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

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March 23, 1984

To the President of the Senate and the
Speaker of the House of Representatives

Pursuant to section 1015 of the Impoundment Control Act, 2 U.S.C. § 686, this letter reports a withholding of $30 million in budget authority provided for grants for the education of immigrant children, which the President previously has not reported to the Congress as required by the Act. Because it appears that there are no plans to obligate the funds before they expire at the end of fiscal year 1984, we are reporting the withholding as a rescission proposal. For purposes of this report, the 45-day period referred to in 2 U.S.C. § 683(b) expires on May 17, 1984.

The funds involved were appropriated by Public Law 98-151, the continuing resolution for fiscal year 1984. The relevant portion of section 101 of Public Law 98-151 provides as follows:

> "(g) Notwithstanding any other provision of this joint resolution, the following amounts are hereby made available, in addition to funds otherwise available, for the following purposes:
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> "GRANTS TO SCHOOLS WITH SUBSTANTIAL NUMBERS OF IMMIGRANTS
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> "For carrying out emergency immigrant education assistance under title V of H.R. 3520 as passed the House of Representatives September 13, 1983, $30,000,000."
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> 97 Stat. 964, 973.

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H.R. 3520 was known as the Rehabilitation Act Amendments of 1984. Title V of H.R. 3520 as passed by the House on September 13 was entitled the "Emergency Immigration Education Act of 1983" and authorized a program of impact aid formula grants for the education of immigrant children. (As discussed below, the enacted version of the Rehabilitation Act Amendments did not include title V.)

The President's budget submission for fiscal year 1985 shows the funds as lapsing at the end of fiscal year 1984, apparently reflecting the decision not to make the funds available for obligation in fiscal year 1984. Section 1012(a) of the Impoundment Control Act, 2 U.S.C. § 683(a), requires the President to submit a rescission proposal to Congress "* * * whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year * * *." Because the executive branch has not reported the withholding, we are reporting it to Congress in accordance with section 1015(a) of the Impoundment Control Act, 2 U.S.C. § 686(a).

The issue presented in this case is whether the $30 million constitutes legally available budget authority. We understand and appreciate the executive branch's position that it does not. If this position is correct, there is, of course, no basis to report a withholding under the Impoundment Control Act.

For the reasons set forth below, however, we believe that the $30 million is legally available. Specifically, we conclude that the language of Public Law 98-151 was effective to create $30 million in budget authority for the program described in title V of H.R. 3520 as passed by the House. Further, in our view, enactment of the final version of this legislation without the title V program did not impliedly repeal the budget authority; thus it remains available.

The reference in Public Law 98-151 to title V of H.R. 3520 as passed by the House on September 13, 1983, could be viewed as not precise enough to constitute a combined authorization and appropriation for the immigrant education program. Instead, one could argue, the reference in the continuing resolution to title V should have included language explicitly "enacting" title V in order to constitute authorization for the obligation of funds for the program. Continuing resolutions, however, commonly provide funding by

reference to bills not yet enacted. (E.g., sections 101(d), (e), and (f) of Pub. L. No. 98-151.) Provisions in continuing resolutions appropriating funds in accordance with unenacted bills, their legislative history (such as a conference report), or the President's budget estimates routinely are found to be specific enough to require that funds be made available as provided in the bills, committee reports, or budget estimates referred to in the continuing resolutions.

In this case, title V of the House-passed bill specified a detailed, self-contained authorization for the immigrant education program. By appropriating the funds in the continuing resolution by reference to title V, Congress achieved the same result as if the entire text of title V were incorporated in the continuing resolution.

There are several provisions in the continuing resolution which specifically provide that the referenced bills are "hereby enacted." For example, two provisions in section 101(c) of the continuing resolution have language specifically "enacting" certain provisions in H.R. 2992, a bill authorizing appropriations for international security and development assistance. However, in both examples, the continuing resolution does not appropriate any funds to carry out the referenced provisions; it only incorporates the authorizing legislation itself. Thus, unlike provisions which appropriate funds, explicit language giving legal effect to the referenced provisions was necessary.

Moreover, even in such cases--where Congress intends, through the continuing resolution, to give effect to provisions in authorizing legislation without also appropriating funds--Congress does not always use specific "enactment" language. See section 108, Pub. L. No. 98-151 (authorizes use of funds in the Federal Building Fund for projects included in the 1984 Treasury appropriation bill as passed either the House or the Senate); section 122, Pub. L. No. 97-276 (October 2, 1982) (prohibits use of funds provided for the Legal Services Corporation for purposes prohibited, limited by, or contrary to certain provisions in H.R. 3480, the bill authorizing appropriations for the Legal Services Corporation, as passed the House on June 18, 1981).

Another example, section 101(d) of the continuing resolution, appropriates funds for programs provided for in the conference version of H.R. 3223, the Agriculture

appropriation bill, "* * * as if such [bill] had been enacted into law." While this language is more specific than the reference to title V, it is not necessary to give effect to the appropriation of funds for title V. In continuing resolution provisions which appropriate funds, the only purpose for referring to a provision of an unenacted bill is to give that provision the force of law; thus the phrase "as if * * * enacted into law" is necessarily implied. Continuing resolutions often give legal force to provisions in appropriation bills without including explicit language to that effect. See, e.g., section 101(f), Pub. L. No. 98-151 (appropriating funds at a rate for operations provided in the Treasury appropriation bill as reported to the Senate on July 20, 1983).

As indicated by the above, one can marshal examples of many different, and to some extent inconsistent, approaches followed by Congress when referring to pending bills in continuing resolutions. However, we believe that Congress' intent in the present case is manifest by the language used and the context of the provision. In our view, Congress could only have intended that the appropriation for the immigrant education program be effective upon enactment of the continuing resolution. The Labor-Health and Human Services (HHS) appropriation bill, which generally contains appropriations for education-related programs, was enacted before passage of the continuing resolution. See Pub. L. No. 98-139, October 31, 1983. Obviously, therefore, Congress did not seek to provide only temporary funding in the continuing resolution for the program in the expectation that a final funding decision would be made during consideration of the Labor-HHS appropriation bill.1/

Moreover, there is no indication in the continuing resolution that the availability of the $30 million was intended to be conditioned on the eventual disposition of H.R. 3520. In fact, the language used--referring to the bill as it passed the House--strongly suggests just the opposite

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1/ In addition, because the Labor-HHS bill had already been enacted, section 102 of the continuing resolution, which states that the funds provided in the resolution are no longer available after enactment of the applicable appropriation bill, does not apply to the $30 million provided for immigrant education.

intent. This conclusion is further supported by the fact that the Senate version of the bill, without any title V program, had been passed several months before enactment of the continuing resolution. See 129 Cong. Rec. S10912-S10917 (daily ed. July 26, 1983). Senate passage of the provision in the continuing resolution appropriating $30 million for title V thus can be seen as indicating the Senate's willingness to support funding for the title V program for one year only, even though its own version of the bill contained no authorization for the program.

The lack of specific authorizing legislation for the program, other than the provision in the continuing resolution itself, does not mean that the $30 million provided in the continuing resolution is unavailable for obligation for the immigrant education program. To the contrary, the provision in the continuing resolution appropriating the funds, standing alone, and in the absence of contrary intent, constitutes sufficient authorization for funding the program. E.g., 55 Comp. Gen. 289, 292 (1975). Therefore, we believe that Public Law 98-151 was complete and legally effective to create $30 million in budget authority for the immigrant education program.

Subsequent to the enactment in November 1983 of the continuing resolution, title V was omitted from S. 1340, the bill passed by Congress in lieu of H.R. 3520 and signed by the President. See Pub. L. No. 98-221, February 22, 1984. However, there is no indication that Congress, by omitting title V, intended by implication to repeal the appropriation for the program in the continuing resolution. The Supreme Court has said that repeal by implication is disfavored, and is justified in only two circumstances: (1) where there is an affirmative showing of intent to repeal; or (2) where the earlier and later statutes are irreconcilable. Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978). In this case, there is no indication in the legislative history of the conference version of S. 1340 that Congress intended to repeal

the appropriation in the continuing resolution.2/ Moreover, the continuing resolution and the authorizing legislation are reconcilable. In the continuing resolution, Congress provided funding for the immigrant education program for one year; in comparison, title V of the authorizing legislation would have authorized appropriations to continue the program for 3 years through fiscal year 1986. Viewed this way, there is no irreconcilable conflict between the two statutes; that is, Congress' decision not to authorize continuation of the program on a long term basis, by omitting title V from the authorizing legislation, is not inconsistent with its decision in the continuing resolution to provide funding for the program for 1 year only.

2/ To the contrary, the Chairman of the House Committee on Education and Labor, Representative Perkins, in discussing the conferees' agreement to drop title V from S. 1340, made clear his understanding that the $30 million in question would nevertheless be available in 1984 for the immigrant education program:

> "Although the conferees did not accept the 3-year authorization for this program included in the House bill, the program was authorized, and a $30 million appropriation made, in the continuing resolution for fiscal year 1984 (H.J. Res. 413). Thus, the program should be operational this year, and I urge the Department of Education to move expeditiously to implement it."
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> 130 Cong. Rec. H669 (daily ed. Feb. 9, 1984).

As a result, it is our view that the $30 million provided in the continuing resolution for immigrant education assistance under title V of H.R. 3520 as passed the House on September 13, 1983, is available for obligation.

Milton J. Socolar
for Comptroller General
of the United States