAVID KLEIN: That's a question to put to the government. We don't know the answer to that.

JUSTICE STEPHEN BREYER: I mean, have you filed a *habeas* or something to get him out?

DAVID KLEIN: There has been a *habeas* proceeding pending in D.C. for the last 14 years.

JUSTICE STEPHEN BREYER: Well, have —

DAVID KLEIN: There's been —

JUSTICE STEPHEN BREYER: They don't decide it?

DAVID KLEIN: There's been no action.

JUSTICE STEPHEN BREYER: They don't decide it?

DAVID KLEIN: I'm sorry?

JUSTICE STEPHEN BREYER: I mean, you just let it sit there.

DAVID KLEIN: Well —

JUSTICE STEPHEN BREYER: All right, well, I guess this is not relevant, but I'm just curious.

DAVID KLEIN: Personally, I'm not handling that proceeding. But, no, my understanding is that we've done everything we could to move it forward, but it simply has not moved forward.

AMY GOODMAN: That's an excerpt from the oral arguments in the Supreme Court case *United States v. Zubaydah*

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We're joined now by two guests. Ray Bonner is a Pulitzer Prize-winning investigative journalist. He's producing a documentary with Alex Gibney about Abu Zubaydah and the CIA's interrogation program, called *The Forever Prisoner*. His latest [article](#) for ProPublica is "Will the United States Officially Acknowledge That It Had a Secret Torture Site in Poland?" Also with us, Joe Margulies, an attorney for Abu Zubaydah, professor of law and government at Cornell University. He was counsel of record in the landmark Guantánamo case *Rasul v. Bush*

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We welcome you both to *Democracy Now!* Joe, let's begin with you. You're part of the legal team, the case argued before the Supreme Court. Talk about the significance of the oral arguments yesterday. And when you use words like "*habeas corpus*," explain exactly what that means.

JOE MARGULIES: Of course. Thanks. Sure.

It was an extraordinary argument in several respects. The narrow question is whether we can secure the testimony of James Mitchell and Bruce Jessen for use by the Polish prosecutors in their investigation into whether crimes were committed in Poland at the black site there. But the more important turn that the oral argument took is several things. One, virtually every justice on the court described Abu Zubaydah's treatment as "torture." They used that word. There were no euphemisms. There was no equivocation. Everyone understood that what happened to him was torture.

Second was the observation that you made, which is the questions by Justice Breyer, Justice Gorsuch and Justice Sotomayor, asking, "Why is it that you can't just let Abu Zubaydah testify?" That obviously would obviate the need for Mitchell and Jessen's testimony. And what was as interesting as their request that Abu Zubaydah be allowed to testify was the government's equivocation and inability to answer that. They were asked — that is, the solicitor general was asked to provide a follow-up statement, so they'll be filing something else, explaining whether they're going to allow Abu Zubaydah to testify. And if they do, that will be a sea change at Guantánamo. That will be a radical change. Guantánamo was built to be an isolation chamber, and they have never allowed any detainee to have uncensored access to the outside. The whole purpose of it was to prevent that kind of communication. So, if that changes, that will be a radical thing.

And the third piece that was really interesting was Justice Breyer's observation, which we have been arguing on Abu Zubaydah's behalf for some time, as well as other detainees have made this argument, that there are no hostilities left in Afghanistan. The legal justification for continuing to hold guys has disappeared. We've been making that argument, and yesterday we heard a Supreme Court justice accept it as though it were commonplace. How could anyone think otherwise? Well, of course, that's what we've been saying for some time.

AMY GOODMAN: As you speak, we're showing for our web and television audience around

the world the artwork of Abu Zubaydah in Guantánamo. Raymond Bonner, it's great to have you with us. Can you talk about the story of Abu Zubaydah? Tell us who he is. You're doing a documentary, *The Forever Prisoner*, on him.

RAYMOND BONNER: Yes. He was the first terrorist suspect captured after 9/11. He was captured and seized in Pakistan in a joint CIA-FBI — to some extent, Pakistani police — operation. And he was rendered — he was the first captured. He was the first taken to a secret prison. I mean, I've interviewed both the CIA — the head of the CIA operation and the FBI operation at the time. And Zubaydah was taken, the first to be rendered to a secret site. He was taken to Thailand.

And soon after he got there is when James Mitchell and then Bruce Jessen showed up and began the interrogation. And as Joe just pointed out, it was very interesting yesterday in the argument to hear, and Justice Barrett included, talking straight about torture. What happened to Zubaydah was torture. There was none of this euphemisms like EITs, you know, enhanced interrogation techniques. And he was the guinea pig, in a way. This is where Mitchell designed the program and tested the program of torture.

You know, Amy, it's always struck me that a lot is made of the 83 times he was waterboarded. If you read what was done to him, read in the government cables that were sent at the time, I mean, to me, the waterboarding was almost benign. I mean, they kept him sleepless. They put him in a small coffin-sized box for hours, overnight. He couldn't move. They hung him by the cell bars with his feet dangling off the ground. I mean, it got to the point it was so bad, that Mitchell would just snap his fingers, and Zubaydah would act, would get onto the waterboard. I mean, what they did to him was far worse, in my view, than waterboarding.

And then, when journalists started to get onto the story about a secret prison — and you've got to remember, this was back in 2002, and we didn't know about secret prisons and black sites. And when they found out about it and started to ask questions, then the CIA moved him to Poland, and quietly, of course, secretly, which leads to the case, as Joe has described, that's in the Supreme Court, that was heard in the Supreme Court yesterday.

But if I could say one more thing about yesterday's argument, in addition to the three points Joe raised, I was gobsmacked when they started asking the lawyers about Zubaydah's *habeas* petition. Fourteen years ago — Justice Roberts asked about it, too: "Well, hasn't he filed a *habeas* petition?" Yes, he has — 14 years ago. And Joe Margulies was his lawyer then. Fourteen years, and the court has yet to rule on his *habeas* petition. And it's — "unprecedented" is always dangerous to say, because somebody will find a case that's taken longer than 14 years. But it's just staggering that for 14 years you have had two judges have now had the case in the D.C. District Court, the federal court in Washington, D.C., and they've yet to rule.

You know why? The cables are there. Because in 2002, Mitchell and the CIA interrogators in Thailand sent a cable to Washington saying, "We're about to do these EITs," the torture of this guy. "He might die," they said. "He might die. And if he does, we're going to cremate him. And if he doesn't, we want assurances that he will never be in a position to tell his story." And Langley cabled back: "You have the assurances of everyone here that he will be held incommunicado for the remainder of his life." And that is exactly what is happening. We're never going to hear from Abu Zubaydah. I would be stunned if he's allowed to testify.

AMY GOODMAN: But you were stunned yesterday. And just to finish up that part of the story that you've written so extensively about, these partially declassified cables that show they said if he dies, they'll cremate him, but, you write, "If he survived questioning, [Gina] Haspel" — who became CIA director under Trump — "sought assurances that 'the subject will remain in isolation and incommunicado for the remainder of his life.'"

RAYMOND BONNER: Exactly. I'm not sure it was Gina Haspel, Amy. We don't know who exactly signed the cable at that time, because they've been redacted to a degree that we don't know who the signatories are. We just know the language of it. And they're quite revealing. And it certainly came — probably came from the Alec Station, as you know, which was the group at the CIA that was trying to find Osama bin Laden. Joe may know who sent those cables, but I don't know.

AMY GOODMAN: So, Joe, if you could tell us that? And also tell us about the significance of the CIA black site in Poland. I mean, now, let's remember, it's the Biden administration that's fighting to keep all of this secret. The Biden administration.

JOE MARGULIES: Yes, that's right. Our litigation began during the Trump administration. And the Trump administration sought the review in the United States Supreme Court, and there was the passing of the baton between Trump and Biden, while the case was pending. And the Biden administration picked up the Trump administration's argument and doubled down on it. So, there's no — there's no window. There's no air between the two administrations.

What Ray describes is exactly right, but what he's describing is the torture that took place in Thailand, which was the first black site. Abu Zubaydah was the first person thrown into a black site, the first person to have his interrogation, quote, "enhanced." And we know a fair amount about what happened to him at Thailand.

But we don't know what happened to him in Poland. We know that, in testimony, James Mitchell described it, just said that Abu Zubaydah was treated very shabbily. But he uses those kind of euphemisms for the most grotesque torture. And that's all he says. But no one has ever questioned him about what went on in Poland. The Polish prosecutor knows where the site was. He knows when it operated. But inside the cell, he doesn't know. There were only three people there. It was Abu Zubaydah, James Mitchell and Bruce Jessen. And they won't let Abu Zubaydah testify. So if we're going to get at what happened there, we have to get it from James Mitchell and Bruce Jessen, who, I should say, are perfectly willing to provide this testimony. When we sought their testimony in this case, they said, "We have no objection. We're happy to tell you. We're happy to sit down for a deposition." It was the United States government that intervened and said, "No, their testimony is a state secret, and you can't have any of it."

The other thing I would want to observe — it's important to remember this — even Mitchell and Jessen, when they were torturing him in Thailand, after six days of virtually 24-hour-a-day torture, they decided that they were done, that they had emptied the content of his head. And they had concluded that they had gotten all the information they needed from him, or all the information he had left — he had to give. And they cabled that to CIA headquarters in Langley. And Mitchell believes it was Jose Rodriguez who cabled back — someone in the Alec Station — who, in James Mitchell's words, "You guys are a bunch of pussies. You've got to continue this. Blood is going to be on your hands if there's another attack. Keep torturing him." And so they did, for another two weeks. And what they eventually concluded is that Abu Zubaydah was telling the truth all along. Contrary to what they believed when they started torturing him, he was not a member of al-Qaeda. He had no involvement with the planning for 9/11. He's never been a member of al-Qaeda. He is ideologically opposed to al-Qaeda, which is what he had been saying. And they eventually concluded that that was true.

AMY GOODMAN: And, Joe, finally, on this, you have met Abu Zubaydah. Can you talk about what condition he is in today, after all of this time, held for so many years, the last number of years, 15 years, in Guantánamo?

JOE MARGULIES: No, actually, I can't, because his condition, and my observation of it, is classified. Everything he tells me — this is why the government's — or, rather, the court's question is so comical. Everything he tells me and everything I learned from him is classified at the highest level. It's top secret. So, if he says to me, for instance, "I'm having terrible headaches, and I vomit every morning," I can't relay that to you. I can't say this is what he says. I can only write it down and then submit it to the CIA for declassification. And we have submitted over a hundred pages of Abu Zubaydah's statements and recounting of what happened to him — excuse me — and that's been submitted for years, and the CIA has never cleared it. Many years ago, they authorized me to say that I am very concerned about his welfare, very concerned or gravely concerned, some adverb like that. And I can tell you that nothing has changed between then and now. I remain very concerned. But that's all I'm allowed to say.

AMY GOODMAN: Well, I want to thank you both for being with us, Joe Margulies, attorney for Abu Zubaydah, and Raymond Bonner, investigative journalist, producing a documentary with Alex Gibney about Abu Zubaydah and the CIA's interrogation program called *The Forever Prisoner*.

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[piece](#)

in ProPublica, "Will the United States Officially Acknowledge That It Had a Secret Torture Site in Poland?"