AYOTTE'S PRO-TORTURE AMENDMENT REFERRED TO CONFERENCE

Update: Adam Serwer informs me that I misunderstood what happened in the colloquy where this was discussed. Ayotte's pro-torture amendment was withdrawn.

I apologize for my error.

As Jeff Kaye laid out here, Kelly Ayotte submitted an amendment to the Defense Authorization that would override Obama's Executive Order eliminating torture (the language of the amendment is below).

I had thought the amendment would get a vote, be easily defeated, and be history.

But instead, the amendment got referred to the conference that will work out differences between the House and Senate bills.

Now, normally, I'd assume this is a convenient way to get rid of it. But given that the amendment would presumably have been voted down by the Senate, I worry that this effectively keeps it alive to be put in the larger package. Then, members of the House and Senate will vote for the whole package (not wanting to defeat the whole defense authorization). Who knows, maybe they'll stick it in the classified section of the bill, so none of us will be able to prove that our members of Congress are voting for torture?

Such decisions get made by the sponsor of a bill—in this case, Carl Levin. And they rarely get made without the assent of the Administration.

While it's not clear what will happen to Ayotte's amendment—and to our brief efforts to stop torturing—the fact that it won't be defeated by a upperdown vote bodes ill.

(a) *Authority*.—Notwithstanding section 1402 of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), the personnel of the United States Government specified in subsection (c) are hereby authorized to engage in interrogation for the purpose of collecting foreign intelligence information using methods set forth in the classified annex required by subsection (b) provided that such interrogation methods comply with all applicable laws, including the laws specified in subsection (d).

(b) *Classified Annex*.—Not later than 90 days after the date of the enactment of this Act, and on such basis thereafter as may be necessary for the effective collection of foreign intelligence information, the Secretary of Defense shall, in consultation with the Director of National Intelligence and the Attorney General, ensure the adoption of a classified annex to Army Field Manual 2-22.3 that sets forth interrogation techniques and approaches, in addition to those specified in Army Field Manual 2-22.3, that may be used for the effective collection of foreign intelligence information.

(c) *Covered Personnel*.—The personnel of the United States Government specified in this subsection are the officers and employees of the elements of the intelligence community that are assigned to or support the entity responsible for the interrogation of high value detainees (currently known as the "High Value Detainee Interrogation Group"), or a successor entity.

(d) *Specified Laws*.—The law specified in this subsection is as follows:

(1) The United Nations Convention Against Torture, signed at New York, February 4, 1985.

(2) Chapter 47A of title 10, United States Code, relating to military commissions (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84)).

(3) The Detainee Treatment Act of 2005 (title XIV of Public Law 109-163).

(4) Section 2441 of title 18, United States Code.

(e) *Supersedure of Executive Order*.—The provisions of Executive Order No. 13491, dated January 22, 2009, shall have no further force or effect, to the extent such provisions are inconsistent with the provisions of this section.

(f) *Definitions*.—In this section:

(1) ELEMENT OF THE INTELLIGENCE COMMUNITY.—The term "element of the intelligence community" means an element of the intelligence community listed or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(2) FOREIGN INTELLIGENCE INFORMATION.—The term "foreign intelligence information" has the meaning given that term in section 101(e) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(e)).