

# Holland & Knight Defense Situation Report: November 2023

## A monthly roundup of defense policy news

Welcome back to Holland & Knight's monthly defense news update. We are pleased to bring you the latest in defense policy, regulatory updates and other significant developments. If you would like additional information on anything in this report, please reach out to the authors or members of Holland & Knight's [National Security, Defense and Intelligence Team](#).

### LEGISLATIVE UPDATES

#### NDA Update

A clearer path forward for the National Defense Authorization Act (NDAA) for fiscal year (FY) 2024 started to take shape in November. The Republican-led House and Democrat-led Senate passed different versions of the NDAA in July. In the House, a version of the NDAA containing hotly debated social policy provisions – such as blocking the Pentagon's abortion travel policy, barring funds for gender-affirming care for transgender troops and limiting diversity and inclusion efforts in the ranks – passed narrowly along party lines. The Senate passed its own version with broad bipartisan support. Negotiators will also have to reconcile differences over whether to shutter the U.S. Department of Defense's (DOD) Cost Assessment and Program Evaluation Office, reestablish the chief management officer and appoint a Ukraine aid watchdog. Other items, such as the amount of funding for the Defense Innovation Unit (DIU), which focuses on leveraging new commercial technology adaptation for the U.S. military, will have to be hashed out as the House bill included \$1 billion for a "Non-Traditional Innovation Fielding Enterprise" portfolio of investments, whereas the Senate included only \$100 million. Debate over these issues has presented obstacles to Congress as it has worked to reconcile the differences.

The process of reconciling the House and Senate versions of the bill began in September, with the House formally voting to create a conference committee comprising House Armed Services Committee (HASC) members, along with representatives from many other committees in the House. In October, newly elected House Speaker and former HASC member Rep. Mike Johnson (R-La.) initially expressed a desire to reach an agreeable joint bill and pass the NDAA before Thanksgiving, but the process has slipped into December. The good news is that, after the Senate voted to formalize its conferees and launch NDAA talks in mid-November, lawmakers have agreed to enter an expedited process to reconcile the differences between the House and Senate versions of the bill. Though most provisions had already been ironed out during the informal negotiations, lawmakers will have to figure out how they approach the social policy provisions, as well as other outstanding provisions not within the jurisdiction of the HASC and Senate Armed Services Committee (SASC). Nonetheless, there is optimism that the FY 2024 NDAA will pass in December, marking its 63rd consecutive year of passage.

Because appropriations for FY 2024 have been pushed to January 2024, as discussed below, the NDAA is one of only a few major bills that may pass before the end of the calendar year. As such, it could become a vessel for congressional and committee leadership to attach priorities at the last minute. Priorities among other committee leaders already have been considered for addition or removal from the NDAA. For example, the reauthorization of Title VII of the Foreign Intelligence Surveillance Act (FISA), which generally addresses electronic surveillance and other methods of acquiring foreign intelligence information that are directed at targets outside the U.S., along with provisions related to

financial services such as digital assets and outbound investment of certain technologies from China, are all being considered for inclusion.

## **Defense Appropriations**

The Republican-controlled House approved its version of the FY 2024 Department of Defense Appropriations Act ([H.R. 4365](#)) on Sept. 28, 2023, by a narrow vote of 218-210. The bill was agreed to after weeks of infighting among House Republicans that saw the defense appropriations legislation get derailed twice. The draft that passed also included some hotly debated social policy provisions. A measure to provide \$300 million in aid for arming and training the Ukrainian military was also removed from the bill to make way for its passage. The House approved the aid to Ukraine separately by a vote of 311-117. Nonetheless, because FY 2023 was set to end on Sept. 30, 2023, Congress passed a continuing resolution minutes before a shutdown that extended the funding for federal agencies until Nov. 17, 2023.

On Nov. 14, 2023, the House easily passed another stopgap spending bill to continue funding the government into the new year. The continuing resolution, proposed by House Speaker Johnson, faced opposition from members of the conservative House Freedom Caucus and its allies, which resulted in 93 Republicans voting against the bill. All but two Democrats voted in favor of the bill, however, allowing it to pass by a vote of 336-95 and advance to the Senate. The bill extends funding for agencies covered by the Agriculture, Energy-Water, Military Construction, Veterans Affairs and Transportation-HUD bills until Jan. 19, 2024, while the eight other appropriations bills were extended to Feb. 2, 2024. The continuing resolution passed by a vote of 87-11 in the Senate. House Speaker Johnson has said he would not support any additional stopgaps to further extend Congress' deadline for funding the government after this, even as conservative House republicans insist on vast funding cuts that are unlikely to pass in the Democrat-controlled Senate.

The defense appropriations bill faces many of the same obstacles in the Senate that the NDAA is facing. In the Democrat-controlled Senate, the House's version of the defense appropriations bill is facing steep opposition for the inclusion of contentious social issues and the pared-down efforts to send aid to Ukraine. Further, President Joe Biden has vowed to veto legislation that cuts down on or defunds the Pentagon's diversity programs or rescinds Pentagon policies that provide support for servicemembers seeking gender-affirming care, abortions or other reproductive healthcare.

## **DOD Nominations**

Amid competing U.S. security priorities – including Israel, Ukraine and the U.S. southern border – attention to Sen. Tommy Tuberville's (R-Ala.) ongoing hold on hundreds of Pentagon promotions and appointments has persisted. Among the nearly 300 DOD officials whose nominations have been put on hold are several high-ranking postings in the Middle East that are relevant to the ongoing crisis in Israel. Now, almost 400 military nominations are stalled, and the number is only growing. In a first attempt to end Sen. Tuberville's blockade of military nominations, Senate Democrats on Nov. 14, 2023, put forth a resolution that would allow for the quick confirmation of hundreds of military nominees.

The Senate Rules Committee voted 9-7 to approve the resolution, which would allow the Senate to confirm large groups of military nominees in one vote for the remainder of the congressional term. Democrats have long refused to go through the time-consuming process of bringing up individual nominations for a vote, which Senate Majority Leader Chuck Schumer (D-N.Y.) has the option to do for any nomination. The Senate has traditionally confirmed large batches of military officers together, but

this process can be prevented by the objection of just one senator. The new resolution would alter the rules for this Congressional term to circumvent Sen. Tuberville's hold by allowing group confirmations in spite of his objections.

Next, the resolution will advance to the Senate floor for a vote. Democrats will need at least nine Republicans to vote in favor of the resolution in order for it to pass. Republicans on the Rules Committee voted against the resolution citing concerns about how it would erode the power of the minority party in the Senate, but some have signaled they may change their minds if Sen. Tuberville does not drop the holds before the Senate votes.

## ISRAEL, UKRAINE AND FOREIGN MILITARY ASSISTANCE

On Oct. 20, 2023, the Biden Administration [announced a supplemental funding request](#) from Congress worth nearly \$106 billion for emergency funds for Israel, Ukraine, the Indo-Pacific region and America's borders. More than half of the request, approximately \$61 billion, is assistance for Ukraine. The package also includes approximately \$14 billion that would boost Israel's defenses, as well as \$10 billion for humanitarian assistance to civilians in Gaza. Though it does not specifically ask for funding for Taiwan, the request includes money to strengthen security in the Indo-Pacific region, particularly to address ongoing and emerging threats from China. Across these initiatives, the administration says that the supplemental funding will ensure American military readiness by investing more than \$50 billion within the American defense industrial base through replenishment funding and other forms of security assistance, such as foreign military financing and the Ukraine Security Assistance Initiative (USAI). Without additional replenishment funding, the request states, the DOD will be unable to continue to backfill the military services for equipment provided via drawdown to Ukraine and Israel, thereby degrading U.S. readiness. Finally, in what is largely seen as a bid to win over Republicans, the request includes funding for national security at the U.S.-Mexico border to combat fentanyl trafficking.

The Senate Appropriations Committee held a hearing on Nov. 8, 2023, to discuss the Biden Administration's supplemental funding request. A vast majority of debate centered around border security, as Homeland Security Secretary Alejandro Mayorkas pledged to work closely with senators on comprehensive border policy reform. Republican lawmakers took issue with many of Mayorkas' suggestions, worrying that calls for "comprehensive" border policy changes could be a substitute for inaction and characterizing the border policy goals outlined in the supplemental funding request as being unrealistic.

### Israel

After an unprecedented cross-border attack in Israel on Oct. 7, 2023, by Hamas, which is based in the Gaza Strip, Israel formed an emergency unity government as it declared war on Hamas. As such, there have been calls for U.S. assistance both for Israeli defense and humanitarian assistance to civilians in Gaza. Since the attacks, members of Congress have voiced bipartisan support for providing aid to Israel, with both President Biden and Congress pledging swift support. Senate Majority Leader Schumer, who sets the Senate vote schedule, said that the Senate "stands ready to deliver on additional needs."

Although there is widespread support in Congress for aid to Israel, appropriators remain divided over whether aid to Israel should be linked with aid to Ukraine. Skepticism over whether to send additional aid to Ukraine is growing among congressional Republicans as progress against Russia stalls. Sen.

Chris Murphy (D-Conn.) has said that the crises in Israel and Ukraine "are both exigent fights that are directly tied to U.S. national security. I want to get Israel done, but we cannot leave Ukraine behind."

Despite the Biden Administration's vast \$106 billion supplemental funding request stalling in Congress as a result of these discussions, the House passed a \$14.3 billion aid bill to Israel on Nov. 3, 2023. The measure was passed by a vote of 226-196, with 12 Democrats voting in favor and two Republicans voting against. The bill proposed to provide \$14.3 billion in aid to Israel and pay for it by cutting funding for the IRS by the same amount, which the Congressional Budget Office (CBO) said would decrease tax revenue and increase the US deficit in the long run. Further, the bill would have provided aid exclusively to Israel, as House Republicans maintain their vehement opposition to bundling aid to Ukraine and Israel in one combined measure.

Senate Majority Leader Schumer was quick to label the bill as "stunningly unserious," and President Biden vowed to veto the bill if it ever landed on his desk. On Nov. 14, 2023, the Senate voted 51-48 to table the bill. Moving forward, the path to passing supplemental aid to Israel remains unclear despite broad bipartisan support for an aid package. Another proposal for aid to Israel is likely to be put forth within the first week of December, as Congress seeks to construct a supplemental aid package of its own for Israel, Ukraine, Taiwan and America's southern border before the end of the year.

## Ukraine

Ukrainian President Volodymyr Zelenskyy visited the U.S. in late September amid growing skepticism among congressional Republicans about sending additional military aid to Ukraine as its long-planned counteroffensive against Russia seems to stall. The White House had asked Congress for an additional \$24 billion in aid for Ukraine in the annual defense spending bill, but this request, along with the Biden Administration's larger supplemental funding request that would provide nearly \$61 billion in aid to Ukraine, sat idle throughout November.

However, momentum in Congress for providing aid to Ukraine seemed to pick up as Congress returned from Thanksgiving recess, with House Speaker Johnson saying that he is "confident and optimistic" that Congress will be able to provide another aid package to Ukraine before the holiday season. Obstacles remain, including a promise from Republicans to oppose any additional aid to Ukraine unless it is paired with robust border security measures to stem the flow of migrants at the U.S.-Mexico border. To achieve a compromise on these two contentious issues, a small bipartisan group in the Senate has begun drafting a measure aimed at overcoming a filibuster and receiving the necessary 60 votes. This may face challenges in the House, where conservative Republicans have called for much broader changes to U.S. border security and immigration policies. According to the official House calendar, there are fewer than 10 legislative days left in the year, during which most lawmakers believe an agreement on aid to Ukraine must be reached to maximize its chances of passage.

In the past month, the Biden Administration announced three drawdowns of equipment from DOD inventories to meet Ukraine's national security needs. These represent the [49th](#), [50th](#), and [51st](#) drawdowns of equipment since August 2021 and are valued at up to \$150 million, \$125 million and \$100 million, respectively. The drawdowns include key capabilities to support Ukraine's additional air defense munitions, artillery and tank ammunition, anti-armor weapons, counter-unmanned aerial systems and other equipment comprising tens of millions of rounds of small ammunition, including that for the Patriot air defense systems, High Mobility Artillery Rocket Systems (HIMARS) and Stinger anti-aircraft systems.

Additionally, the Biden Administration announced another two packages totaling as much as \$600 million and \$300 million, which included critical air defense capabilities and munitions. The package is being provided under USAI. Unlike presidential drawdown authority, which the DOD has continued to leverage to deliver equipment to Ukraine from DOD stocks at a historic pace, USAI is an authority under which the U.S. procures capabilities from industry or partners. This announcement represents the beginning of a contracting process to provide additional priority capabilities to Ukraine.

In total, the U.S. has committed more than \$43 billion in security assistance since the beginning of the war in Ukraine in February 2022.

## **China**

Of the \$106 billion in emergency supplemental funds requested by President Biden in October, approximately \$2 billion was to provide aid to Taiwan and the Indo-Pacific region. In November, House China Select Committee Chair Mike Gallagher (R-Wis.) and six Republicans from the panel lambasted President Biden's request as "wholly inadequate," pushing congressional leadership to instead approve a \$12 billion aid package to "safeguard peace in Asia and deter conflict" and "treat the [Beijing] threat with the gravity it deserves." The hawkish calls came days after Chinese President Xi Jinping met with President Biden in San Francisco on the sidelines of the Asia Pacific Economic Cooperation forum meeting on Nov. 15, 2023. The lawmakers cited Chinese aggression in the South China Sea and a burgeoning alliance between China and Russia as justification for the larger request. They said the additional \$10 billion would be used to boost U.S. military presence in the Indo-Pacific region and expand production of munitions for the Indo-Pacific Command.

Meanwhile, a bipartisan group of senators on Nov. 20, 2023, wrote a letter to urge leaders of the HASC and SASC to include in the FY 2024 NDAA provisions that would place limits on companies' ability to send sensitive technologies to China and other adversarial nations. In the letter, the lawmakers say "we have known for some time that U.S. companies are sending capital, intellectual property, and innovation to the PRC," and that this has fueled Chinese progress in dual-use critical technology areas. They argued that, at the very least, there must be more transparency surrounding companies' sensitive investments into China and advocated for an outbound investment screening program to "fill a gap in our ability to combat this growing national security threat."

## **AUKUS**

Debates over AUKUS – the trilateral security pact between Australia, the United Kingdom and the U.S. – have proven to be another sticking point in Congress as the House and Senate race to pass critical defense authorizing and spending legislation. President Biden sought to send conventionally armed, nuclear-powered submarines and share classified technology with Australia, as promised under an agreement brokered between AUKUS member states, but this requires congressional approval to do so. British and Australian officials also want U.S. lawmakers to approve an exemption for the U.K. and Australia to the United States' International Traffic in Arms Regulations (ITAR) exports regime. This policy sets strict restrictions on sensitive defense exports. Australian and British authorities have expressed concern about the deadlock in Congress and urged that the exemptions to ITAR be granted expeditiously. When Australian Prime Minister Anthony Albanese visited the U.S. in late October, he sought progress on the AUKUS defense technology partnership to transfer U.S. nuclear submarine technology to Australia.

Progress on the AUKUS agreement, or lack thereof, has the potential to become another roadblock for negotiators of the NDAA. Sen. Roger Wicker (R-Miss.), the top Republican on the SASC, has said he would refuse to back the transfer of attack submarines to Australia unless Congress first approves a \$3.4 billion emergency funding package to upgrade the American submarine industrial base. A supporter of the AUKUS agreement, Sen. Wicker said that the U.S. has yet to take the measures necessary ensure that the industrial base can support the needs of both the U.S. and Australia. Sen. Wicker has [argued](#) that selling submarines to Australia without a clear plan to replace them would "unacceptably weaken" the U.S. fleet while China expands its military power.

## EXECUTIVE AND DEPARTMENTAL UPDATES

### Defense Guidelines in AI Executive Order

On Oct. 30, 2023, the White House announced a long-awaited executive order (EO) on artificial intelligence (AI). The EO establishes principles, tasks federal agencies with developing methods of testing AI usage in their work, codifies governmental oversight of AI development by private companies and outlines AI's implications in national security and foreign policy issues. For a full breakdown of the EO, see Holland & Knight's alert, "[What to Know About the New Artificial Intelligence Executive Order](#)," Oct. 31, 2023.

In addition, there are various actions directing the defense and national security agencies with regard to implementation of this EO. The EO calls for the National Security Council and White House chief of staff to develop a national security memorandum that directs further actions on AI and security. This document would ensure that the U.S. military and intelligence community "use AI safely, ethically, and effectively in the missions" and direct actions to counter adversaries' military use of AI, particularly directing specific AI assurance and risk management practices for the national security use of the technology. The memorandum would address the governance of AI used as a component of a national security system or for military and intelligence purposes and take into account current efforts to govern the development and use of AI for national security systems.

The EO on AI also implicates the Defense Production Act by directing companies developing any foundation model that poses a risk to national security, national economic security, or national public health and safety to notify the federal government when training the model and must share the results of all red-team safety results.

### DOD Announces Data, Analytics and AI Adoption Strategy

On Nov. 2, 2023, Deputy Secretary of Defense Kathleen Hicks announced the release of the [2023 DOD Data, Analytics, and Artificial Intelligence Adoption Strategy](#). The document was developed by the Chief Digital and AI Office (CDAO) and seeks to unify previous strategic guidance to scale advanced capabilities across the enterprise.

The first DOD AI Strategy, published in 2018, and revised DOD Data Strategy, published in 2020, are two foundational documents that matured the department's data-centric structures to increase the efficacy of fielding modern AI-enabled capabilities. Since these strategies were published, industry has produced tools, platforms and services enabling effective, decentralized data management and analytics, and AI development. This updated 2023 Strategy focuses on how the DOD will accelerate adoption of data, analytics and AI in a manner that is repeatable by all DOD components.

The CDAO became operational in June 2022 and is dedicated to integrating and optimizing AI capabilities across DOD. The office is responsible for accelerating DOD's adoption of data, analytics and AI, enabling the department's digital infrastructure and policy adoption to deliver scalable AI-driven solutions for enterprise and joint use cases, safeguarding the nation against current and emerging threats.

## **CDAO Releases RAI Toolkit for Ensuring Best Practices Alignment**

Continuing with the AI theme, on Nov. 14, 2023, the CDAO publicly released the [Responsible Artificial Intelligence \(RAI\) Toolkit](#), a key deliverable of the [DOD RAI Strategy & Implementation Pathway \(RAI S&I Pathway\)](#) signed in June 2022 by Deputy Secretary of Defense Hicks.

The RAI S&I Pathway spells out 64 lines of effort for operationalizing the [DOD's AI ethical principles](#), including developing technical tools and guidance to help DOD personnel design, develop, deploy and use AI systems responsibly. The RAI Toolkit is built upon the earlier [Responsible AI \(RAI\) Guidelines and Worksheets](#) developed by the DIU, the [NIST AI Risk Management Framework and Toolkit](#) and the [IEEE 7000 Standard Model Process for Addressing Ethical Concerns during System Design](#), among other sources.

The RAI Toolkit provides users a voluntary process that identifies, tracks and improves alignment of AI projects to RAI best practices and the DOD's AI ethical principles, while capitalizing on opportunities for innovation. Additionally, the toolkit's intuitive flow guides users through tailorable and modular assessments, tools and artifacts throughout the AI product lifecycle. Finally, the RAI Toolkit offers guidance and an RAI standard to current and future DOD industry partners related to the RAI-focused products and other capabilities they seek to develop. The toolkit is a living document that will be continuously enhanced.

## **Army Announces Solicitation on Drones**

In what is the first solicitation under the DOD's new Replicator initiative – which was first discussed in the [September 2023 Holland & Knight Defense Situation Report](#) – the U.S. Army is calling for an assessment of low-cost, nondevelopmental or commercial uncrewed aircraft systems to support unit training and operations. According to the [notice](#), the service will use the information obtained to determine which vendors are deemed the most likely to successfully fulfill a Replicator Initiative or future competition and may invite those vendors to participate in a demonstration of their proposed capabilities. The notice says that the Army is looking for systems that cost less than \$3,000, use day/night visual capabilities, have flight endurance for 30 minutes and a range of 1 to 5 kilometers. Submissions for this solicitation are due on Dec. 7, 2023.

## **DIU Solicitations**

In the past month, the DIU, which focuses on leveraging new commercial technology adaptation for the U.S. military, published three new solicitations.

The first solicitation is for Advanced Rapid Analysis of Cyber Hunt Network Infrastructure Data (ARACHNID) system. The DOD requires the ability to conduct cyber hunt operations on a variety of DOD- and partner-owned networks in order to find, analyze and reveal malicious cyber actors' activities, capabilities and infrastructure. Upon receiving a mission to hunt on a new network, the DOD



needs to rapidly identify and map network devices and seeks innovative ways to accomplish this efficiently. Preferred solutions will allow for the ingestion of Layer 2 and Layer 3 network device configuration files, packet capture (PCAP) files and flow logs versus taking an active scanning approach. The solution must not require internet access or cloud resources while operating. Solutions should address the particular use case of a team hunting as an invited guest on a network versus managing their own enterprise cybersecurity and should be able to price in accordance with this use case. Preference is given to submitting companies that directly develop the solution. Resellers, integrators and academic research proposals are not desired.

The second solicitation is for the second iteration of the Hybrid Space Architecture (HSA II). The integration of commercial and government space-based capabilities poses a significant challenge that must be addressed to preserve operational and informational security while enabling collaboration between services, allies and other strategic partners. In the space communications arena, legacy government systems are very capable, according to the DOD, but are reliant on proprietary data architectures that are not scalable or easily integrated. New commercial space systems leverage modern information architectures based on open standards, which improve speed, latency, scalability and interoperability. In response, the DOD seeks additional capabilities for an HSA to integrate emergent commercial sensor and communications capabilities with U.S. government space systems, while incorporating best-in-class commercial practices to secure and defend the network across multiple domains. To realize meaningful and transformative demonstration, four areas of interest are addressed in this HSA II solicitation: persistent sensing, data transport, high-performance edge compute (in situ) and data fusion.

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