

# *SUFFOLK TRANSNATIONAL LAW REVIEW*

*Symposium  
Spring 2021*



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SUFFOLK UNIVERSITY LAW SCHOOL  
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With Special Thanks To:

The 2021 Symposium Guest Speakers:

**Mr. Steve Barney**

*Former General Counsel Senate Armed Services Committee*

&

**Ms. Samantha Clark**

*Special Counsel, Covington & Burling LLP*

The 2021 Symposium Hosts:

**Jon Rosenthal**

*Chief Symposium Editor*

&

**Cameron Panepinto**

*Symposium Editor*



The Formation of U.S. Defense Policy:  
An Overview of the National Defense Authorization Act



Steve Barney (SULS '90)  
Former General Counsel  
Senate Armed Services Committee



Samantha Clark  
Special Counsel  
Covington & Burling LLP

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## **Introduction to Mr. Steve Barney**

Steve Barney is a Suffolk Law School Alum and a retired Captain in the United States Navy. Steve served for 22 years in the Navy's Judge Advocate General's Corps. His assignments included tours as the Inspector General of Naval Legal Service Command, Executive Assistant to the Judge Advocate General of the Navy, and Deputy Director of Navy Office of Legislative Affairs in Washington, DC. Steve also served as Fleet Judge Advocate for U.S. Fleet Forces Command in Norfolk, Virginia, and as a legal advisor to the Commander Joint Task Force with U.S. Seventh Fleet in Japan.

Following his military service, Steve was the General Counsel for the Senate Armed Services Committee. As General Counsel, he advised then Chairman, Senator John McCain on the Committee's authority under the United States Constitution and the Rules of the Senate. He provided recommendations on matters involving Senate advice and consent on Presidential nominations of senior civilian and military leaders, the Committee's authority to exercise oversight of the Department of Defense and the military departments, and the drafting and enacting of the annual NDAA, the National Defense Authorization Act.

Most recently, from 2017 to 2020, Steve was appointed by Senator John McCain to serve as a Commissioner on the National Commission on National, Military, and Public Service. Established by the National Defense Authorization Act for Fiscal Year 2017, the Commission considered and developed recommendations concerning the need for a military draft and means by which to foster a greater attitude and ethos of service among American youth. The Commission released its final report in March 2020 with policy and legislative recommendations that seek to encourage every American to be inspired and eager to serve our nation in various different capacities.

## **Introduction to Ms. Samantha Clark**

Samantha Clark is an attorney at Covington & Burling in Washington, DC. Samantha works at the intersection of public policy, government contracts, and national security as she counsels clients on how to navigate challenging national security issues. Samantha provides advisory and advocacy support for clients facing policy, political, and regulatory challenges in the aerospace, defense, national security, and emerging technologies sectors. Samantha plays a leading role in the firm's Global Supply Chain initiative, where she advises clients on complex, emerging regulatory requirements in global supply chain security.

Before joining the firm, Samantha served as Deputy Staff Director and General Counsel of the Senate Armed Services Committee. On the committee, Samantha managed a multi-billion dollar policy portfolio that covered acquisition and national security law and policy. Samantha also managed the annual passage of the National Defense Authorization Act. In addition, Samantha worked on Senator McCain's legislative priorities to modernize the military retirement system and reform the defense acquisition system and served as an investigative counsel for the committee's inquiry into cyber intrusions affecting U.S. Transportation Command contractors. Samantha also is a Senior Advisor for the Center for the Study of the Presidency and Congress and is on the American Bar Association's Standing Committee on Armed Forces Law.

# **2021 NDAA Enacted, Resulting in Significant Expansion and Centralization of U.S. Government Authority in Cyberspace**

**Authors: Samantha Clark, Susan Cassidy, Ashden Fein, Moriah Daugherty**

On January 1, 2021, Congress overrode President Trump's veto of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (the "FY21 NDAA").<sup>1</sup> The FY21 NDAA contains significant cybersecurity provisions that represent a substantial expansion and centralization of the U.S. Government's authority in cyberspace.

These changes will be of interest to clients who engage with the U.S. Government on cybersecurity matters, including government contractors, particularly members of the Defense Industrial Base, and private sector companies, including U.S.-based network and email providers.

As described<sup>2</sup> by the bipartisan Cyberspace Solarium Commission, which was established in the John S. McCain National Defense Authorization Act for Fiscal Year 2019<sup>3</sup> to "develop a consensus on a strategic approach to defending the United States in cyberspace against cyber attacks of significant consequences," the FY21 NDAA is "the most comprehensive and forward-looking piece of national cybersecurity legislation in the nation's history" and contains more than 70 cyber provisions, 27 of which were drawn from the Cyberspace Solarium Commission recommendations for improving the U.S. cybersecurity posture.

Listed below are key provisions of the FY21 NDAA that will substantially expand and centralize the U.S. Government's authority over cyberspace and cybersecurity, with more reforms likely to follow during the FY22 legislative cycle.

**Cabinet-Level Leadership on Cyberspace.** To elevate the issues of cybersecurity and induce policy collaboration at the highest levels of the U.S. Government, Section 1752 of the FY21 NDAA establishes a National Cyber Director within the Executive Office of the President. The National Cyber Director will serve as the President's principal advisor on cybersecurity policy and will be responsible for, among other tasks, coordinating the implementation of national cyber policy and strategy.

**Expanded Role and Authority for DHS CISA, Including Administrative Subpoenas.** The FY21 NDAA expands the role of the Department of Homeland Security ("DHS") Cybersecurity and

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<sup>1</sup> See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, H.R. 6395 (2021).

<sup>2</sup> See Press Release, NDAA Enacts 25 Recommendations from the Bipartisan Cyberspace Solarium (Jan. 2, 2021) *available at* <https://www.solarium.gov/press-and-news/ndaa-override-press-release>.

<sup>3</sup> See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, H.R. 5515 (2018).



Infrastructure Security Agency (“CISA”) in U.S. Government and private sector cybersecurity and grants CISA increased authority. For example, under Section 1716, if CISA is unable to identify the owner or operator of a device or system of critical infrastructure, CISA is authorized to issue an administrative subpoena to U.S.-based service providers to obtain the “information necessary to identify and notify” the owner or operator of “specific” security vulnerabilities. This authority could be used, for example, to obtain information from a network provider about one of the provider’s customers; CISA could then use the information to inform the customer of the security vulnerability. (This section does not authorize CISA to issue subpoenas to obtain information about personal devices or systems, such as an individual’s cell phone or home computer.) Providers who disclose information in response to an administrative subpoena are protected from liability, as the FY21 NDAA extends the protections for providers under the Electronic Communications Privacy Act, 18 U.S.C. § 2703(e), to administrative subpoenas issued by CISA under Section 1716.

### **Bolstering Collaboration on Cybersecurity, Particularly in the Defense Industrial Base.**

The FY21 NDAA implements several provisions designed to bolster the collaboration between the U.S. Government and the private sector, an area the Cyber Solarium Commission found needed improvement. For example, Section 1715 establishes a Joint Cyber Planning Office under CISA to require collaboration between the government and industry to develop plans for the cyber defense of private and public sector entities and Section 1728 requires the Secretary of Defense (“DoD”) and the private sector on cybersecurity and critical infrastructure.

The FY21 NDAA also implements additional provisions designed to increase collaboration between the U.S. Government and the defense industrial base (“DIB”). Despite DoD’s efforts in recent years to integrate enhanced cybersecurity compliance obligations and standards into the acquisition process, most notably through the Cybersecurity Maturity Model Certification

(“CMMC”), Congress remains concerned about the level of participation of the DIB in active cyber defense activities and has raised concerns that the first three levels of DoD’s new CMMC are insufficient given that they are not designed to protect against an advanced persistent threat. In the report accompanying the Senate-passed version of the FY21 NDAA, the Senate Armed Services Committee noted that “[w]hile the committee commends the Department’s efforts to address cybersecurity risks to the DIB, the committee is concerned that the CMMC program does not require DIB companies, levels one through three, to have a threat hunting capability.”

### **Bolstering Collaboration on Cybersecurity and Critical Infrastructure.**

The FY21 NDAA also implements changes designed to bolster collaboration between the U.S. Government and the owners and operators of critical infrastructure across the sixteen U.S. critical infrastructure sectors.<sup>4</sup> Section 9002 requires agencies responsible for critical infrastructure sectors to, among other tasks: establish and carry out programs to assist critical infrastructure owners and operators in identifying, understanding, and mitigating threats,

<sup>4</sup> See CRITICAL INFRASTRUCTURE SECTORS, <https://www.cisa.gov/critical-infrastructure-sectors> (last visited Apr. 3, 2021).

vulnerabilities, and risks to their systems or assets; and recommend security measures to mitigate the consequences of destruction, compromise, and disruption of critical infrastructure systems and assets.

**Strategy to Secure Email.** Based on concerns from the Cyber Solarium Commission that email represents one of the most common vectors for initial compromise that leads to cyber incidents, Congress adopted Section 9006. This provision directs DHS to develop a strategy for implementing the Domain-based Message Authentication, Reporting, and Conformance protocol, which verifies the authenticity of the sender of an email and blocks and reports to the sender fraudulent accounts.

**Impact of the FY21 NDAA.** The ultimate impact of the FY21 NDAA's centralization and expansion of U.S. Government authority in cyberspace remain to be seen as agency rulemaking and implementation takes place, but the significant provisions in the FY21 NDAA, including those highlighted above, will likely result in increased interaction between the U.S. Government and private sector entities on issues related to cybersecurity. This increased interaction is even more likely for companies who are owners and operators of critical infrastructure, U.S.-based service providers, and members of the DIB. In addition, while it is not clear how CISA will exercise its new administrative subpoena authority, the language in the NDAA highlights Congress' concerns about the need to protect the country's critical infrastructure, such as operational and industrial controls systems and the networks of the DIB contractors.

**2021 Outlook on Cybersecurity Legislation.** Looking ahead to this year's FY22 NDAA legislative cycle, the Cyber Solarium Commission is expected to testify on its various proposals before the Senate and House Armed Services Committees. The remaining 80 recommendations offered by the Cyber Solarium Commission that were not included in the FY21 NDAA legislation will require full public hearings and debate prior to adoption or modification, a process that was put on hold during the FY21 NDAA cycle due to the COVID-19 pandemic. Such testimony will provide an important preview of further cybersecurity policy reforms being considered for the FY22 NDAA legislative cycle.

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