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The Youngstown Question and the Presidential Contest

Posted By [Timothy Zick](#) On October 25, 2007 @ 11:01 am In [Politics](#) | [12 Comments](#)

As the confirmation hearings of Michael Mukasey demonstrate, perhaps the most pressing concern in the upcoming presidential election is the shape the office itself will assume in January, 2009. Mukasey has [created controversy](#) ^[1] by professing to be unclear with regard to whether waterboarding is "torture" and, more importantly, suggesting that the president has the constitutional power (in national security contexts) to act contrary to duly enacted federal law. As to the latter position, [Youngstown](#) ^[2], its progeny, and most of our constitutional tradition strongly indicate otherwise. Because no question is more fundamental or important to the office, we ought to be asking the presidential candidates the [Youngstown](#) question too. Perhaps more than any other in recent history, this election raises questions regarding not only what kind of president the candidates will be, but more fundamentally what kind of *presidency* they envision.

A few of the candidates have addressed that question, or provided substantial hints. For example, Hillary Clinton recently [pledged](#) ^[3] to "relinquish" some of the executive powers she says the Bush Administration has illegitimately claimed and exercised. If the claim is that President Bush has exercised power he does not have — say, the power to ignore federal statutes — then "relinquish" does not seem the appropriate term. One cannot "relinquish" what one never possessed. Perhaps not surprisingly, candidate Clinton did not provide specific examples of powers President Clinton would not exercise. We also ought to keep in mind that presidents have made similar pledges in the past, only to renege once in office. Among the Republican candidates, we are gaining a clearer picture of Rudy Giuliani's vision of the presidency. Not surprisingly, candidate Giuliani offers a very muscular conception of executive power. He has [reportedly](#) ^[4] surrounded himself with hawkish advisors with regard to foreign policy. Striking Iran, he says, is a more timely concern than many Democrats will concede. More specifically, like Mukasey, Giuliani has said [he does not know whether waterboarding is "torture."](#) ^[5] He has also derided characterizations of sleep deprivation as torture as "plain silly." He favors "aggressive" questioning of suspected terrorists. These answers ought to raise even greater concern than those recently given by Judge Mukasey; after all, Mr. Giuliani seeks all of the executive power the Constitution vests in the presidency. In any event, it seems a very safe bet that President Giuliani would not relinquish any presidential authority; indeed he may even seek to enhance the powers of the office.

Admittedly, it is not easy to work [Youngstown](#) (or any other constitutional precedent, save perhaps [Roe](#)) into presidential debates. The scope of presidential power generally is too nuanced for sound bites, zingers, and applause lines. But every candidate ought to at least be asked whether he or she believes the president is, under *any* circumstance, above the law. If so, he or she ought to be asked to provide specifics, using current examples (wiretapping, detention, "enhanced interrogation," etc.) as necessary. If there is no clear answer to that question, then it would seem our democracy is in serious trouble. As Giuliani himself once wrote: "Elections are necessary but not sufficient to establish genuine democracy. Aspiring dictators sometimes win elections, and elected leaders sometimes govern badly and threaten their neighbors."

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[1] created controversy:

<http://www.nytimes.com/2007/10/25/washington/25mukasey.html?ref=washington>

[2] Youngstown: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=343&invol=579>

[3] pledged: <http://www.nytimes.com/2007/10/24/us/politics/24dems.html?ref=politics>

[4] reportedly: <http://www.nytimes.com/2007/10/25/us/politics/25giuliani.html?hp>

[5] he does not know whether waterboarding is "torture.":

<http://www.nytimes.com/2007/10/25/us/politics/25torture.html>

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