DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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DATE: SEP 30 1975

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FILE: B-176994

MATTER OF: Authority to continue Domestic Food Programs under Continuing Resolution

DIGEST: I. Appropriation of funds in continuing resolution for fiscal year 1976 for domestic food programs established under National School Lunch Act and Child Nutrition Act confers upon Department of Agriculture necessary authority to continue such programs until termination of continuing resolution, notwithstanding expiration of funding authorization in enabling legislation on September 30, 1975.

II. Proviso in section of continuing resolution which suspends effectiveness of provisions in appropriation acts making availability of appropriations contingent upon enactment of authorizing legislation, was intended to apply only to appropriation bills prior to their final enactment. Thus, enactment of appropriation act with such contingency provision will supersede continuing resolution, and will suspend availability of fund pending enactment of necessary legislative authority.

This decision to the Secretary of Agriculture is in response to a request dated September 15, 1975, from the General Counsel, Department of Agriculture (DOA), concerning the authority of DOA to continue three domestic food programs after September 30, 1975, in light of the circumstances set forth below. The programs, all administered by DOA, are--

(1) School Breakfast Program, section 4 of the Child Nutrition Act of 1966, as amended, 42 U.S.C. § 1773. This program provides grants to States to provide breakfasts free or at a reduced price to needy schoolchildren.

(2) Special Food Service Program for Children, section 13 of the National School Lunch Act, as amended, 42 U.S.C. § 1761. Established in 1968, this program authorizes grants and other assistance to States to provide nonprofit food service programs for needy and handicapped children in "service institutions" as defined in the Act.

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(3) Special Supplemental Food Program (known as "WIC" -- women, infants, and children), section 17 of the Child Nutrition Act of 1966, as amended, 42 U.S.C. § 1786. WIC was established in 1972 to aid local health or welfare agencies or private nonprofit agencies, and Indian tribes and organizations, in making supplemental foods available to pregnant or lactating women and to infants determined to be nutritional risks.

Funds for the three programs were authorized in the respective sections of the enabling legislation and have been appropriated in the annual DOA appropriation acts. Without legislative action in the First Session of the 94th Congress, the authorization for all three programs would have expired on June 30, 1975. Legislation, H.R. 4222, was introduced early in the session to extend the programs, passed both the House and the Senate, and was reported out of conference on July 30 (H.R. Rep. No. 94-347). However, on September 5, the Senate voted to recommit the conference report. Cong. Rec., September 5, 1975 (daily ed.), S15394-99. In addition, the Agriculture and Related Agencies Appropriation Act for 1976, H.R. 8561, is also presently under consideration. The bill passed the House on July 14, passed the Senate on July 25, and is now ready for conference.

On May 2, 1975, Congress extended the Special Food Service Program to September 30, 1975, by Pub. L. No. 94-20, 89 Stat. 82. This was done to enable proper planning by sponsoring agencies for the summer program without fear of having the program expire midway in the summer. S. Rep. No. 94-57, 94th Cong., 1st Sess. 2 (1975). Similarly, WIC was extended to the same date on May 28, 1975, by Pub. L. No. 94-28, 89 Stat. 96. This was deemed necessary because the program faced interruption if States did not receive their letters of credit containing WIC funds by approximately June 1. S. Rep. No. 94-158, 94th Cong., 1st Sess. 3 (1975). No special legislation was enacted to extend the School Breakfast Program, but it was specifically included in the Joint Resolution making continuing appropriations for fiscal year 1976 ("Continuing Resolution"), Pub. L. No. 94-41 (June 27, 1975) § 101(e) (13th unnumbered paragraph), 89 Stat. 225, 229.

DOA expresses doubt that authority would exist to continue the Special Food Service and WIC Programs beyond September 30, 1975, if H.R. 4222 or similar legislation is not enacted by that date. DOA further believes this result is not affected by the Continuing Resolution. The Department's position is summarized in its September 15 letter as follows:

"We have concluded, however, that there is no basis in Public Law 94-41, the Joint Resolution, for considering

either the Special Food Service Program or the WIC Program as having been continued beyond September 30, 1975, despite the fact that the Resolution does provide funding authority for them in section 101(e) and (f). We reach this result because shortly before the Resolution was passed, legislation specifically extending these two programs to September 30, 1975 was adopted; the Senate Committee Report on the Resolution, while mentioning the School Breakfast Program, is silent with respect to these other two programs; and, there is language with respect to the WIC Program in section 101(f) of the Resolution which excepts section 17(b) (the funding provision) of the Child Nutrition Act."

DOA further believes that the enactment of H.R. 8561 prior to H.R. 4222 would cause termination of all three programs because H.R. 8561 (title III, pages 56 and 57) expressly makes the availability of appropriations for the three programs contingent upon the enactment of "necessary legislative authority."

If neither the authorizing legislation nor the appropriation act is enacted by September 30, it is necessary to consider the effect of the Continuing Resolution in order to determine the status of the programs in question. Pertinent provisions of Pub. L. No. 94-41 are set forth below:

"[T]he follwing sums are appropriated out of any money in the Treasury not otherwise appropriated * * *:

* * * * *

"[Section 101(e)] Such amounts as may be necessary for continuing the following activities, but at a rate for operations not in excess of the current rate unless otherwise provided specifically in this subsection * * *--

"The following activities for which provision was made in the Agriculture-Environmental and Consumer Protection Appropriation Act, 1975: * * *

"food programs under section 32 of the Act of August 24, 1935, and section 416 of the Agricultural Act of 1949, as amended, including cost-of-living increases mandated by law and the School Breakfast Program; * * *.

* * * * *

"[Section 101(f)] Such amounts as may be necessary to permit payments and assistance mandated by law for the following activities which were conducted in fiscal year 1975 — * * *

"Activities under the Food Stamp Act, the Child Nutrition Act, and the School Lunch Act, as amended, except for section 17(b) of the Child Nutrition Act of 1966;

* * * * *

"[Section 102] Appropriations and funds made available and authority granted pursuant to this joint resolution shall be available from July 1, 1975, and shall remain available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) enactment of the applicable appropriation Act by both Houses without any provision for such project or activity, or (c) sine die adjournment of the first session of the Ninety-fourth Congress, whichever first occurs."

We have recognized that Congress may appropriate funds in excess of a cost limitation contained in the original authorization act and that the agency is thereby authorized to continue the program at the higher level. 36 Comp. Gen. 240 (1956). By the same token, it would seem that the appropriation of funds for a program whose authorization is due to expire during the period of availability of the funds, confers the necessary authority to continue the program during that period of availability, in the absence of indication of contrary intent. A Continuing Resolution has the same "force and effect" as an appropriation act. Oklahoma v. Weinberger, 360 F. Supp. 724, 726 (W.D. Okla. 1973). The specific inclusion of the School Breakfast Program in section 101(e) of the Resolution is a clear indication of the intent of Congress that this program continue under the Resolution, notwithstanding the expiration of its authorization on June 30. Thus, it is our view that the appropriation made by Pub. L. No. 94-41 confers upon DOA the authority to continue the School Breakfast Program at the rate specified in section 101(e), until the availability of that appropriation terminates by the occurrence of one of the three events specified in section 102.

The situation with respect to the Special Food Service and WIC Programs is only slightly different, in that, as noted above, Congress

has extended these programs to September 30 by specific legislation. In our opinion, the enactment of this specific legislation (Public Laws Nos. 94-20 and 94-28) shortly before the Continuing Resolution should not be construed as preempting the Resolution since, as discussed above, the timing of those two statutes seems to have been dictated not by any intent to alter the effect of the Continuing Resolution, but rather by the particular needs of the programs involved. Indeed, it is manifest from the enactment of Public Laws Nos. 94-20 and 94-28, the pending extension of authorization in H.R. 4222, which has passed both Houses, and the appropriation provided in H.R. 8561, which has also passed both Houses, that the intent of Congress with respect to the Special Food Service and WIC Programs is that they be continued. It would therefore be illogical to conclude that this intent must be frustrated for the two programs which were not specifically mentioned in the Resolution but which were extended to September 30 while continuing the School Breakfast Program for which no extension was enacted at all for the time being, pending further consideration by the substantive committee.

We note further that the Special Food Service Program and the major portion of the WIC Program are funded under section 32 of the Act of August 24, 1935," as amended. Thus it may be argued that the Continuing Resolution did provide for these programs, albeit not as specifically as in the case of the School Breakfast Program. In this connection, the specific mention in section 101(f) of section 17(b) of the Child Nutrition Act, 42 U.S.C. § 1786(b), does not appear to have been intended to totally exclude the WIC Program from the operation of the Continuing Resolution. The purpose of this specific mention, although it is not discussed in the legislative history, appears merely to be to exclude WIC from the specialized coverage of section 101(f). Section 101(e), quoted above, would in our opinion still be applicable.

In light of the foregoing considerations, it is our view that authority to continue the three subject programs exists under the Continuing Resolution, unless the DOA appropriation act is sooner enacted. Barring some further congressional indication of intent to terminate the subject programs, this authority will extend to the sine die adjournment of the first session of the 94th Congress.

If H.R. 8561, the DOA appropriation act for fiscal year 1976, is enacted prior to H.R. 4222 or similar authorizing legislation, DOA points out that the availability of appropriations for the subject programs would, by the terms of H.R. 8561, be made contingent upon the enactment of "necessary legislative authority" (See p. 56, lines 17-20 and p. 57, lines 10-13 of H.R. 8561). The Department's position

is that the prior enactment of H.R. 8561 would satisfy section 102(a) of the Continuing Resolution, thereby terminating the operation of the Resolution. The subject programs would then terminate because there would be no funds available for them. In this connection, section 101(a)(3) of Pub. L. No. 94-41 provides:

> "Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection as passed by the House as of July 1, 1975, is different from that which would be available or granted under such Act as passed by the Senate as of July 1, 1975, the pertinent project or activity shall be continued under the lesser amount or the more restrictive authority: Provided, That no provision in any appropriation Act for the fiscal year 1976, which makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation, shall be effective before the date set forth in section 102(c) of this joint resolution."

The "date set forth in section 102(c)" is the sine die adjournment of the first session of the 94th Congress. The Department's position regarding the effect of section 101(a)(3) is set forth in the September 15 submission:

> "The subsection of the Resolution in which [the proviso in section 101(a)(3)] appears does not refer to appropriations for the Department of Agriculture. In any event, if the appropriation bill is finally agreed upon and signed by the President it would constitute a later legislative enactment which would seemingly supersede section 101(a)(3) of the Resolution even if it were applicable."

The proviso of section 101(a)(3) was first used in the Continuing Resolution for fiscal year 1973, Pub. L. No. 92-334 (July 1, 1972), 86 Stat. 402. Its purpose was explained by the House Committee on Appropriations as follows:

> "In several of the appropriation bills for 1973 the Senate has attached provisions to a number of appropriations, making their availability contingent on enactment of authorization legislation. Thus, in these instances the effective Senate-passed amounts are zero and if the provisions are operative as of July 1, under the standard application

> of the section 101(a)(3) groundrule they would be without funds come July 1. Pending disposition of the provisions and the authorizations to which they refer, the above-quoted provision in the accompanying continuing resolution is necessary to avoid what would in its absence be the case; namely, an abrupt cutoff of funds for many important on-going programs and agencies come midnight, June 30." H.R. Rep. No. 92-1173, 92d Cong., 2d Sess. 3 (1972).

It seems clear from this legislative history, as well as from the relationship of the language of the proviso to the language in the rest of section 101(a)(3), that the proviso was intended to suspend the effect of contingency provisions only in appropriation bills prior to their final enactment. There is nothing in the legislative history to indicate an intent to cover such bills once they have been enacted. Indeed, such an interpretation would be inconsistent with the basic purport of a continuing resolution, which is to provide funding on an interim basis until the applicable appropriation act can be enacted. To conclude otherwise would require continued operation of these programs under the Continuing Resolution despite the fact that the Congress might choose to deal otherwise with the programs involved in subsequent legislation. Therefore, if H.R. 8561 is enacted prior to new authorizing legislation, or prior to additional extensions such as Public Laws Nos. 94-29 and 94-28, the contingency provisions therein will supersede the Continuing Resolution and will become the controlling legislative statement. In that event, the availability of funds for the subject programs will be suspended pending the enactment of "necessary legislative authority."

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States