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Correspondence: The Center for Constitutional Rights vs. Jack Goldsmith

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In his article "The Great Legal Paradox of Our Times: How Civil Libertarians Strengthened the National Security State", Professor Jack Goldsmith credits Michael Ratner and the Center for Constitutional Rights for initiating—and consistently sustaining—challenges to the Bush Administration's Guantanamo Bay detention and torture practices, while suggesting that Ratner and CCR may be experiencing regret about the ultimate outcome of its campaign.

Quite to the contrary, the Center for Constitutional Rights is extremely proud of its decision to challenge the Bush Administration's outrageous actions in Guantanamo Bay, premised as they were on a legal claim that the President could create an island prison beyond the law where the U.S. military was free to indefinitely and secretly detain and torture individuals—and lie about it—outside of any constraints of United States or international human rights law. Responding to this shocking arrogation of Executive power was a courageous act then and, in hindsight, CCR would not hesitate again to take such a clear stance in favor of fundamental human rights. In this struggle to restore the rule of law, CCR stands alongside literally thousands of courageous lawyers from every practice area and region of the country—as well as with activists and conscientious citizens.

Beyond, as Professor Goldsmith acknowledges, achieving several dramatic victories in the courts, litigation and advocacy by CCR and this broad coalition have reunited hundreds of detainees with their families, brought glimmers of hope to men suffering in intolerable conditions, exposed a legacy of torture and abuse by government officials and overall, created a record of U.S. crimes and abuses for history to review—a record that simply could not have been developed absent the decision to file the first habeas corpus petitions in 2002.

Professor Goldsmith correctly observes that our three branches of government have acquiesced in and further legitimated some still-troubling aspects of indefinite detention and have dismissed our efforts to obtain accountability for torture. However, we certainly disagree with Professor Goldsmith that this dramatic, substantive departure from U.S. constitutional norms somehow represents a proper functioning of separation of powers; indeed, we continue to fight efforts to further diminish fundamental human rights in the name of a seemingly limitless fight against terrorism.

Ultimately, the greatest flaw in Mr. Goldsmith's analysis is that he assumes this battle is lost or that the history of this struggle has been finally written. In the courts, all is not lost—several detainee habeas cases currently before the

Supreme Court may limit the D.C. Circuit's continuing efforts to rubber-stamp executive branch detention decisions. But more importantly, the record of CCR's work and that of its courageous allies will not be judged by recent legal victories or losses alone. Cases brought by Fred Korematsu and Dred Scott—as well as Pinochet's eventual reckoning with justice for his crimes—all teach us that much. History will pass a critical judgment on whether past torture practices or the current regime of indefinite military detention is legal or wise or just. And, when that history is written, we are confident that the actions of CCR and its allies will be judged a success.

Baher Azmy

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Jack Goldsmith responds:

My essay did not maintain, as Baher Azmy suggests, that CCR regrets initiating its GTMO campaign. I argued instead that CCR is disappointed in where the campaign has ended up. CCR's landmark Supreme Court victories led to habeas corpus review by federal judges who approved military detention at GTMO, an outcome in turn blessed by Congress in the 2012 Defense Authorization Act. As a direct result of CCR's efforts, long-term military detention is now embedded in the rule of law, approved by all three branches of our government, and broadly supported by the American people. CCR accomplished much, but this is not the outcome it wanted. As CCR's long time leader, Michael Ratner, told me, after acknowledging CCR's accomplishments: "We lost on the enemy combatant issue, and the definition. We lost on the preventive detention issue, more or less."

Azmy's ultimate point is that our current "dramatic, substantive departure from U.S. constitutional norms" will one day be reversed, and that CCR will keep fighting the good fight. This attitude exemplifies two characteristics of the robust accountability system that has grown up to watch the presidency, both described in my new book. The first, alluded to in the essay, is that both the presidency itself and the watchers of the presidency feel they are on the losing end of the stick as a result of the accountability wars of the last decade. The second is that the human rights organizations that have been so consequential in bringing accountability and the rule of law to the presidency believe that non-accountability and illegality are still rampant, and are fighting hard to vindicate their beliefs. This belief is inaccurate, I think. But it is also healthy for the presidency, because it leads to aggressive scrutiny that requires incessant self-reflection and accounting by the presidency. Paradoxically, the continued efficacy of the modern presidential accountability system depends on institutions like CCR having a skeptical attitude about the accountability system's efficacy.

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