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Burma's Political Prisoners and U.S. Sanctions

Updated July 21, 2016

Congressional Research Service
https://crsreports.congress.gov
R42363

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The release of all Burma's political prisoners is one of the fundamental goals of U.S. policy towards the nation. Several of the laws imposing sanctions on Burma—including the Burmese Freedom and Democracy Act of 2003 (BFDA, P.L. 108-61) and the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (JADE Act, P.L. 110-286)—require the release of all political prisoners before the sanctions contained in those laws can be terminated.

Although the outgoing President Thein Sein provided pardons or amnesty for more than 1,000 alleged political prisoners, security forces continued to arrest new political prisoners and over 100 political prisoners remained in jail when he left office in March 2016. Burma's new President, Htin Kyaw, released more than 200 political prisoners in his first month in office. The leadership of the new Union Parliament, in which the National League for Democracy (NLD) led by Nobel laureate Aung San Suu Kyi holds a majority in both chambers, has stated plans to revise, amend, or repeal laws that have been used by Burma's security forces to detain people for political reasons.

While the new NLD-led government appears willing to address the political prisoner issue, it is unclear if Burma's military leadership and its security forces, which retain substantial power under Burma's new political structure, will desist in arresting and detaining people allegedly for political reasons. All of Burma's security forces, including the national Myanmar Police Force, report directly to the Burmese military and Commander-in-Chief Senior General Min Aung Hlaing. In the past, Burma's security forces have used provisions in laws promulgated by the nation's past military juntas to arrest and try political dissidents and protesters. Burma's courts and judges have demonstrated a willingness to convict these people.

Estimates of how many political prisoners are being detained in Burma vary. According to two nonprofit organizations dedicated to identifying and locating political prisoners in Burma, the Assistance Association for Political Prisoners (Burma), or AAPP(B), and the Former Political Prisoners Society (FPPS), the Burmese government, as of June 30, 2016, was incarcerating 83 political prisoners and an additional 203 were awaiting trial.

Differences in estimates of the number of political prisoners in Burma can be attributed to two main factors. First, Burma's prison and judicial system is not transparent, making it difficult to obtain accurate information. Second, there is no consensus on the definition of a "political prisoner." Some limit the definition of "political prisoner" to "prisoners of conscience;" others include detained members of ethnic militias as political prisoners.

The State Department consulted with the government of former Prime Minister Thein Sein to promote the release of Burma's political prisoners, but Administration interest in the issue appears to have declined over time. The State Department commended the NLD-led government for its first political prisoner release on April 8, 2016, but did not issue a similar statement of support for the second such release on April 17, 2016.

Congress may choose to examine the political prisoner issue in Burma either separately or as part of a broader review of U.S. policy towards Burma. The Consolidated Appropriations Act of 2014 (P.L.113-76) required the Secretary of State to submit to Congress "a comprehensive strategy for the promotion of democracy and human rights in Burma," including support for former political prisoners. The State Department, Foreign Operations, and Other Related Programs Appropriations Act, 2017 (S. 3117) would require funds be provided to implement the strategic plan, presumably including support for former political prisoners.

This report will be updated as circumstances require.

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Introduction

The status of Burma's political prisoners is an important issue for U.S. policy towards Burma (Myanmar).[1] The full removal of many of the U.S. sanctions on Burma is contingent on certain conditions being met by the Burma's government in Naypyidaw[2] and the Burmese military, including the unconditional release of all political prisoners.[3] Moreover, the release of political prisoners may play a pivotal role in Burma's possible transition to a free and democratic country.

The 114th Congress continues to be concerned about Burma's political prisoners. S. Res. 320, passed by the Senate on December 16, 2015, "calls on the Government of Burma to release all political prisoners." The resolution also called on the President and Secretary of State to focus on several ongoing issues in Burma, including "bringing about the immediate and unconditional release of all political prisoners, including those awaiting trial or sentencing."

For nearly 60 years, Burma was controlled by an authoritarian military junta that arrested and incarcerated an estimated 7,000 – 10,000 people for political reasons.[4] In April 2011, the junta, then known as the State Peace and Development Council (SPDC), transferred power to a mixed civilian/military government headed by ex-SPDC Prime Minister, retired General and subsequently President Thein Sein.[5] As President, Thein Sein granted amnesty to hundreds of political prisoners, but his government and the Burmese military continued to arrest and incarcerate alleged political prisoners.

On November 8, 2015, The National League for Democracy (NLD), led by Nobel laureate Aung San Suu Kyi, won a majority of the seats in nationwide elections for both chambers of Burma's Union Parliament.[6] The NLD-led Union Parliament chose Htin Kyaw, childhood friend and close advisor to Aung San Suu Kyi, as President on March 15, 2016; he took office on March 30, 2016. Aung San Suu Kyi was subsequently appointed as Foreign Minister and to the newly-created position of State Counselor on April 5, 2016.

Following her appointment as State Counselor, Aung San Suu Kyi reportedly outlined a strategy to release all the political prisoners that remained in custody.[7] On April 8, 2016, President Htin Kyaw granted amnesty to 113 "prisoners of conscience," including some awaiting trial.[8] On April 17, 2016, he granted amnesty to 83 more political prisoners.[9] Despite these actions, according to

[1] The U.S. government officially calls the country, "the Union of Burma," or Burma. The nation's 2008 constitution states its official name is "the Republic of the Union of Myanmar," or Myanmar.

[2] Burma has been embroiled in a low grade civil war since the Burmese military seized power from an elected civilian government in 1962. Parts of the country are controlled and governed by ethnic organizations with armed militias. Most of the country is controlled by a government whose capital is in Naypyidaw, and is backed by the Burmese military, or Tatmadaw.

[3] Many of the U.S. sanctions on Burma have been temporarily waived. For more details see CRS Report R42939, *U.S. Sanctions on Burma: Issues for the 113th Congress*, by Michael F. Martin.

[4] AAPP(B) and FPPS, After Release I Had to Restart My Life from the Beginning, May 25, 2016, http://aappb.org/2016/05/after-release-i-had-to-restart-my-life-from-the-beginning-the-experiences-of-ex-political-prisoners-in-burma-and-challenges-to-reintegration/.

[5] For more information about Burma's 2011 political transition, see CRS Report R41971, *U.S. Policy Towards Burma: Issues for the 112th Congress*, by Michael F. Martin and Derek E. Mix.

[6] For more about the 2015 elections, see CRS Report R44436, *Burma's 2015 Parliamentary Elections: Issues for Congress*, by Michael F. Martin.

[7] San Yamin Aung, "Suu Kyi Outlines Strategies to Free Political Prisoners," *Irrawaddy*, April 7, 2016.

[8] Aye Min Soe, "P.O.C's Walk Free," *Global New Light of Myanmar*, April 9, 2016.

[9] "Myanmar President Pardons 83 Political Prisoners: Official," *AFP*, April 18, 2016.

the Assistance Association for Political Prisoners (Burma), or AAPP(B), and the Former Political Prisoners Society (FPPS), two nonprofit organizations dedicated to identifying, locating, and assisting political prisoners in Burma, the Htin Kyaw government was incarcerating 67 political prisoners as of May 31, 2016, and another 189 were awaiting trial (including 47 in detention).

Since the 2015 parliamentary elections, the NLD has been under domestic and international pressure to release all political prisoners, and undertake measures to prevent the arrest and detention of new political prisoners.[10] In addition, the AAPP(B) and the FPPS have pointed out the need for greater assistance for released political prisoners, many of whom suffer from physical and mental conditions caused by their alleged mistreatment while in prison.[11]

Some observers, however, have questioned whether the NLD-led government has the power to fully address the political prisoner issue, noting the various means by which the Tatmadaw, Burma's military, still controls the arrest, detention, and release of political prisoners.[12] All of Burma's security forces, including the national Myanmar Police Force (MPF), are controlled by the Tatmadaw and its Commander-in-Chief Senior General Min Aung Hlaing.[13] Burma's security forces allegedly use laws—some promulgated by the military juntas and some passed during the Thein Sein government (2011-2016)—to arrest and detain people for political reasons. In addition, while the President has the authority to grant amnesty to prisoners under Burma's 2008 constitution, that is subject to the recommendation of the National Defense and Security Council (NDSC), a majority of its 11 members are appointed by the Commander-in-Chief.

The Obama Administration has recognized past releases of political prisoners as evidence of political progress in Burma, while reportedly continues to work with the new NLD-led government to press for the release of the remaining political prisoners and the prevention of the arrest and detention of new political prisoners. It is unclear, however, how prominent a role political prisoners will play in U.S. relations with the NLD-led government, given other important issues for Burma's potential transition to democracy, such as the ongoing low-grade civil war and efforts for national reconciliation, continuing ethnic and religious tensions, and the military's prominent role in the nation's governance.

For Congress, the continued existence of political prisoners in Burma raises a number of issues, including:

- Does the unconditional release of all political prisoners in Burma remain a top priority for U.S. policy?
- Should the existence of political prisoners continue to be a factor in determining if restrictions on relations with Burma remain in effect?

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[10] Amnesty International released a report on political prisoners in Burma on March 24, 2016 (Amnesty International, *New Expression Meets Old Repression*, ASA 16/3430/2016, March 24, 2016, https://www.amnesty.org/en/documents/asa16/3430/2016/en/. In addition, several Burmese human rights activists interviewed by Irrawaddy about political prisoners called for the release of all political prisoners, as well as measures to prevent the arrest and detention of new political prisoners (*Dateline Irrawaddy: 'There Should be No Political Prisoners in a Democratic Country'*, May 28, 2016.

[11] AAPP(B) and FPPS, *After Release I Had to Restart My Life from the Beginning*, May 25, 2016, http://aappb.org/2016/05/after-release-i-had-to-restart-my-life-from-the-beginning-the-experiences-of-ex-political-prisoners-in-burma-and-challenges-to-reintegration/.

[12] Sam Yamin Aung, "On Political Prisoners, Does the Military Hold the Key?," *Irrawaddy*, February 18, 2016.

[13] Under Burma's 2008 constitution, the Commander-in-Chief is appointed by Burma's President, "with the proposal and approval of the National Defence and Security Council (NDSC). The NDSC consists of the President; two Vice Presidents; the Speakers of each chamber of the Union Parliament; the Commander-in-Chief; the Deputy Commander in Chief; and the Ministers of Border Affairs, Defence, Foreign Affairs, and Home Affairs. Once in office, the Commander-in-Chief is "the Supreme Commander of all armed forces," according to the constitution.

- Should the release of all (or some) of the political prisoners be a precondition on certain forms of U.S. assistance to the NLD-led government and/or the Burmese military?
- What kinds of assistance, if any, should the United States provide to facilitate the identification, release, and support of political prisoners in Burma; as well as to prevent or avoid the arrest or detention of new political prisoners?

This report is one of a series of CRS reports on Burma, including:

- CRS In Focus IF10352, *U.S. Relations with Burma: Key Issues for 2016*;
- CRS In Focus IF10417, *Burma's Peace Process: Challenges Ahead*;
- CRS Report R44436, *Burma's 2015 Parliamentary Elections: Issues for Congress*; and
- CRS Report R44465, *Energy and Water Development: FY2017 Appropriations*.

Defining Political Prisoners

At present, there is no consensus on how many political prisoners there are in Burma. One major reason is the lack of transparency of the records of Burma's 42 prisons and 109 labor camps. Another reason for variation in estimates is the use of different definitions of political prisoners. Moreover, reports of new political prisoners being arrested and detained periodically appear in the press suggest that the number of political prisoners is a moving target.

One factor complicating the determination of the number of political prisoners in Burma is a lack of agreement on the definition of a political prisoner. While the concept of political prisoner has a long history, there is no single international standard for defining political prisoners. Prisoners detained for political reasons are afforded some protection by international agreements, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The State Department's Bureau of Democracy, Human Rights, and Labor considers someone a political prisoner if:

1. the person is incarcerated in accordance with a law that is, on its face, illegitimate; the law may be illegitimate if the defined offense either impermissibly restricts the exercise of a human right; or is based on race, religion, nationality, political opinion, or membership in a particular group;
2. the person is incarcerated pursuant to a law that is on its face legitimate, where the incarceration is based on false charges where the underlying motivation is based on race, religion, nationality, political opinion, or membership in a particular group; or
3. the person is incarcerated for politically motivated acts, pursuant to a law that is on its face legitimate, but who receives unduly harsh and disproportionate treatment or punishment because of race, religion, nationality, political opinion, or membership in a particular group; this definition generally does not include those who, regardless of their motivation, have gone beyond advocacy and dissent to commit acts of violence.[14]

[14] Definition provided to CRS by the State Department.

In applying this definition, the State Department recognizes that being accused of violent acts and committing violent acts are two different matters, and considers the circumstances pertaining to a particular person when determining if she or he is to be considered a political prisoner.

In Burma, one of the more critical issues in defining political prisoners is whether or not to include individuals who have been detained for their alleged association with Burma's ethnic-based militias or their associated political parties. Because these militias periodically have been involved in armed conflict with the Burmese military, some analysts exclude detainees allegedly associated with the militias from their estimates of Burma's political prisoners.

Ex-President Thein Sein consistently confined his definition to include only "prisoners of conscience," and generally used that phrase when discussing the issue. He repeatedly stated that individuals who have committed criminal acts are not considered "prisoners of conscience," and are expected the serve out their prison sentences. Similarly, Burma's military prefers to restrict the definition of political prisoner to only include "prisoners of conscience." Some international groups, such as Amnesty International (AI), also prefer a narrower definition that only includes so-called "prisoners of conscience."[15]

The AAPP(B), an independent organization founded in 2000 by ex-political prisoners,[16] and Human Rights Watch (HRW) use a relatively broad definition of political prisoners. The AAPP(B) defines a political prisoner as "anyone who is arrested because of his or her perceived or real involvement in or supporting role in opposition movements with peaceful or resistance means."[17] The AAPP(B) rejects the limitation of political prisoners to "prisoners of conscience" for several reasons. First, the AAPP(B) maintains that Burmese security forces frequently detain political dissidents with false allegations that they committed violent or nonpolitical crimes. Restricting the definition to "prisoners of conscience" would exclude many political prisoners. Second, the AAPP(B) maintains that the decision to participate in armed resistance against the government in Naypyidaw should be "viewed with the backdrop of violent crimes committed by the state, particularly against ethnic minorities."[18] In short, the AAPP(B) views armed struggle as a reasonable form of political opposition given the severity of the violence perpetrated by the Burmese military and police.

The Political Prisoners Review Committee (PPRC, also known as the Political Prisoner Scrutiny Committee), set up ex-President Thein Sein, reportedly attempted to develop a consensus definition of political prisoners. Bo Kyi, the Committee's AAPP(B) representative, told the press in May 2013 that the 19 members had agreed to a definition, but that the Thein Sein government did not formally adopt the definition.[19]

On August 17 and 18, 2014, AAPP(B) and the FPPS held a workshop in Rangoon to discuss a common definition of political prisoners and to open a discussion with the Thein Sein government and Burma's Union Parliament on the topic.[20] Representatives of various Burmese

[15] For Amnesty International's definition, see http://www.amnestyusa.org/our-work/issues/prisoners-and-people-at-risk/prisoners-of-conscience.

[16] The AAPP(B) describes itself as being dedicated to identifying and locating political prisoners in Burma, and providing support for the prisoners and their families.

[17] AAPP(B), "The Recognition of Political Prisoners: Essential to Democratic and National Reconciliation Process," press release, November 9, 2011.

[18] AAPP(B), "The Recognition of Political Prisoners: Essential to Democratic and National Reconciliation Process," press release, November 9, 2011.

[19] "Burma Releases Political Prisoners Ahead of US State Visit," *Irrawaddy*, May 17, 2013.

[20] "Myanmar Still Seeks Definition of Political Prisoner," *Eleven Myanmar*, August 18, 2014.

organizations and political parties, as well as the International Committee of the Red Cross, attended the workshop. The attendees at the conference agreed to the following definition of political prisoner:

> Anyone who is arrested, detained, or imprisoned for political reasons under political charges or wrongfully under criminal and civil charges because of his or her perceived or known active role, perceived or known supporting role, or in association with activities promoting freedom, justice, equality, human rights, and civil and political rights, including ethnic rights, is defined as a political prisoner.[21]

The adopted statement of the conferees further explained:

> The above definition relates to anyone who is arrested, detained, or imprisoned because of his or her perceived or known active role, perceived or known supporting role, or in association with political activities (including armed resistance but excluding terrorist activities), in forming organizations, both individually and collectively, making public speeches, expressing beliefs, organizing or initiating movements through writing, publishing, or distributing documents, or participating in peaceful demonstrations to express dissent and denunciation against the stature and activities of both the Union and state level executive, legislative, judicial, or other administrative bodies established under the constitution or under any previously existing law.

Following the workshop, a member of Parliament from Aung San Suu Kyi's National League for Democracy (NLD) reportedly said that the NLD would submit a proposed definition of political prisoner to the Union Parliament.[22]

Since the NLD has assumed power, different voices have been raised about establishing a legal definition for political prisoners. In their May 2016 report cited above, the AAPP(B) and FPPS recommended that the NLD-led government adopt an internationally recognized definition of political prisoners.[23] On June 2, 2016, Pe Than, an Arakan National Party (ANP) member of the Union Parliament's lower house, spoke on the chamber's floor in support of adopting legal definitions of "political prisoners" and "political offenses" to protect political activists.[24] Deputy Minister of Home Affairs General Aung Soe voiced his ministry's opposition to Pe Than's proposal, stating that providing special treatment to political prisoners would discriminate against other people arrested for alleged violations of the law.[25]

In addition, the plight of two segments of Burmese society has also been raised in association with the issue of political prisoners. First, allegations of corruption among local Burmese officials are fairly common, with officials reportedly frequently using their official power to detain people on falsified charges in order to confiscate property or otherwise exact revenge on their opponents. In addition, officials have reportedly used provisions in old and new laws to arrest and detain people protesting alleged violations of their legal rights. These reported abuses of power by officials have been portrayed as creating a special group of "political prisoners." Second, past governments in Burma singled out the Rohingya, a predominately Muslim ethnic minority residing in northern Rakhine State along the border with Bangladesh, and allegedly subjected

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[21] Assistance Association for Political Prisoners (Burma), *AAPP & FPPS Press Release About the Definition of a Political Prisoner*, September 2, 2014, http://aappb.org/2014/09/aapp-fpps-press-release-about-the-definition-of-a-political-prisoner/.

[22] "NLD Moving to Recognise Myanmar's 'Political Prisoners,'" *Eleven Myanmar*, August 20, 2014.

[23] AAPP(B) and FPPS, After Release I Had to Restart My Life from the Beginning, May 25, 2016, http://aappb.org/2016/05/after-release-i-had-to-restart-my-life-from-the-beginning-the-experiences-of-ex-political-prisoners-in-burma-and-challenges-to-reintegration/.

[24] "Union Government Urged to Adopt Political Prisoner Definition," *Global New Light of Myanmar*, June 3, 2016.

[25] Tin Htet Paing, "Calls to Legally Define Political Prisoners Rebutted in Parliament," Irrawaddy, June 2, 2016;

them to more extensive and invasive political repression, including restrictions on movement, employment, education, and marriage. In remains to be seen if the NLD-led government will continue the previous practice of discrimination against the Rohinyga.

Current Estimates

Different groups provide varying estimates of the number of political prisoners being detained in Burma. According to the AAPP(B), as of June 30, 2016, 83 political prisoners remained in prison and an additional 203 were awaiting trial.

The State Department's "Burma 2015 Human Rights Report"[26] states:

> While the government released dozens of political prisoners during the year [2015], it continued to arrest new ones. Groups assisting political prisoners estimated that more than 100 political prisoners had been convicted and sentenced as of December. As of September more than 400 were facing trial on various charges, of whom 100 or more were in detention. This number did not include detainees in Rakhine State, estimated to be in the hundreds.

Obtaining an accurate and current tally of the number of political prisoners in Burma is complicated by the lack of transparency of Burma's judicial and prison system. Burma has 42 prisons and 109 labor camps scattered across the country, with no publicly accessible records of who is being detained and where they are being detained. To estimate the number of political prisoners, groups rely on a network of sources to provide information concerning each of the prisons and labor camps. The AAPP(B), for example, reports that it uses inside networks, confidential sources, court trial files, recently released prisoners, and families of prisoners to compile its list of political prisoners.[27]

Maintaining an accurate tally of the number of political prisoners is also difficult because the Burma's security forces, including the Myanmar Police Force, allegedly continue to arrest and detain new political prisoners, or otherwise infringe on their civil liberties.

NLD-led Government's Stance on Political Prisoners

After her appointment as State Counselor, Aung San Suu Kyi announced that the NLD-led government would secure the release of all political prisoners "as soon as possible."[28] In Announcement No. 1/2016, issued on April 7, 2016, Aung San Suu Kyi listed three methods stipulated in the 2008 constitution and Burma's laws that the government would use to free the nation's political prisoners.[29] Following the release of Announcement No. 1/2016, President Htin Kyaw granted amnesty to 113 people awaiting trial on April 8 and pardoned 83 political prisoners on April 17.

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[26] Department of State, *Burma 2015 Human Rights Report*, April 25, 2016, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252751.

[27] AAPP(B), "Political Prisoner List is Now 1,572—Location of 918 Confirmed and Documented," press release, December 23, 2011.

[28] San Yamin Aung, "Suu Kyi Outlines Strategies to Free Political Prisoners," *Irrawaddy*, April 7, 2016.

[29] The first method would be for President Htin Kyaw to grant pardons for existing prisoners using authority provided in sub-article (a) of article 204 of the 2008 constitution. The second method would be for President Htin Kyaw to grant an amnesty for both prisoners and those facing trial as provided by sub-article (b) of article 204. Such an amnesty, however, requires the approval of the NDSC. The third method relies on Sec. 494 of the Code of Criminal Procedure, that allows the President to drop pending charges.

Legal Reforms

S. 3117 preventing the arrest, detention and trial of new political prisoners. One possible approach is to amend or repeal some of the laws that have been used in the past to arrest and imprison people for political reasons, including:

- **The Right to Peaceful Assembly and Peaceful Procession Act:**[30] The act places a number of conditions and restrictions on the right to hold peaceful protests or assemblies. Failure to comply with the act can result in a sentence of one year in prison.
- **The Ward and Village Tract Administration Law:**[31] Enacted in 2012, the law requires all Burmese households to report overnight guests to local authorities, and allows security forces to perform house checks for unreported overnight guests. A previous, but similar version of this law was used to arrest and detain Aung San Suu Kyi in 2009 when an uninvited U.S. visitor swam across a small lake to her house.
- **The Electronic Transactions Act** (as amended):[32] First adopted in 2004, the act imposes a sentence of up to seven years in prison for (a) "doing any act detrimental to the security of the state or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture," or (b) "receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture."
- **The Penal Code** (as amended): Originally adopted in 1861, but amended on multiple occasions, the code contains several provisions that have been used to suppress political dissent. Among those provisions is article 124A, which allows criminal penalties of up to three years in prison for speech that "attempts to bring into hatred or contempt, or excites or attempts to excite disaffections towards" the government; article 295A, which allows criminal penalties of up to two years in prison for insulting or attempting to insult religious feelings of any class of persons "with deliberate and malicious intent;" and article 505, which allows criminal penalties of up to two years in prison on anyone who makes, publishes or circulates any statement, rumor or report "with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity."
- **Unlawful Association Act:**[33] Originally adopted in 1908, the law grants the President the authority to declare illegal any organization or association that "has for its object interference with the administration of the law or with the maintenance of law and order." The law also stipulates a term in prison of no less than three years and no more than five years for persons convicted of being

[30] Copy of law online at: http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93087&p_country=MMR&p_count=86.

[31] Copy of law online at: http://www.altsean.org/Docs/Laws/Ward%20or%20Village-tract%20Administration%20Law.pdf.

[32] Copy of law online at: http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan041197.pdf.

[33] Copy of law online at: http://www.icnl.org/research/library/files/Myanmar/UNLAWFUL.pdf.

> members of an unlawful association, or manages, promotes, or assists an unlawful association.

In addition, Burma's judicial system is widely considered either corrupt or incompetent, and in serious need of substantial reform. The Union Parliament's Judicial and Legal Affairs Complaints and Grievances Investigation Committee submitted a report in December 2015 indicating the existence of a "chain of bribery" in the judiciary, with judges at different levels taking instructions from their superiors and links between supervisory legal staff that often affects the outcome of criminal and civil cases.[34] The NLD-government could undertake legal efforts to try to mitigate judicial corruption, but will need the cooperation of the Tatmadaw to make constitutional changes in the judicial system.

Given that the NLD has a majority in both chambers of the Union Parliament, it has the ability to amend or repeal these laws, despite military officers appointed by Commander-in-Chief Min Aung Hlaing occupying 25% of the seats in both chambers.[35] If the NLD should chose to change the problematic laws, however, it must consider the possible implications for the Tatmadaw's cooperation on other pressing issues, such as ending the nation's low-grade civil war.[36]

Constitutional Amendments

A third option available to the NLD-led government would be to propose amendments to the 2008 constitution to transfer some of the nation's security forces to civilian control. Article 20 states that "The Defence Services is the sole patriotic defence force" in Burma, and "The Commander-in-Chief of the Defence Services is the Supreme Commander of all armed forces." Article 338 stipulates that "All the armed forces in the Union shall be under the command of the Defence Services." This includes not only the three branches of the Burmese military (Air Force, Army, and Navy), but also the national Myanmar Police Force (MPF).[37]

The MPF functions as the nation's local police force across the country, and is responsible for the arrest and detention of alleged criminals. It is part of the Ministry of Home Affairs, and under article 232 of the constitution, the Minister of Home Affairs is effectively appointed by the Commander-in-Chief of Defence Services, placing the MPF directly under the control of the Commander-in-Chief. Amending the constitution to either remove the MPF from the security forces under the command of the Commander-in-Chief and/or granting the President more control over the appointment of the Minister of Home Affairs could reduce the use of the MPF as a means of arresting people for political reasons.

Amending the constitution, however, is a relatively difficult process. At least 20% of the members of the Union Parliament must support the proposed amendments before they can be considered by the Union Parliament. More than 75% of the members must vote in favor of the proposed amendments. For changes in most of the provisions of the constitution, more than half of all eligible voters must vote in favor of the changes in order for the amendment to be approved. Given the military hold 25% of the seats in the Union Parliament, some level of military support for the amendments is necessary to alter the constitution.

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[34] "Myanmar's Judicial System Deeply Corrupt, Parliament Told," *Anti-corruption Digest*, December 11, 2015.

[35] For more about the composition of the Union Parliament, see CRS Report R44436, *Burma's 2015 Parliamentary Elections: Issues for Congress*, by Michael F. Martin.

[36] For more about Burma's civil war and its peace process, see CRS In Focus IF10417, *Burma's Peace Process: Challenges Ahead*, by Michael F. Martin.

[37] A 5th security force, the Myanmar Frontier Forces (also known as Na Sa Ka), was abolished in 2013. Na Sa Ka, which operated in Burma's border states, had a reputation for serious human rights violations.

The Tatmadaw's Position on Political Prisoners

Burma's military leadership has a mixed record with regards to political prisoners. On the one hand, top military officers on the NDSC have periodically supported the granting of amnesty for political prisoners as required by the 2008 constitution. On the other hand, by means of their control of Burma's security forces, Burma's military leaders have continued to arrest new political prisoners for alleged violations of one or more of Burma's repressive laws. The Tatmadaw may have been more cooperative with the Thein Sein government than it will be with the NLD-led government because of their close ties during the reign of the State Peace and Development Council (SPDC). Of particular importance with be the Tatmadaw's stance on the release of persons with alleged ties to ethnic armed organizations that did not sign the October 2015 ceasefire agreement (see "Political Prisoners and National Reconciliation" below).[38]

During the Thein Sein government, the NDSC approved the granting of amnesty for political prisoners on several occasions, presumably in support of the President's pledge to release all political prisoners by the end of 2013.[39] At the same time, the Burmese military and Myanmar Police Force continued to arrest and detain people engaged in peaceful protests for alleged violations of Burmese laws.

Since the transfer of power to the NLD-led government, the Tatmadaw has continued to display mixed signals on political prisoners. The first two amnesties granted by President Htin Kyaw in April 2016 used constitutional powers that did not require the support of the NDSC, possibly to avoid confrontation over the issue. Following the amnesties, the Myanmar Police Force reportedly arrested 90 individuals for political reasons in May 2016, according to the AAPP(B), including 71 workers seeking better working conditions.[40]

There are some indications that the Burma's military leaders intend to continue to arrest and detain political protesters. In his speech to assembled troops on Tatmadaw Day (March 27, 2016), Commander-in-Chief Min Aung Hlaing said, "The two main hindrances to democratization are not abiding by the rule of law and presence of armed insurgencies. These could lead to chaotic democracy."[41] Colonel Tin Aung Htun, Minister for Security and Border Affairs for Yangon Region, reportedly warned "anarchical groups" passing themselves off as peaceful organizations "will be exposed and legal action taken."[42]

Efforts in the Union Parliament to amend or repeal some of the more repressive laws used to arrest protesters and other individuals expressing their opinions on political issues have been opposed by the military officers appointed to seats by Commander-in-Chief Min Aung Hlaing. On June 3, 2016, the upper house of the Union Parliament passed revisions to the Ward or Village Tract Administration Law, which requires households to report overnight guests to local authorities, despite opposition from the military members and the Ministry of Home Affairs.[43] As

[38] For more about ceasefire agreement, see CRS Insight IN10374, *Less-than-Nationwide Ceasefire Agreement Signed in Burma*, by Michael F. Martin.

[39] In a speech at London's Chatham House in July 2013, President Thein Sein pledged to release all "prisoners of conscience" by the end of the calendar year (Colin Freeman, "Burma to Release All Political Prisoners 'by the End of the Year'," *Telegraph*, July 15, 2013.

[40] Assistance Association for Political Prisoners (Burma), *May Chronology 2016*, June 22, 2016.

[41] Sai Wansai, "Burma's Political Tug of War: Democratic Bulllying, Military Reinforcement, Political Prisoners and Diplomatic Overtures," *Shan Herald Agency for News*, April 18, 2016.

[42] "Police to Toughen Stance on 'Disruptive Elements'," *Global New Light of Myanmar*, May 29, 2016.

[43] Tin Htet Paing, "Upper House Passes Bill Repealing Overnight Guest Registration," *Irrawaddy*, June 3, 2016.

previously mentioned, the military members of Parliament opposed a June 2016 proposal to establish a legal definition for "political prisoners."

Political Prisoners and National Reconciliation

The release of political prisoners has potentially important implications for prospects for national reconciliation. Relations between the NLD and some of Burma's ethnic armed organizations (EAOs) are reportedly tentative. Some of the EAOs are cautious about Aung San Suu Kyi, given her father's military background and her willingness to participate in a government under the provisions of the 2008 constitution. Other EAOs think that Aung San Suu Kyi and the NLD will be willing to offer more favorable terms than ex-President Thein Sein in order to end the nation's six decade long low-grade civil war. One signal of such flexibility by the NLD might take the form of the release of prisoner detained for alleged association to EAOs which were declared illegal by Burma's past military juntas and the Thein Sein government under the Unlawful Association Act.

One of the outlawed ethnic armed organizations, the Shan State Progress Party (SSPP), and its associated militia, the Shan State Army (SSA), sent a letter to President Htin Kyaw calling for the release of any civilians who have been detained by the Burma Army for their alleged association with the groups.[44] According to the AAPP(B), about 40 of the 64 political prisoners serving sentences as of May 2016 under the Unlawful Association Act. Other ethnic armed organizations have similarly called for the release of its alleged members, along with a cessation of attacks by the Burmese Army, as a precondition to peace negotiations aimed at national reconciliation.

U.S. Sanctions, Laws, and Political Prisoners

Burma's detention of political prisoners was a major reason for the United States to impose sanctions on Burma between 1988 and 2008.[45] The Customs and Trade Act of 1990 (P.L. 101-382), which required the President to impose "such economic sanctions upon Burma as the President determines appropriate," was passed after Burma's ruling military junta, the State Peace and Development Council (SPDC), refused to honor the results of May 1990 parliamentary elections and detained Aung San Suu Kyi and many other opposition leaders. Similarly, the Burmese Freedom and Democracy Act of 2003 (BFDA) (P.L. 108-61) was passed after the SPDC cracked down on opposition parties, and once again detained Aung San Suu Kyi and other opposition leaders. The Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (JADE Act) (P.L. 110-286) was passed after the violent suppression of the autumn 2007 popular protests and the subsequent arrest and imprisonment of many of the protest leaders, including a number of Buddhist monks.

The release of all political prisoners is also one of the preconditions for the removal of many of the U.S. sanctions on Burma (see **Table 1**).[46] The economic sanctions required by Section 138 of the Customs and Trade Act of 1990 are to remain in place until the President certifies to Congress that certain conditions have been met, including "[p]risoners held for political reasons in Burma have been released." Section 570 of the Foreign Operations, Export Financing, and Related

[44] "SSPP/SSA asks President Htin Kyaw to Release Detainees," *Shan Agency for News*, July 5, 2016.

[45] For more about the history of U.S. sanctions on Burma, see CRS Report R41336, *U.S. Sanctions on Burma*, by Michael F. Martin.

[46] For a description of the waiver provisions of U.S. sanctions on Burma, see CRS Report R41336, *U.S. Sanctions on Burma*, by Michael F. Martin.

Programs Appropriations Act of 1997 (Section 570, P.L. 104-208) authorizes the President to ban new investments in Burma if "the Government of Burma has physically harmed, *rearrested for political acts* [emphasis added] or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition." The BFDA requires a ban on all imports from Burma (including a ban on the products of certain Burmese companies), a freeze of the assets of certain Burmese officials and U.S. opposition to "any loan or financial or technical assistance to Burma" until certain conditions are met, including the release of "all political prisoners."[47] Finally, the JADE Act bans the issuance of visas to certain Burmese officials and their supporters, freezes the assets of certain Burmese officials and their supporters, and prohibits the provision of financial services to certain Burmese officials and their supporters until specific conditions have been met, including the unconditional release of all political prisoners.

Table 1. Specified Conditions for the Removal of U.S. Sanctions on Burma

(Text extracted from relevant legislation unless otherwise noted; emphasis added)

Law	Conditions
Section 138 of the Customs and Trade Act of 1990	(1) Burma meets the certification requirements listed in Section 802(b) of the Narcotics Control Act of 1986 (2) The national government legal authority has been transferred to a civilian government (3) Martial law has been lifted in Burma **(4) Prisoners held for political reasons in Burma have been released.**
Section 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997	President determines and certifies to Congress that the Government of Burma has not physically harmed, **rearrested for political acts**, or exiled Daw Aung San Suu Kyi, and has not committed large-scale repression of or violence against the Democratic Opposition.[a]

[47] The general import ban and company-specific import ban in the BFDA lapsed in July 2013, when Congress did not pass the required annual resolution to renew the trade restrictions. The other sanctions specified in the law remain in effect.

Law	Conditions
Burmese Freedom and Democracy Act of 2003	(A) The SPDC has made substantial and measurable progress to end violations of internationally recognized human rights including rape, and the Secretary of State, after consultation with the ILO Secretary General and relevant nongovernmental organizations, reports to the appropriate congressional committees[b] that the SPDC no longer systematically violates workers' rights, including the use of forced and child labor, and conscription of child-soldiers. (B) The SPDC has made measurable and substantial progress toward implementing a democratic government, including— **(i) releasing all political prisoners;** (ii) allowing freedom of speech and the press; (iii) allowing freedom of association; (iv) permitting the peaceful exercise of religion; and (v) bringing to a conclusion an agreement between the SPEC and the democratic forces led by the NLD and Burma's ethnic nationalities on the transfer of power to a civilian government accountable to the Burmese people through democratic elections under the rule of law. (C) Pursuant to Section 706(20 of the Foreign Relations Authorization Act, Fiscal Year 2003 (P.L. 107-228), Burma has not been designated as a country that has failed demonstrably to make substantial efforts to adhere to its obligations under international counternarcotics agreements and to take other effective counternarcotics measures…
The Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008	(T)he President determines and certifies to the appropriate congressional committees[c] that the SPDC has— **(1) Unconditionally released all political prisoners, including Aung San Suu Kyi and other members of the National League for Democracy;** (2) Entered into a substantive dialogue with democratic forces led by the National League for Democracy and the ethnic minorities of Burma on transitioning to democratic government under the rule of law; and (3) Allowed humanitarian access to populations affected by armed conflict in all regions of Burma.

Notes:

a. The law required the imposition of sanctions if the President determines and certifies to Congress that the Government of Burma has committed these acts. It is assumed that removal requires a presidential determination that the Government of Burma no longer commits these acts.

b. "Appropriate congressional committees" are Senate Appropriations Committee, Senate Foreign Relations Committee, House Appropriations Committee, and House Foreign Affairs Committee.

c. "Appropriate congressional committees" are Senate Finance Committee, Senate Foreign Relations Committee, House Ways and Means Committee, and House Foreign Affairs Committee.

The Burmese sanction laws, however, generally include provisions that allow for a presidential waiver if the President determines that it is in the national interest of the United States. The ban on new U.S. investments in Burma was waived on July 11, 2012. The BFDA import ban was waived on November 15, 2012, by the State Department using presidential authority granted in the BFDA. President Obama waived the financial sanctions in the JADE Act on August 6, 2013, as part of Presidential Executive Order 13651. As a consequence, most of the sanctions tied to political prisoners have been waived.[48]

[48] These waivers remain in effect until such time they are rescinded by the President or the underlying laws imposing the sanctions are changed.

Beyond the laws imposing sanctions on Burma, Congress has also enacted legislation addressing the issue of political prisoners in Burma. Section 7043(b)(3)(A) of the Consolidated Appropriations Act of 2014 (H.R. 3547, P.L. 113-76) stipulates:

> Not later than 60 days after enactment of this Act, the Secretary of State, in consultation with the USAID Administrator, shall submit to the appropriate congressional committees a comprehensive strategy for the promotion of democracy and human rights in Burma, which shall include support for civil society, *former prisoners*, monks, students, and democratic parliamentarians [emphasis added].

The explanatory statement by the Chairman of the House Committee on Appropriations regarding the law elaborates further on the required support for former prisoners, stating:

> In addition to programs specified in section 7043(b)(2) of this Act, the Department of State and USAID shall support programs for former political prisoners (including health, education, and vocational training activities); … and programs to monitor the number of political prisoners in Burma.[49]

The Senate version of the State Department, Foreign Operations, and Other Related Programs Appropriations Act, 2017 (S. 3117) would reinstate the requirement in P.L. 113-76 that funds be provided for the implementation of the mandated comprehensive strategy.

Obama Administration's Position on Political Prisoners in Burma

U.S. officials have continued to call for the release of all political prisoners in Burma since 2011. The State Department welcomed the April 2016 release of political prisoners by the NLD-led government, but it remains to be seen how active it will be in encouraging the release of any remaining political prisoners and/or assisting the new government's efforts to prevent the arrest and detention of new political prisoners.

Several years ago, the Obama Administration tied Burma's political prisoner issue with other major issues related to Burma's potential transition to democracy. President Obama spoke of the continued detention of prisoners of conscience during his first visit to Burma in November 2012. Then-National Security Advisor Tom Donilon stated in a presentation in Washington prior to the President's trip to Burma that:

> The President's meetings—as well as his speech to the people of Burma—will also be an opportunity to reaffirm the progress that still must be made. This includes **the unconditional release of remaining political prisoners** [emphasis added], an end to ethnic conflicts, steps to establish the rule of law, ending the use of child soldiers, and expanded access for humanitarian assistance providers and human rights observers in conflict areas.[50]

In her testimony at a December 4, 2013, hearing on U.S. policy in Burma, held by the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, then-State Department Senior Advisor on Burma Judith Cefkin stated:

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[49] "Explanatory Statement by Mr. Rogers of Kentucky, Chairman of the House Committee on Appropriations regarding the House Amendment to the Senate Amendment on H.R. 3547, Consolidated Appropriations Act, 2014," *Congressional Record*, daily edition, vol. 160, No. 9 - Book II (January 15, 2014), p. H1169.

[50] Office of the Press Secretary, The White House, "President Obama's Asia Policy and Upcoming Trip to Asia," press release, November 15, 2012.

> We are committed to working with the [Thein Sein] government, Aung San Suu Kyi and political opposition, and with civil society to fully implement commitments announced before President Obama's visit just a year ago. In particular, we are watching closely the commitment to release all political prisoners by the end of the year.… We are committed to assisting the reintegration of these heroic individuals back into society and ensuring that they are released without conditions.[51]

In its report to Congress required by Section 7043(b)(3)(A) of the Consolidated Appropriations Act of 2014, the State Department indicated that it intends to continue to work with the Thein Sein government "to resolve remaining cases of prisoners convicted under repressive laws or for political activism."[52] The report also stated that the technical assistance programs would be established to "rehabilitate released political prisoners so they can effectively resume their role promoting democratic transition and human rights."

The political prisoner issue came up in during President Obama's November 2014 visit. Following his meeting with then-President Thein Sein on November 12, 2014, President Obama referred to past political prisoner releases as an example of past progress towards political reform, saying,

> In part because of President Sein's leadership, the democratization process in Myanmar is real and we can point to specific changes that are making the difference. Domestically, we've seen political prisoners that have been released.[53]

President Obama also mentioned 'the release of additional political prisoners" as evidence of "renewal and reconciliation," during a press interview.[54] In the same interview, he also mentioned the continued restrictions placed on former political prisoners as evidence of "a slowdown in reforms."

A number of Burmese activists, however, were disappointed with President Obama's second visit to Burma, including AAPP(B) secretary and former PPRC member Bo Kyi, who reportedly indicated that President Obama's assessment of Burma's reforms was "out of touch with reality."[55] These critics conveyed that many serious issues were unaddressed during President Obama's visit, including the continued imprisonment of political activists.

The State Department has also raised the issue of political prisoners in Burma with other governments. The previous U.S. ambassador to Burma, Derek Mitchell, traveled to China, Japan, and South Korea following Secretary Clinton's 2011 trip to Burma to discuss the status of U.S. policy towards Burma during his time as U.S. Special Representative and Policy Coordinator for Burma. The issue of political prisoners was reportedly raised during his meetings on that trip. Similar discussions have been held with other governments and the European Union. Following his visit to Burma, British Foreign Secretary William Hague told reporters that EU sanctions on Burma should not be lifted while political prisoners remain in detention.[56]

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[51] Department of State, "Oversight of U.S. Policy Toward Burma: Testimony of Judith Beth Cefkin," press release, December 4, 2013.

[52] Department of State, *Strategy for the Promotion of Democracy and Human Rights in Burma*, Ref: Sec. 7043(b)(3)(A) of H.R. 3547, "Consolidated Appropriations Act, 2014," April 21, 2014.

[53] White House, "Remarks by President Obama After Bilateral Meeting with President Thein Sein of Burma," press release, November 12, 2014.

[54] "The Irrawaddy Interviews US President Barack Obama," November 12, 2014.

[55] Kyaw Zwa Moe, "Obama's Second Burma Visit Falls Flat," *Irrawaddy*, November 14, 2014.

[56] Ba Kaung, "EU Sanctions Remain Until Burmese Prisoner Release: Hague," *Irrawaddy*, January 6, 2012.

Following the political prisoner release on April 8, 2016, State Department Deputy Spokesperson Mark C. Toner stated:

> We do welcome reports that the new democratically elected, civilian-led Government of Burma has released a number of political prisoners, including dozens detained during peaceful protests on education reform last year and who had been awaiting trial. Respect for and promotion of human rights and fundamental freedoms, including freedoms of expression and peaceful assembly, are critical components of a vibrant democracy, and we commend the new government's early demonstrated commitment to human rights. The United States stands ready to support Burma on further democratic reform.[57]

No similar statement was made following the political prisoner release on April 17, 2016.

Issues for Congress

The continued detention of political prisoners in Burma—as well as the state of human rights in general—are likely to figure prominently in any future congressional consideration of U.S. policy towards Burma. In the coming months, Congress may decide to examine the status of the implementation of existing U.S. restrictions on relations with Burma. It may also assess the political prisoner issue, either in isolation or as part of a broader consideration of human rights in Burma and U.S. policy. Congress may take up legislation to amend or alter U.S. restrictions on relations with Burma, depending on the evolving conditions in the country. In addition, Congress may consider its funding for humanitarian programs in Burma to address the humanitarian needs of Burma's released political prisoners, as well as internally displaced people (IDPs), refugees, and other vulnerable populations.

Prior to Secretary Kerry's August 2014 trip to Asia, which included two days in Burma, Members of the House of Representatives and the Senate sent letters to Secretary Kerry expressing concern about the conduct of U.S. policy toward Burma and indicating dissatisfaction with recent trends in the country. The House letter to Secretary Kerry, which was signed by 72 members, observed, among other things:

> Political prisoners remain behind bars and those released still have sentences hanging over their heads, despite President Thein Sein's explicit commitment to President Obama and the United States Congress that all such prisoner would be released.[58]

The letter also cites the "jailing and harsh sentences of 10 years of imprisonment with hard labor" of the five *Unity Journal* journalists as evidence that "press freedoms have gone awry." The letter to Secretary Kerry from Senator Marco Rubio and Senator Mark Kirk also indicates that "[f]resh arrests of journalists for simply doing their jobs … have sent a chill through the press corps."[59] Members individually or collectively may decide to continue to press the Obama Administration and the State Department to address the political prisoner issue with Burmese officials, as well as its implications for further political reform in Burma.

In addition, existing U.S. restrictions on relations with Burma are based on several laws specifically focused on Burma, as well as other laws that sanction nations that fail to comply with U.S. standards of conduct related to specific issues. The changing political situation in Burma, including the status of political prisoners, may result in congressional consideration of whether the laws placing restrictions on relations with Burma should be altered or removed. Similarly, the

[57] Department of State, "Daily Press Briefing," press release, April 8, 2016.

[58] Letter from 72 Members of the House of Representatives to John Kerry, Secretary of State, July 31, 2014.

[59] Letter from Marco Rubio, Senator, and Mark Kirk, Senator, to John Kerry, Secretary of State, August 7, 2014.

President has the authority—which he has used several times—to waive or suspend some of the existing restrictions on relations with Burma if he determines that the necessary conditions have been met, or if he determines that doing so is in the national interest of the United States. If the President were once again to exercise this executive authority, Congress may choose to review the President's determination.

Congress may also choose, as it has done in the past, to include provisions in future appropriations bills regarding political prisoners in Burma. As previously mentioned, the Consolidated Appropriations Act of 2014 (H.R. 3547, P.L. 113-76) required the Department of State and the U.S. Agency for International Development (USAID) to "support programs for former political prisoners" and "monitor the number of political prisoners in Burma," as well as develop a "comprehensive strategy for the promotion of democracy and human rights in Burma," including support for former prisoners. Similar language was not included in the consolidated appropriations acts for fiscal years 2015 and 2016. The Senate version of the State Department, Foreign Operations, and Other Related Programs Appropriations Act, 2017 (S. 3117) would reinstate the requirement in P.L. 113-76 that funds be provided for the implementation of the mandated comprehensive strategy, which would presumably include support for former political prisoners.

Congress may also be called upon to consider additional funding for assistance to Burma. For FY2017, the Obama Administration requested $82.7 million for various projects inside Burma "to promote national reconciliation, democracy, human rights, and the rule of law; foster economic opportunity; increase food security; and improve national and local health systems."[60] If it chooses, Congress could consider placing conditions on the availability of assistance to Burma, including requirements related to the identification and release of political prisoners.

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[60] Department of State, *Congressional Budget Justification*, Department of State, Foreign Operations, and Related Programs—Fiscal Year 2017, February 5, 2016.

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