Remarks by Senator Dianne Feinstein on Detention Provisions in the National Defense Authorization Act United States Senate November 17, 2011

Madam President, I view the detention provisions of this bill as real pernicious, as an attack on the Executive power of the President, and contrary to the best interests of this Nation. So I rise to express my strong opposition to three specific detention provisions in the Defense authorization bill.

There was some discussion on the Senate floor that the Intelligence Committee had reviewed these. This is not true. I would like to read a letter that I sent to the majority leader that was signed by every Democratic member of the Intelligence Committee on October 21.

"We write as members of the Senate Judiciary Committee..."

...because there were some Judiciary Committee members on this...

"and the Senate Select Committee on Intelligence, to express our grave concern with subtitle D, titled Defense Matters of title 10 of S. 1253, the National Defense Authorization Act for Fiscal Year 2012. We support the majority of provisions in the bill which further national security and are of great importance. But we cannot support these controversial detention positions."

Then we go on to say—and I will not read the whole letter. I will put the whole letter in the Record.

"The executive branch must have the flexibility to consider various options for handling terrorism cases, including the ability to prosecute terrorists for violations of U.S. law in Federal criminal court.

"Yet, taken together, sections 1031 and 1032 of subtitle (d) are unprecedented and require more rigorous scrutiny by Congress. Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001, authorization for use of military force, especially because it would authorize the indefinite detention of American citizens without charge or trial..."

I will stop reading here, but again, I want to emphasize this point. We are talking about the indefinite detention of American citizens without charge or trial. We have not done this at least since World War II when we incarcerated Japanese Americans. This is a very serious thing we are doing. People should understand its impact.

I want to outline the provisions in the Armed Services bill that would further militarize our counterterrorism efforts and ignore the testimony and recommendations of virtually all national

security and counterterrorism officials and experts. We have heard from the Secretary of Defense, the Attorney General, the general counsel of the Defense Department, and John Brennan, the Assistant to the President for Homeland Security and Counterterrorism. Every one of them opposes these provisions. They have to carry them out. They are the professionals responsible for so doing. Yet, we are going to countermand them?

The first problematic provision, section 1032, requires mandatory military custody with no consideration of the details of individual cases. The bill mandates military detention of any non-U.S. citizen who is a member of al-Qaida, or an associated force, whatever that may be, and who planned or carried out an attack, or attempted attack, on this country or abroad. Here is the problem: The Armed Services Committee ignores the administration's request to have this provision apply only to detainees captured overseas. Therefore, any noncitizen al-Qaida operative captured in the United States would be automatically turned over to military custody.

Military custody for captured terrorists may make sense in some cases, but certainly not all. Requiring it in every case could harm our Nation's ability to investigate and respond to terrorist threats and create major operational hurdles. For example, the FBI has 56 local field offices around the country. It is staffed with agents who can arrest, interrogate, and detain. The military does not. As has been the policy of Republican and Democratic Presidents before and after 9/11, the decision about where to hold a prospective terrorist should be based on the facts of each case, and should be made by national security professionals in the executive branch.

In a letter, Secretary Panetta said this week that this provision "...restrains the executive branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available."

He added that the bill as written "...may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States."

This is the man who ran the CIA and is now running the Department of Defense, and we are going to ignore him? Are we saying it doesn't make any difference what he says? I am not part of that school of thought. I think what he says does make a difference.

I ask unanimous consent to have Secretary Panetta's November 15 letter printed in the Record.

Let me explain why this proposal is bad policy.

Consider the case of Najibullah Zazi. He was arrested in September of 2009 as part of an al-Qaida conspiracy to carry out suicide bombings of the New York City subway system. The FBI arrested Zazi after they had followed him on a 24/7 basis. He began providing useful intelligence to the FBI once captured.

If the mandatory military custody in the Armed Services bill were law, all of the surveillance activities, all of what the FBI did would be in jeopardy. Instead of interrogating him about his coconspirators, or where he had hidden other bombs, the FBI would have squandered valuable

time determining whether Zazi was a member or part of al-Qaida or an "associated force." Requiring law enforcement and national security professionals to determine whether an individual meets a specific legal definition adds a delay—most people would have to admit this. Also a waiver process takes time as it proceeds through the President and Secretary of Defense, both of whom believe it unduly complicates the ability to immediately interrogate an individual or prevent another attack.

Suppose a terrorist such as Zazi were forced into mandatory military custody. Then the government could also have been forced to split up codefendants, even in cases where they otherwise could be prosecuted as part of the same conspiracy in the same legal system.

Zazi was a permanent legal resident. His coconspirators were both U.S. citizens. They would be prosecuted on terrorist charges in Federal criminal court, but Zazi himself would be transferred to military custody. Two different detention and prosecution systems would play out and could well complicate a unified prosecution.

Incidentally, in the Zazi case, prosecutors have obtained convictions against six individuals, including guilty pleas from Zazi, who faces life in Federal prison without parole.

What could be better than that? If it is not broke, don't fix it. What is happening now isn't broke. That is the point.

Guess what. I try to do my homework, I read the intelligence, and I try to know what is happening. It is working. The government has its act together. Now arbitrarily this is going to change because there is a predilection of some people in this body that the military must do it all—if they cannot do it all, a part of it. But what this does is essentially militarize certain criminal terrorist acts in the United States. I have a real problem with that. I don't understand why Congress would want to jeopardize successful terrorism prosecutions.

The former speaker was talking about Farouq Abdulmutallab, better known as the Underwear Bomber, from Christmas Day in 2009. Abdulmutallab was brought into custody in Detroit after failing to detonate a bomb on Northwest Flight 253. He was interrogated almost immediately by FBI special agents. And he talked.

Some critics contend that Abdulmutallab stopped talking later that day because he was Mirandized. That happens to be correct, at least temporarily. But what these critics don't mention is that he likely would have been even less forthcoming to military interrogators.

It was FBI agents who traveled to Abdulmutallab's home in Nigeria and persuaded family members to come to Detroit to assist them in getting him to talk. The situation would have been very different under Section 1032. Under the pending legislation, it would have been military personnel who were attempting to enlist prominent Nigerians to assist in their interrogation, and Abdulmutallab would have been classified as an enemy combatant and held in a military facility and, therefore, his family would not be inclined to cooperate. This is we have been told on the Intelligence Committee.

For the record, Umar Farouq Abdulmutallab pleaded guilty to all charges last month in a Federal criminal court in Michigan and will likely spend his life behind bars. What can be better than that? Where can the military commission come close to that effort? In fact, they can't. They had 6 cases, minor sentences, or released, plus 300 to 400 convictions in Federal Court.

To conclude on this mandatory military custody provision, the Defense Department has made clear it does not want the responsibility to take these terrorists into mandatory military custody. But do we know better? I don't think so.

The Department of Justice has said that approximately one-third of terrorists charged in Federal Court in 2010 would be subject to mandatory military detention, absent a waiver from the Secretary of Defense.

The administration contends that the mandatory military custody is unwise because our allies will not extradite terrorist suspects to the United States for interrogation and prosecution—or even provide evidence about suspected terrorists—if they will be sent to a military brig or Guantanamo.

Finally, the military isn't trained or equipped for this mission—they have plenty to do as it is—but the Department of Justice is.

As John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, said in March:

"Terrorists arrested inside the United States will, as always, be processed exclusively through our criminal justice system. As they should be."

I agree.

The alternative would be inconsistent with our values and our adherence to the rule of law. Our military does not patrol our streets or enforce our laws in this country. Nor should it.

I could add that our military doesn't spend its resources and expertise surveilling terrorists in the U.S. like Najibullah Zazi, as the FBI did, to know his every move, to know where he bought the chemicals, to know the amount of chemicals, to know what backpacks they had, and to follow him to New York. It makes no sense to me to have to transfer that jurisdiction.

The second problematic provision imposes burdensome restrictions to transfer detainees out of Guantanamo, section 1033. This provision essentially establishes a de facto ban on transfers of detainees out of Gitmo, even for the purpose of prosecution in U.S. courts or another country.

The provision requires the Secretary of Defense to make a series of certifications that are unreasonable—and, candidly, unknowable—before any detainee is transferred out of Gitmo.

Again, here is an example: The administration proposed eliminating the requirement that the Secretary of Defense certify that the foreign country where the detainee will be sent is not

"facing a threat that is likely to substantially affect its ability to exercise control over the individual."

How can the Secretary of Defense certify that—facing a threat that is likely to not just affect, but substantially affect, its ability to exercise control over the individual? What does it mean for a nation to "exercise control" over a former Gitmo detainee? Does he have to be in custody? Can he have an ankle bracelet? Is he remanded to his home? Is he in some county facility somewhere? What does it mean?

The Secretary of Defense must also certify, in writing, that there is virtually no chance that the person being transferred out of American custody would turn against the United States once resettled.

I agree with the sentiment, but as it is written, this is another impossible condition to satisfy.

The administration tried to work with the Armed Services Committee to make this section more workable, but the input by professionals in the defense, law enforcement, and intelligence communities, quite frankly, was rejected.

The committee didn't address the concerns of the administration except to limit these restrictions to 1 year.

In his November 15 letter, Secretary Panetta wrote he was troubled this section remains essentially unchanged and that none of the administration's concerns or suggestions for the provision were adopted. This in itself is a concern. The views of the professionals who do this day in and day out should be considered. Congress is not on the streets, we are not shadowing terrorists, we are not putting together intelligence. So I find this just terribly imperious.

The third problematic detention provision reverses the interagency process of detention reviews for those detained at Guantanamo.

Let me begin by saying I support detention of terrorists under the law of war. There must be a way to hold people who would, if free, take up arms against us. But detention without charge, perhaps forever, is a power that must be subject to serious review to ensure it is applied correctly and that we are only holding people—in some cases for decades—with cause and careful consideration and review.

Incidentally, this would apply to U.S. citizens. Do we want to go home and tell the people of America we are going to hold them, if such a situation comes up, without any thorough and considered review? It is just not the American way.

In March, the President issued an executive order that laid out the process for reviewing each detainee's case to make sure indefinite detention continues to be an appropriate and preferred course. Section 1035 essentially reverses the interagency process created by the President's order.

Let me just say a few things about this process. The Secretary of Defense is in charge of the decision. He is allowed to reject the findings of an interagency review board that includes a senior official from the State Department, the Department of Defense, the Justice Department, DHS, the Office of the Director of National Intelligence, and the Office of the Chairman of the Joint Chiefs of Staff. They, together, review a case of a person who could be held forever without trial, without charge. They can deliberate on the kind of threat this individual continues.

There are people who are in Guantanamo—or I should say who were in Guantanamo—who were simply in the wrong place at the wrong time. That is possible for an American as well. Everything we are all about is to see that the system is a just system. This is not just and particularly not for a U.S. citizen. I don't care who they are, they have certain rights under the Constitution as a U.S. citizen.

Why should we place the Department of Defense above the unified judgment of five other departments on what is, at its heart, a question about the legality of continued detention, the assessment of the threat a detainee poses, and the options available to handle that individual?

Secretary Panetta is not requesting new authority in this section. Again, reading from the Secretary's November 15 letter, he says:

Section 1035 shifts to the Department of Defense responsibility for what has been a consensusdriven interagency process that was informed by the advice and views of counterterrorism professionals from across the Government. We see no compelling reason—and certainly none has been expressed in our discussions to date—to upset a collaborative, interagency approach that has served our national security so well over the past few years.

Let me conclude by saying I support the vast majority of provisions in this authorization. The bill improves our national security and it is essential to meet our commitment to the men and women of our Armed Forces. I understand all that, and I have voted for virtually every Defense authorization bill. But I intend to continue to oppose these three detention policy provisions.

I have not made up my mind, candidly, how I will vote on this bill. I guess maybe I see things a little differently than many in this body, because one of the things I have learned in my time here is the importance of the U.S. Constitution—and I have had 18 years on the Judiciary Committee—and what it means to have due process of law, and that means for everybody. That is for the poorest person on the street, the wealthiest person or whoever it is. Criminals are entitled to due process of law.

How can we do this? It may not stand the test of constitutionality. But be that as it may, despite having raised these concerns months ago and offered suggestions to address them, this bill does very little to resolve my three principal concerns and those of the administration about mandatory military custody and the possibility this bill will create operational confusion and problems in the field.

I look forward to the debate. Candidly, I hope sides haven't hardened.

The three amendments I will offer will—one will strike the language, one will insert the word "abroad," in section 1032, and one will carry with it the administration's proposal. I hope there will be the opportunity to offer these amendments.

I can't think of anything more serious that we are doing, and I must tell you a lot of effort has gone into putting the FBI in a position by creating a huge intelligence operation within the Federal Bureau of Investigation to be able to deal with terrorist threats in this country. We also have a Department of Homeland Security to do that as well. To now say the military is going to take over in certain situations is going to end up unworkable, if, in fact, this becomes the law and I hope it will not.

I thank the Chair, and I yield the floor.