Stevens Again Named Chair

Bass, Healey, and Williamson Appointed to Standing Committee

ABA President N. Lee Cooper has named three new members to the Standing Committee on Law and National Security and has reappointed Paul Schott Stevens as the groups’ chairman. New committee members are: Kenneth C. Bass, III, L. Christine Healey, and Edwin D. Williamson. In addition, three new members were added to the Advisory Committee and new liaisons were appointed for the ABA Board of Governors and the Law Student Division.

Mr. Bass heads the appellate practice group of Venable, Baetjer, Howard & Civiletti. A Phi Beta Kappa graduate of Duke, Mr. Bass served on the editorial board of the Yale Law Journal before clerking for Supreme Court Justice Hugo Black. During the Carter Administration he served as the first Counsel for Intelligence Policy in the Department of Justice, advising both the Attorney General and the White House on important intelligence and national security matters. He is very active in the field of information law, and his many outside endeavors include service as a Senior Fellow of the Business Executives National Security Educational Fund. He has also been an Adjunct Professor of Law at George Washington University Law Center.

Mr. Williamson is a partner in the firm of Sullivan & Cromwell. He received his legal training at New York University Law School, where he was a Root-Tilden scholar and an Editor of the Law Review. Continued on page 7

As CIA General Counsel, Standing Committee member Jeffrey H. Smith (right) met regularly with Director of Central Intelligence John Deutch.

An Interview with Former CIA General Counsel
Jeffrey H. Smith

Standing Committee member Jeffrey H. Smith has had a distinguished career in Washington dealing with issues of national security law, including many years as a top aide to Senator Sam Nunn (perhaps most prominently as Chief Counsel to the Senate Armed Services Committee) and, until a few weeks ago, as the General Counsel to the Central Intelligence Agency. As part of our series on prominent national security lawyers, he was interviewed by Standing Committee Chairman Paul Schott Stevens shortly after he returned to private law practice with Arnold & Porter. —Ed.

Stevens: As you look back on your tenure as General Counsel of the Central Intelligence Agency, what do you think were your most important contributions?

Smith: Only time can tell what my most important contributions will be, but I hope they will fall into five categories.

First, helping restore confidence in Congress and the public that CIA is not only the finest intelligence service in the world, but also is responsive to

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Faculty Seminar on Teaching Strategic Weapons Proliferation

Nuclear, chemical, and biological weapons programs and the development of missiles and other high-level conventional weapons in Iraq, Iran, and North Korea have made strategic weapons proliferation one of the central international security issues of the 1990s. What should be the focus and content of academic instruction about those subjects? This will be the topic of the second Faculty Seminar on Teaching Strategic Weapons Proliferation. The seminar is being organized by the Nonproliferation Policy Education Center and the National Strategy Information Center and will be held tentatively from July 12-17, 1997 at Bowdoin College in Brunswick, Maine.

Applicants are invited from U.S. faculty of all ranks who already teach in the field or intend to do so. The deadline for applications is December 1, 1996. It is anticipated that approximately 25 applicants will be selected. Final notification will be given in early February of 1997. Participants will be provided with room and board at the seminar and economy travel will be awarded to those unable to secure departmental travel funds. For further information and applications, contact: Henry Sokolski, Executive Director, The Nonproliferation Policy Education Center, 1718 M Street, NW, Suite 244, Washington, DC 20036. Tel: (202) 466-4406 / Fax: (202) 859-5429. E-mail: npiec@ix.netcom.com.

December 9-10, Hotel Washington
Sixth Annual “Review of Field” Conference Planned

The Standing Committee is joining with the University of Virginia Center for National Security Law and the Duke Law School Center on Ethics, Law and National Security in planning the sixth annual “review of the field” conference on “National Security Law in a Changing World.” This program, which continues a highly successful series first suggested by former Standing Committee Chairman Morris I. Leibman, will take place at the Hotel Washington, 15th at Pennsylvania Avenue, Washington, DC, on Monday and Tuesday, December 9-10, 1996. Please mark your calendar.

One of the highlights of each of these conferences has been the general counsels panel, which brings together the top legal officers from the Departments of State and Defense, the National Security Council, the Central Intelligence Agency, and the Joint Chiefs of Staff to discuss national security law issues confronting their agencies and perhaps to speculate about important issues coming over the horizon which might warrant detailed attention by the professional bar. While invitations are still being extended, most have already accepted and it is our hope that all of these individuals will be able to take part once again in this important session.

The second panel on Monday morning will feature senior legal counsel from the key national security committees of the Senate and House of Representatives. Distinguished speakers are being invited to address the two luncheons being planned for the conference. Monday afternoon’s session will focus upon the control of weapons of mass destruction, and Tuesday morning’s program will begin with a review of counter-terrorism issues. This will be followed by a discussion of legal aspects of Information Warfare; and, following lunch, the conference will conclude with an ethics panel examining the issue of who is the “client” of the government national security lawyer. We also hope to have some discussion during the conference of the recent ICJ advisory opinion on nuclear weapons.

If you are not on the Standing Committee’s mailing list and would like further information on this important upcoming conference, contact Standing Committee Staff Director Holly Stewart McMahon (see box on page 5) for further information.

Paul Schott Stevens
Chairman, Standing Committee on Law and National Security

Holly Stewart McMahon
Staff Director

Robert F. Turner
Editor

The National Security Law Report, which is published eight times a year, contains articles concerning the law relating to the security of the Nation and associated topics. The National Security Law Report is sponsored by the ABA Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the Standing Committee or the American Bar Association. Comments or original articles should be directed to Professor Robert F. Turner, Center for National Security Law, University of Virginia School of Law, 580 Massie Road, Charlottesville, VA 22903-1789.

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BOOK REVIEW

Americans No More: 
The Death of Citizenship  
By: Georgie Anne Geyer  
Pages: 352  
Price: $23.00  

Reviewed by Richard E. Friedman

Some commentators predict a wave of immigrants from failed states will inundate the Western nations. The United States appears to be insulated from this strategic threat, except for the possibility of a political breakdown in Mexico which may cause a flood of illegal immigrants to cross the border into the U.S. The theme of this outstanding book is that the first wave of the immigrant flood has already occurred, and has caused great harm to America in a way that strategists may have overlooked.

It is difficult to estimate a nation’s capacity to absorb immigrants. It is not merely a question of economic resources—how much employment, housing, education, and healthcare, there is to go around. There is also the question of political culture, something that is impossible to quantify or codify.

The author, a journalist, foreign correspondent, and keen observer, poses the threshold issue: What makes an American citizen? Who belongs to the American polity, and why? A starting point is an analysis of world instability—seventy flash points that threaten regional or international stability, and twenty-six wars or insurrections are ongoing at the present time. Geyer contends that large centrifugal forces are at work. Peoples’ loyalties seem to be shifting from the nation-state to the group—which can be defined ethnically, religiously, racially, or economically. Geyer sees evidence of this disintegration in the United States.

Historically, the United States has been one of the few countries in which citizenship has not been conflated with nationality. The Mayflower descendant is the equal of the naturalized Vietnamese-American. There are multi-ethnic and multi-national states all over the world, but Geyer notes that virtually all of them are experiencing some degree of fragmentation.

America’s political system only works if there is a commonly held view of the “social order befitting a citizen.” Geyer argues that unless Americans feel an “allegiance” to this social order, there will be precious little civility in the public sphere of life. How is this social order maintained and transmitted?

As the international business globalization phenomenon intensifies, the result, the author predicts, will be that American corporations and the entire American economy will be disconnected economically, politically, and morally from the good-old “America.” Many American trans-national business leaders have ceased to consider themselves as Americans who have responsibility for America’s destiny. Globalization suggests diminution of the power of the nation state—the responsibility of the state to its citizens and the reciprocal allegiance of the citizen to the state. Will people fight and die for the Internet?

Geyer offers compelling evidence that there is a crisis of political legitimacy in the United States. A recent Gallup poll found that 39 percent of Americans surveyed fear the federal government. This fear takes two forms. Many Americans believe that the federal government poses a threat to their personal and economic security. Americans also fear for their personal liberty, their sense of individual autonomy. Popular culture is filled with the imagery, if not the reality, of Americans fighting against encroaching authority. Across the political spectrum, there is a palpable fear of government power—whether it is represented by the tax code, environmental regulations, gun control laws, abortion regulations, affirmative action policies, or what have you. There are those who see an even broader conspiracy of liberal journalists, campus intellectuals, and social justice advocates, working in league with the “tyrannical government” to restrict property rights, freedom of association, and other traditional liberties.

America’s political system depends on “deference or allegiance to the social order befitting a citizen”—the civility of its citizens to each other. But who is a citizen in America in a society which has undergone rapid and bewildering change since World War II? Citizenship organizes society by defining who belongs and who does not. However, citizenship is not exclusionary. Citizenship is the manifestation of who we are and what our objectives should be. Classical American citizenship is a readily accessible guide to collective decisions as to what is right and wrong, and good and bad. This is the American ethos. Our ethos, the author explains, is debased or in terminal drift. The traditional relationship between the individual and the state with corresponding duties and rights of each is in imbalance. Individual and group rights and entitlements have been made available to all at the expense of individual and community responsibility.

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Book Review—Friedman on Geyer . . .

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Every American, native-born or naturalized, is theoretically socialized to the obligations and privileges of US citizenship. Geyer believes that it can no longer be assumed that Americans are being socialized in this way. There are fewer cultural common denominators—experiences in which the American ethos is transmitted.

The author focuses on immigration which is one aspect of the complex problem of citizenship. The most recent wave of immigration has occurred without any prospect of meaningful training or socialization into American life. In the early years of American history, the policy was to encourage immigration, and to encourage immigrants to retain their ethnic and religious habits and to observe them. Implicit in this freedom was the demand, "as a fair exchange for the security and opportunity of American allegiance to the central concepts that brought Americans together in one inter-connected and inter-committed political people." This has broken down because many immigrants do not seek to assimilate, without their fault, because many Americans are ambivalent or uncaring about the benefits of American citizenship.

Geyer believes that there is no longer a consensus about what is valuable in our nation’s history and traditions (and therefore what is worth defending). Even the national dialogue over national purposes is debased. Geyer finds that the proliferation of group rights and entitlements is not a sign of healthy pluralism, but rather a sign of dangerous imbalance. Rights imply corresponding responsibilities according to the theory of the social compact. However, present-day advocates for group rights, entitlements, and preferences characterize them as compensatory—redress for past injustices. So, there is no point in discussing what is owed in exchange for expanded rights and entitlements. The allocative choices that political leaders make become a zero-sum game unless those leaders can articulate values that every citizen should be willing to sacrifice for, purposes that every citizen should be willing to defer to.

The open-door policy of the Immigration Act of 1965 has been significantly changed by the recently enacted Immigration Act of 1996. The objective of this new law, in part, is to strengthen the porous U.S. borders, but it does not restrict employment of illegal aliens; it limits the social welfare benefits available to illegal immigrants, but it also removes benefits from legal aliens. But this legislation will not answer the deeper and arguably more important questions that confront our nation. Georgie Anne Geyer has framed them carefully, in all their complexity: what is an American citizen, and what does a citizen owe his or her fellow citizens?

Interview with Jeffrey H. Smith

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the rule of law in our democracy. One must remember that when the DCI, John Deutch, and his team took over, the Agency was under extraordinary fire as a result of the Ames investigation, the substantial questioning about the future of the Intelligence Community, the establishment of the Aspin-Brown Commission, and allegations about improper conduct in Guatemala.

Rebuilding morale while addressing these challenges was crucial. I think we succeeded. Morale is very high at CIA; but even more importantly, we have made some fundamental changes that will, I believe, insure that CIA remains the world's best intelligence service.

The second area is closely related. The CIA is in the business of taking risks. I am hopeful that my efforts, and those of my colleagues in the Office of General Counsel, helped the Directorate of Operations analyze and conduct operations in such a way that they were consistent with American law and values. But at the same time we had to be willing to take the risks that are necessary to acquire intelligence and conduct covert operations. The key is to gain the confidence of the Directorate of Operations so they see lawyers in OGC as their partners. Again, I think we succeeded.

Third is a wide ranging series of changes in the personnel and training systems at CIA. Although these are not very glamorous changes, I am convinced that in the long run revamping the personnel system and enhancing training throughout an officer's career can make a vast difference in the performance of the Agency. That is the way the Army reinvented itself after Vietnam and the Agency has undertaken a very similar process. I believe it, too, will be successful.

Fourth, is a number of steps we undertook to improve cooperation with law enforcement agencies. Building on the work begun by my predeces-
Sor, Standing Committee member! Elizabeth Rindskopf, these measures include personnel exchanges, joint training and operations, joint R&D efforts and frequent regular meetings between very senior people in both communities.

Howard Shapiro, the General Counsel of FBI, and I initiated several special measures to improve cooperation between CIA and FBI, including the first ever meeting between senior CIA Chiefs of Station and FBI Legal Attaches. Although there are still problems, I believe these steps have set in motion fundamental changes that will be of enormous value.

Fifth, during the past eighteen months comprehensive reviews of the Intelligence Community were undertaken by several groups, including the Aspin-Brown Commission, the Council on Foreign Relations and both Congressional oversight committees. Some suggested sweeping change; others favored more incremental change. In the end Congress enacted some very important changes, including creation of the National Imaging and Mapping Agency. As you know, the President signed these changes into law but expressed opposition to the creation of three new Assistant Directors that would require Senate confirmation. The President is correct and I hope Congress will repeal those positions next year. But on the whole, the changes were very positive and will greatly strengthen the effectiveness and efficiency of the Intelligence Community.

Stevens: What was the most difficult aspect of having CIA as a client?

Smith: By its nature, an intelligence service must operate in secret. Yet in a democracy we must be accountable, and this requires congressional oversight and press attention. Only CIA's failures seem to make it into public attention. Our successes somehow manage to stay secret. In trying to deal with allegations of wrongdoings or criticisms, we were always confronted with a dilemma. To explain the Agency's actions frequently required disclosure of classified information which we were not prepared to do on the grounds of principle, even if disclosure of the information would correct a misleading story or dispel an incorrect allegation. Preserving the principle of secrecy is important, but quite frankly the Agency often pays a price for maintaining that principle. It's very frustrating trying to defend a client when there are dynamite defenses in your briefcase that you can't use.

The Congress can be of great help in this regard. When one of these episodes arises, Congress is often the only body able to judge fully whether the Intelligence Community has functioned properly or not. I think Congress has done a good job of fulfilling that role, but I occasionally wish they were a bit more willing to step up to the plate.

I'm also concerned about a growing tendency to use intelligence issues as political issues. There are intelligence issues that are proper subjects for public scrutiny and debate. But at the same time we must be careful not to politicize either the intelligence process or the public debate about intelligence issues.

Stevens: There has been a lot of discussion recently concerning various new roles and missions for the Intelligence Community. Do you believe that the traditional core role of the Agency, with respect to strategic intelligence gathering, is less important today? How much of the General Counsel's attention is focused on that role?

Smith: Strategic intelligence gathering is not less important today. However, it is more diffused. The Intelligence Community must watch not only the remaining Russian and Chinese nuclear forces, but also a wide range of other threats, that, in many ways, are harder to follow. Much has been written on this but the Aspin-Brown Commission made it very clear—and the President and Congress agree—that we must continue to have a very healthy and vigorous Intelligence Community.

The Office of General Counsel must keep up with these changing threats and priorities. Increasingly we find ourselves drawn into "Out of Embassy" activities. This raises a variety of interesting legal challenges.

Stevens: DCI Deutch and his team, including you, took over the CIA just as the IG was concluding his investigations on Guatemala and the Ames Damage Assessment, among others. The DCI took some strong disciplinary action, including firing two employees. There was some concern that the DCI had unfairly applied today's standards to yesterday's activities. Is that correct?

Smith: No. Those two episodes were very difficult for all of us at the CIA. The DCI and his senior leadership carefully reviewed the IG report and, in some cases, did a de novo review of the facts and circumstances. The decisions that were taken with respect to discipline were painful, but the conduct for which disciplinary action resulted would have been improper whether it occurred in 1975, 1985 or 1995. It was wrong then. It is wrong today.

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Interview with Jeffrey H. Smith...

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Stevens: One important aspect of your work at the CIA involved the review of standards that guide the selection and recruitment of agents overseas. Could you describe for us why this review was undertaken, and what standards emerged? Some have expressed concerns that these standards are unrealistic and unworkable. Do you think these concerns are well placed?

Smith: The Inspector General’s report on Guatemala caused us to realize that the Agency did not have guidelines for dealing with human sources, or “assets,” with criminal or human rights problems. I knew that the FBI and the DEA had guidelines for dealing with informants who were engaged in criminal conduct. I suggested that we examine those guidelines and determine whether CIA should adopt similar guidelines.

As a result of this review, the DCI approved new guidelines drafted jointly by the Directorate of Operations and the Office of General Counsel. The guidelines are quite simple. They provide that when a case officer proposes to recruit an individual to serve as an asset, headquarters must be fully advised of any information suggesting that the prospective asset may have committed a human rights violation or a serious felony. Headquarters will then make a decision which balances the value of the intelligence that might be obtained from the individual against the cost of having a relationship with the individual. Since headquarters approval has long been required prior to recruiting an asset, this new requirement adds very little burden.

This system has two advantages. First, headquarters now has a complete picture of the individuals and can make an informed decision. Second, the individual case officer knows that he or she has the full approval and backing of headquarters as they deal with this individual. One of the problems resulting from recent episodes is that case officers were understandably apprehensive about dealing with assets who might have human rights or criminal problems. This system eliminates that uncertainty.

These guidelines were fully briefed to both oversight committees, which resulted in some very useful suggestions from the Congress that were adopted. Nevertheless, there are still some who question the wisdom of the guidelines and suggest that CIA has a political correctness test in the recruiting of assets. I do not believe that is correct. In my experience, the guidelines did not prove an unnecessary burden in recruiting human assets. If we are going to penetrate terrorist groups and hostile foreign powers, we have to deal with a pretty unsavory lot. But we must know who we’re dealing with and case officers must have the knowledge that they will be backed up by headquarters in their dealings with these people. That can only be assured by a system in which headquarters knows what is going on and approves. That is what these guidelines provide and I believe they will prove in the long run to be a great benefit to CIA and its officers.

Stevens: In a notable break from the principles established in the National Security Act of 1947, Congress recently enacted legislation which will, for the first time, permit the Department of Justice to task the Intelligence Community to collect information overseas that will be used as evidence in a criminal prosecution. What are the implications of this new law and how will it work in practice?

Smith: This legislation is permissive; it does not require that the Intelligence Community respond to a request from the law enforcement community. Rather, it takes the somewhat small step of saying that the Intelligence Community may respond to requests from law enforcement agencies to collect information about non-U.S. Persons outside the United States. In many ways, we are doing that now. However, this statute will clarify the authority under which such information is collected for law enforcement purposes.

I believe that clarification is useful. As crime becomes more international, the law enforcement and intelligence communities must work together more closely but without tripping over one another. This statute should help. It is also a useful companion piece to the expansion of the FBI presence outside the United States. It should avoid the need for duplicative efforts between the intelligence and law enforcement communities because it will permit the Intelligence Community to be much more responsive to requests from law enforcement.

Stevens: President Clinton recently acted to ease controls on encryption technology. How do you think we should strike the balance between the legitimate needs of the marketplace and the needs of government with respect to communications security?

Smith: The question of information systems security, of which encryption is a piece, is one of the most difficult questions facing the United States. You may recall that I chaired the Joint Security
Commission in 1994, which devoted a chapter in our final report to this issue.

The United States is vulnerable to attacks from individuals, hostile groups or attacks on our information management systems. Although progress has been made in producing greater security, much remains to be done both in industry and government. There are technical problems, conceptual problems, bureaucratic problems, and legal problems. As you know, the President has recently appointed the Commission on Critical Infrastructure to examine this problem. It will be important to watch what the Commission recommends.

With respect to the export of encryption technology, I believe that the President's decision to shift the responsibility from the State Department to the Commerce Department and to encourage the development of a key management system is a big step in the right direction. It results from a cooperative effort between the government and industry and is an important effort to balance the interests of both groups. Hopefully, it will serve as a model for future cooperation, but this remains one of the most difficult and challenging issues faced by this country.

Stevens: What thoughts do you have about your former office and what recommendations would you make to your successor as he takes over the reins as General Counsel?

Smith: One of the great delights of becoming the General Counsel was to discover the extraordinarily high quality of lawyers in the office. My predecessors did a great job of recruiting first rate people and I was deeply honored to be the General Counsel.

Mike O'Neil will be a great General Counsel. My only advice, which I know he intends to follow, is to work closely with the lawyers in the office and to continue to provide first class legal support to the world's best intelligence service.

New Members Appointed...

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While much of his professional career has been in the field of international trade and investments, he served as Legal Adviser to the Department of State during the final years of the Bush Administration. In that capacity, he led the successful United States legal team in the case brought by Libya before the International Court of Justice following the Pan Am 103 bombing. A member of the Permanent Court of Arbitration, Mr. Williamson serves on the Council of the ABA International Law Section and is Chairman of the Business and Industry Advisory Council Experts Group formed to provide input to the OECD's Negotiating Group for a Multilateral Agreement on Investments.

Ms. Healey is the Senior Counsel (Minority Staff) of the House Permanent Select Committee on Intelligence, where she previously served as staff director of the Subcommittee on Legislation. A graduate of Harvard University and the Georgetown University Law Center, Ms. Healey served for six years as a senior legislative assistant to Representative Barbara B. Kennelly (D-Conn.).

Newly appointed to the Advisory Committee are former President's Intelligence Oversight Board Counsel Seth L. Hurwitz, O'Melveny & Myers associate Michael K. Powell, and congressional staff member Daniel L. Richard (who has been contributing to the Report's National Security Agenda page).

Truman Q. McNulty, of Whyte, Hirschboeck & Dudek in Milwaukee, was named Board of Governor's Liaison, and George Washington Law School student C. Joseph Coleman, III, was appointed to represent the ABA Law Student Division.

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The National Security Agenda . . . .

by Daniel Richard

Congress Approves FY 97 Intelligence Authorization Bill—As the 104th Congress concluded, both the House and the Senate passed the FY 97 conference report on intelligence authorization (H.R. 3259). According to House Intelligence Committee Chairman Larry Combest (R-TX), "The conference report authorized 2.3% more than President Clinton's budget request." The House floor debate on H.R. 3529 focused on allegations that the CIA was involved in drug trafficking in California. This recent accusation, printed in the San Jose Mercury News, overshadowed the underlying jurisdictional struggle between the civilian and military intelligence communities which hampered final passage of this bill. Congressman Combest and Senator Arlen Specter (R-PA), Chairman of the Senate Select Committee on Intelligence, had pushed for giving the DCI greater control over military intelligence operations in order to divert more intelligence resources towards potential threats against nontraditional military targets. However, both the Senate Armed Services Committee and the House National Security Committee rejected these recommendations and successfully defeated many of the reform proposals.

President Approves Defense Conference Report in Omnibus Appropriations Bill—President Clinton signed into law the 1997 Defense Authorization Bill which Congress attached to the omnibus appropriations bill sent to the President. The defense conference agreement (H.R. 3610) appropriates $244 billion for defense programs—$44 billion for weapons procurement, $3.7 billion for ballistic missile defense programs and $1.3 billion for defense operations in Iraq and Bosnia. In a major policy split between legislators and the Administration, Congress appropriated $9.3 billion more than President Clinton requested for defense programs. The Administration initially targeted this excess appropriation as an offset for several domestic programs President Clinton wanted to fund. However, after a heated debate with congressional leaders, the Administration accepted the increased appropriations and relied on banking and communications offsets to fund an assortment of terrorism and education programs.

President Clinton Signs Foreign Operations Appropriations Bill—President Clinton signed a comprehensive spending bill that combined six major appropriations bills into one omnibus budget package. A major component in this package was the Foreign Operations Appropriations bill which appropriated $12.1 billion for foreign aid and export assistance. This bill authorized $3.1 billion in aid for Israel and $2.1 billion for aid to Egypt, preserving the budget levels requested by President Clinton. Abortion opponents fought to deny U.S. funding for international organizations that performed or advocated abortions. However, in a last minute compromise, critics of international population assistance agreed to a $79 million cut in the Administration's budget request and greater restrictions on the President's discretion to distribute funds instead of a complete elimination of funding for international population assistance programs.