

UPDATE ON THE SIGNING OF THE NDAA

Many people have been wondering what happened regarding the signing of the 2012 NDAA containing the critical, and much criticized, detention provisions. The House of Representatives passed the conference report of the bill on December 14th, with the Senate approving it by a 86 to 13 margin the following day, December 15th. Interest then turned to whether the President would veto it (he won't) and when he will sign the legislation.

Most seemed to think that meant the bill must be signed by yesterday, which would have been the tenth day, excluding Sundays, after passage pursuant to Article I, Section 7 of the Constitution, which provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a

Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

But Obama has not yet signed the NDAA, so what gives? Presentment. A bill coming out of Congress must be formally presented to the President for signature. Sometimes, if the subject matter is deemed urgent, the presentment process is accelerated remarkably and happens on an emergency basis quite quickly. But, normally, it is a time honored deliberate process also governed by statute. 1 USC 106 and 107 require an enrolled bill passed by both chambers of Congress be printed on parchment or paper "of suitable quality" and "sent" to the President; this is the "presentment" process. 1 USC 106 does allow for alternate accelerated means for a bill emanating during the last six days of a session, and the OLC, in a little known opinion from May 2011, has decreed that electronic transmission is even acceptable (basically, the thing can be emailed).

In the case of the critical 2012 NDAA, however, Congress (one would assume with the blessing of the White House) apparently made no attempt to accelerate the schedule as often occurs for end of session matters, and the NDAA was not formally presented to President Obama until December 21st. So, excluding intervening Sundays, the tenth day is, in fact, Monday

January 2, 2012.

Why, then, is the White House and President stringing out the signing of the NDAA? Well, we know AG Eric Holder has indicated Obama would be attaching a signing statement to the executed NDAA. Although unconfirmed officially, the word I am hearing from DOJ, who was working with the White House on the signing statement, was that they were done late last week.

So, it is not clear why Obama has still not yet signed the NDAA. Maybe he and the White House optics shop realized what a sour pill it would be to sign such a perceived toxic hit on civil liberties right before Christmas? The better question might be whether they are planning on slipping this little gem in the end of the week pre New Years trash dump.