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[12/8/76]

1-18

December 7, 1976

MR PRESIDENT:

**Public Works Employment Act:
Prison Construction and Renovation**

It was felt that some additional staffing was necessary to that reflected in the attached memorandum prepared by Jim Cannon on the above subject.

This additional staffing reflected the following recommendations:

Jack Marsh - Recommends Option 2.

Alan Greenspan, Max Friedersdorf and Bill Seidman all recommend Option 3.

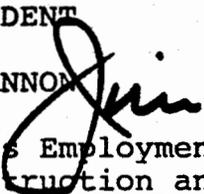
Alan Greenspan offered some additional comments to support his recommendation of Option 3. His comments are at TAB D.

Jim Connor

THE WHITE HOUSE
WASHINGTON

December 2, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES M. CANNON 
SUBJECT: Public Works Employment Act:
Prison Construction and Renovation

This memorandum seeks your guidance on a proposal advanced by the Attorney General for the earmarking of public works construction funds for projects of construction and renovation of State and local penal institutions. Alternatively, the Attorney General suggests that you direct a "high priority" be given to such projects.

BACKGROUND

On July 22, 1976, the Congress overrode your veto of the Public Works Employment Act of 1976, thus enacting the measure into law. As you know, the avowed purpose of the Act is to stimulate employment through the creation of public works jobs. Title I of the Act specifically provided for the funding of projects for the construction, renovation and repair of public facilities.

On October 2, 1976, you signed into law H.R. 15194, the Public Works Employment Appropriations Act of 1976, appropriating some \$3.95 billion for public works projects under the authorization act. Of this amount, up to \$2 billion is available under Title I for construction and renovation projects.

The Economic Development Administration (EDA) in the Department of Commerce is responsible for the administration of this program.

PROPOSAL

The Attorney General has recommended that you direct the Secretary of Commerce to dedicate up to one-fourth of the funds available under Title I of the Act to be expended on construction, renovation or repair of State and local correctional facilities.

In the event you are opposed to an earmarking of these funds, the Attorney General suggests that, at a minimum, you encourage State and local governments to review their needs for construction, renovation and repair of correctional facilities in applying for Title I funds and direct the Assistant Secretary for Economic Development to give "high priority" to these applications.

DISCUSSION

The need for more prisons and for rehabilitation of existing prisons is clear and compelling. As you pointed out in a speech before the Florida Chapter of the Federal Bar Association last February: ". . . America still has the same prison capacity as in 1960, although crime has doubled and the population has burgeoned."

Because of overcrowding and dilapidation, many judges are reluctant to send convicted prisoners to certain jails. Indeed, approximately \$300 million is required merely to bring various correctional facilities now under federal court order into compliance with federal court standards. Moreover, many believe the corollary to mandatory minimum prison sentences, as you and other responsible leaders have advocated, is more prisons. Finally, as a practical matter, dedication of up to one-fourth of the public works construction funds to building new prisons and renovating old ones would put "teeth" in your anticrime proposals. Professor James Q. Wilson, of Harvard University, recently advocated a program of this sort as a fundamental building block of his theory on crime control.

It is clear that at least \$500 million of the \$2 billion could be utilized effectively at the present time for the purpose advanced by the Attorney General.

On the other hand, it should be pointed out that Title I funds will be available for prison construction projects and if a State or local government deems construction or repair of a correctional facility to be a priority it may apply to EDA for public works funds for the project. It could be argued, therefore, that by dedicating a set percentage of these funds to construction or repair of correctional facilities you are limiting the flexibility of State and local governments to set their own priorities. Secondly, dedicating a portion of the funds to one purpose would inevitably create pressures for similar dedications for other purposes. Finally, certain timing problems are raised by the proposal since it would require further delays in the distribution of grants under the Act and could result

in substantial embarrassment to the Administration for its failure to alert State and local officials of the dedication of prison funds in timely fashion.

The alternative recommendation advanced by the Attorney General, to require "high priority" treatment for applications for prison funds would appear to be administratively workable, albeit burdensome, at this stage. Although EDA has all but finalized its consideration of applications for Title I funds, the application period could be extended slightly for the purpose of receiving additional grant requests for the construction or improvement of prison facilities.

Attached (at Tab A) is a copy of the Attorney General's proposal. Also attached are copies of the objections to the proposal which have been raised by Commerce and OMB (at Tab B) and Justice's reponse to those objections (at Tab C).

ACTION

Three options are available to you with regard to the proposal advanced by the Attorney General. An affirmative decision in this regard would be reinforced in your State of the Union message.

1. Direct the Secretary of Commerce to earmark up to one-fourth of the funds available under Title I (\$500 million) to be expended on construction, renovation or repair of State and local correctional facilities. [Principal recommendation of the Attorney General.]

Approve _____ Disapprove _____

2. Direct the Assistant Secretary for Economic Development to give high priority to applications for Title I funds to construct, renovate or repair correctional facilities. [Alternative recommendation of the Attorney General. Recommended by Counsel's Office and the Domestic Council.]

Approve _____ Disapprove _____

3. Advise the Attorney General that you have rejected his proposal. [Recommended by OMB and Commerce.]

Approve _____ Disapprove _____

TAB
A



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 21 1976

1976 OCT 21 PM 7 44

MEMORANDUM FOR:

JAMES CANNON

FROM:

PAUL O'NEILL
Acting Director

A handwritten signature in cursive script, appearing to read "O'Neill", written over the typed name "PAUL O'NEILL".

SUBJECT:

Draft Memo on Public Works and
Prison Construction

Your memorandum of October 16 asks for our views on the proposed memorandum to the President regarding the potential use of Local Public Works program funds, under Title I of the Public Works Employment Act of 1976, for the construction of jails and prisons. We do not believe the memorandum should be sent to the President.

I believe that the possibility of emphasizing certain types of projects under the Local Public Works program was discussed a few weeks ago at a Cabinet meeting and subsequently dropped as being undesirable. As you note in your draft, it would tend to create multiple, similar demands from other areas, such as for parks, health care facilities, pollution abatement, etc. In addition, such an emphasis would open the Administration to charges of subverting the legislation. The clear intent of the law is to allow local governments, as opposed to States and the Federal Government, to select those projects which they considered of higher priority.

As well, there are practical timing problems with your recommendations. The Department of Commerce has already published final regulations to implement the program and will begin taking applications on October 26, less than a week from now. Any changes at this point would delay the starting date for the program. However, there is reason to believe that several penal projects will be funded. The Department of Commerce has been working with LEAA to ensure that high priority projects which can be started within 90 days will be considered.

For the reasons I have noted above, I do not believe that there is any real issue to be presented to the President. Therefore, your draft memorandum should not be sent.



Office of the Attorney General

Washington, D. C. 20530

November 24, 1976

076 NOV 24 PM 4 35

MEMORANDUM FOR JAMES CANNON
ASSISTANT TO THE PRESIDENT
FOR DOMESTIC AFFAIRS

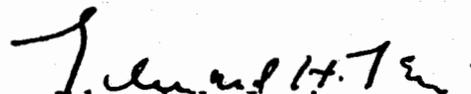
SUBJECT: The Public Works Employment Act of 1976

As you know, the Department of Justice has urged that a substantial portion of the construction and renovation funds available under Title I of the Public Works Employment Act be allocated for local penal facilities. The Department of Commerce has responded that since the Act itself does not authorize the executive branch to use a portion of the funds for a specified type of facility, the Administration is prohibited from making such an application. For the reasons outlined in the short memorandum that is attached (Appendix A), that assumption is not supportable. For the reasons set forth in the original Department of Justice memorandum (Appendix B), the need for local penal facilities is crucial and realistically there appears to be no other source of funds to meet that need.

I consider the opportunity presented to be of unusual importance. This Administration has strongly and consistently stressed the deterrent value of the criminal law. Yet where there are no available penal facilities there can be no real deterrent value.

This Administration has been presented with a unique opportunity to do something about the problem. It would be a sad mistake if such an opportunity were permitted to pass.

I hope that you can bring this matter to the attention of the President in the very near future, and I ask that you convey to him my strong personal support for the program.


Edward H. Levi
Attorney General

Attachments

11240

OPP
9/7/76

Funding State and Local Penal and Correctional Facilities
under the Public Works Employment Act of 1976

This memorandum addresses the issue whether the Public Works Employment Act of 1976 can be of assistance in helping state and local governments meet their requirements for adequate penal facilities.

Summary

The funds authorized by the Act can be used to aid local governments in constructing new jails and in renovating old ones. Such expenditures would be within the purposes of the Act, and the funds could be used quickly and efficiently within the allotted time limits. Such use of the funds could not only have a potential effect in reducing the level of the nation's crime, but could result in substantial savings to the federal government by obviating a considerable amount of proposed federal jail construction.

Discussion

I. The Public Works Employment Act of 1976.

A. The Statute.

On July 22, 1976, Congress enacted the Public Works Employment Act of 1976 (P.L. 94-369), an intended anti-recession measure under which federal funds will be distributed to state and local governments under the auspices of the Economic Development Administration of the Department of Commerce. Title I of the Act is intended to produce greater employment through the funding of projects for the construction, renovation, and repair of public facilities. 1/ (A copy of the Act is appended at Tab A.)

1/ Only Title I of the Act is directly relevant to the subject of this memorandum. Title II, which seeks to avoid recessionary budget cuts by providing grants to local governmental units to be used for the maintenance of basic governmental services, may have some marginal relevance. Title III (amending the Federal Pollution Control Act) is irrelevant.

Section 111 of Title I of the Act authorizes an appropriation of up to \$2 billion for the period ending September 30, 1977. 2/ The money is to be distributed in the form of grants of 100 percent of the cost of the projects funded (Section 103(b)). The money may also be distributed as increased contributions to projects initiated under other federal legislation, raising the federal share of such projects to 100 percent (Section 104), and to projects initiated under state or local laws requiring a contribution (Section 105).

The money is to be expended for construction, renovation, repair, or improvement of public works projects (Section 103(a)), or to produce plans, specifications, and designs for such projects (Section 103(a)). It may not be used for site acquisition (Section 106(b)), for building certain water projects (Section 106(a)), or for maintenance of projects constructed with funds from the Act (Section 106(c)). Since the purpose of the Act is to provide needed employment promptly, grants are to be conditioned upon assurances that the projects can be started with on-site labor within 90 days of approval (Section 106(d)).

The money is to be allocated to projects throughout the nation (Section 108(a)), with preference to areas of high unemployment (70 percent, preferentially, to those areas where unemployment exceeds 6 1/2 percent and the national average and 30 percent to those areas where the rate is below the national average but in excess of 6 1/2 percent) (Section 108(c)). Priority is to be given to projects of local, as opposed to state, governments (Section 108(b)).

B. The Implementing Regulations

Under Section 107 of the Act, the Secretary of Commerce is to issue implementing regulations within 30 days of passage. Those regulations were issued on August 20, 1976, under the signature of the Assistant Secretary for

2/ On August 25, by a vote of 311-72, the House of Representatives passed a bill (H.R. 15194) appropriating \$2 billion for Title I projects. The next day the Senate Appropriations Committee reported the House bill to the floor of the Senate, increasing the appropriation for the whole bill by \$500 million. It is likely that a conference will be required after Senate passage.

Economic Development, and were published in the Federal Register on Monday, August 23 (41 F.R. 35670). (A copy is appended at Tab B.)

The regulations are not restrictive. For the most part, they merely provide detail to the eligibility aspects of the Act. However, Section 316.11(c) of those regulations requires that any detention facilities funded under Title I must be in compliance with the provisions of Part E of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750b(1), (4)-(9)). Those provisions require that applications include a comprehensive statewide program, an emphasis on community based corrections, advanced design features, regional sharing (where feasible and desirable); advanced correctional practices, personnel standards, and drug and alcohol treatment. Since only the first of these requirements would be particularly burdensome, and since it would already have been met by state planning agencies in earlier applications to LEAA for funds for penal or correctional purposes, these requirements do not appear to be a serious bar to the effective use of Title I funds for such purposes. 3/

Conclusion: Funds under the Act may be used to build penal and correctional facilities and to renovate existing facilities. The strictures of the Act, however, indicate that the bulk of this money would go to local communities, and thus that the funds used for such purposes would most likely be available for jails rather than penitentiaries.

II. The Need for Jail Construction and Renovation.

There is an urgent, demonstrable need for construction and renovation of jails. The nature of the specific need varies with the size of the community.

3/ The regulations (§316.10(g)) limit project costs to \$5 million but permit the Assistant Secretary to waive the limit for "good cause." This provision would affect only a limited number of large, metropolitan jail construction projects, and "good cause" in those cases would seem to be apparent.

Jails located in or near large metropolitan areas are commonly overcrowded. 4/ The jail in Prince Georges County is operating at 297% above capacity. Florida is using tents and airplane hangars to house prisoners. Maryland has purchased a "mothballed" freighter to use as a prison. The Law Enforcement Assistance Administration has recently resorted to authorizing the purchase of hundreds of trailers for use as substitute facilities.

Most rural jails, although small (75 percent have capacities of 20 or less), are still large enough to handle existing and projected near-term needs. However, the conditions of many of these jails have been described by knowledgeable authorities as anywhere from "despicable" to "abominable." Six percent are more than 100 years old; 12 percent are more than 75 years old; 25 percent are more than 50 years old. Eighty percent have no recreational facilities available and many have no visitation facilities. Some have totally inadequate sanitation facilities. Many present safety hazards -- to both inmates and staff -- as a result of non-locking cell doors and antiquated security features.

These overcrowded and substandard conditions have a drastic effect on the criminal justice system. Judges are understandably reluctant to detain persons prior to trial where such facilities exist, and, although evidence suggests incarceration of convicted offenders deters crime, 5/ in the last few years an increasingly number of serious offenders has been sentenced only to probation, frequently because judges are unwilling to send offenders to overcrowded

4/ The 1972 census stated that five percent (or 167) of the nation's jails were then overcrowded. Many experts now allege that all urban jails are overcrowded and that rural and county jails are nearing a crisis point.

5/ For a general discussion of the subject, see James Q. Wilson, Thinking About Crime (New York, Basic Books, 1975); Norval Morris, The Future of Imprisonment (Chicago, University of Chicago Press, 1974); and Ernest van den Haag, Punishing Criminals (New York, Basic Books, 1975).

or substandard jail facilities. Indeed, in recent years the conditions in some penal facilities have been found so poor that federal courts have ruled that being sentenced to them constitutes cruel and unusual punishment under the Eighth Amendment of the Constitution. 6/ The states of Alabama and Louisiana currently have all their jails under either court attack or court order. It is acknowledged by all who have studied the field that these local jails are in serious need of renovation, both for humanitarian and correctional purposes.

Other detrimental consequences can be found where overcrowded or poorly designed jails exist, since most jails are multi-use facilities. Thirty percent of jails house juveniles with adult offenders. Ten percent do not segregate mental patients awaiting commitment. Some sixty percent do not segregate pretrial detainees.

Conclusion: There is a pressing and widely-recognized need for jail construction and renovation. (A copy of a recent GAO study that is in agreement with this conclusion is attached at Tab C. See pp. 19-27).

6/ See, e.g., Costello v. Wainwright, 525 F.2d 1239 (5th Cir. 1976); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974); Gates v. Collier, 501 F.2d 129 (5th Cir. 1974).

III. The Need for Federal Funds for Such Purposes.

Penal and correctional facilities have never ranked high in the priorities of taxpayers. Even where some local funds are available, they are usually inadequate to permit the construction of modern facilities. For example, while correctional experts are in general agreement that single inmate cells should be the rule (for safety and privacy purposes), local authorities are reluctant to build such facilities because of their cost.

State funding may be a more realistic means of providing adequate jails than local funding. Yet those states which have inadequate jails are also likely to have inadequate penitentiaries, and consequently statewide systems can be expected to continue to receive higher priority.

Past efforts at federal funding have not been particularly successful because of two principal shortcomings. First, the total federal funds available have been inadequate for the purpose. The LEAA funds available for jail construction and repair, under Part E of the Safe Streets Act, total \$37 million for FY 1977 and \$41 million for FY 1978. Yet LEAA has projected a figure of \$300 million as necessary merely to bring those correctional facilities now under federal court orders into compliance with court standards, and a joint ABA/LEAA study estimates the cost of bring all correctional facilities up to such standards at \$3.5 to \$4.7 billion. (A copy of the ABA/LEAA study is appended at Tab D.) Second, problems have been encountered as a result of the requirement that, as a requisite to obtaining LEAA funds, the local governments supply up to 50 percent of the costs of such projects. Some locales, even where under court order, have simply been unable to raise the necessary revenue. Some are reluctant to expend the required matching funds because of the view that the proposed facilities are too expensive as a result of what they perceive as unnecessarily high LEAA standards (e.g., single occupant cells). Others, under pressure from federal courts to renovate their jail systems, quite naturally resent being forced to expend local funds at federal direction.

The availability of federal funds an order of magnitude greater than those previously available for penal facilities, dispensed under a program that places no burden upon states and localities to produce matching funds, should resolve most of the funding problems previously encountered.

A further rationale for the use of federal funds for such purposes is the long-term savings that can accrue to the federal government. The Bureau of Prisons contracts with local jails for housing of federal prisoners (there are some 6,100 federal prisoners, about one-fourth of the total, in non-federal facilities). The inadequacies of many local jails, however, has led to the construction by the Bureau of three federal Metropolitan Correctional Centers (MCC's). The Bureau has determined that there is an immediate need for construction of MCC's in three more metropolitan areas ^{7/}, and is studying the need for construction of MCC's in ¹⁷ additional cities. ^{8/} There is much to be said for aiding in the improvement of local jails and avoiding the construction of at least some of these MCC's, especially since the MCC's already constructed have served the purpose of providing models for jail construction. The construction of a dozen more such facilities could be avoided through the use of Title I funds to improve local jails. ^{9/}

Conclusion: There does not appear to be any other adequate, practicable source of funds for the building of local penal facilities, and the use of Title I funds for this purpose may result in substantial savings from other parts of the federal budget.

^{7/} These metropolitan areas are Baltimore-Washington, Detroit, and Phoenix.

^{8/} These cities are Atlanta, Boston, Houston, Los Angeles, Miami, New Orleans, Philadelphia, St. Louis, East St. Louis, San Antonio, San Francisco, Sacramento, Tampa, Tucson, and Orlando.

^{9/} The 17 cities indicated include some within the same state. The strictures of the Public Works Act would probably limit construction to one jail per state, thus reducing to 12 the total of MCC's that could be obviated.

IV. The Ability to Plan and Execute a Program of Construction Within the Stated Time Limits.

Since the Public Works Employment Act is designed as an immediate anti-recession measure, it is replete with provisions requiring the prompt expenditure of the funds authorized. Intelligent spending for penal facilities can, in fact, be accomplished promptly. 10/

The federal government is in a unique position to plan and execute an expedited program of construction of penal and correctional facilities. The Bureau of Prisons has had long, high-level experience with planning such facilities. Its National Institute of Corrections is designed to provide technical assistance to local penal and correctional authorities, and the Bureau's task force on jails is nearing completion of its work. Moreover, the National Clearinghouse for Criminal Justice Planning and Architecture (an LEAA-funded group at the University of Illinois) has developed comprehensive plans not only for general application but for specific application as well; it has plans for renovating all correctional facilities in Nevada, Illinois, New Jersey, Hawaii, and Oklahoma, among others, and has specific plans for a number of local jails. 11/ (An example of one such plan is attached at Tab E. See pages 67-93.)

The above groups can readily be formed into a task force to set specific standards for applicants. Although, in the past, local authorities have opposed national standards because of the cost of their implementation, with 100 percent federal funding such objections should be avoided.

10/ Such a utilization of Title I funds would help in other ways to achieve the purpose of the legislation. Section 316.10(a)(2)(i)(C) of the implementing regulations states a strong preference for labor intensive projects. Experts on penal and correctional architecture have advised the Department of Justice that jail facilities are more labor intensive than other public works projects because they require little capital for special equipment or expensive frills, they are not subject to prefabrication, and they use a wide variety of labor skills.

11/ These include at least five county jails in Texas, Indiana, and Nebraska. State and county plans are being developed for Oregon, Colorado, New Hampshire, Tennessee, and New Mexico. Kentucky and Kansas have completed their

Conclusion: If some portion of the Title I funds are earmarked for correctional purposes, they can be expended within the timetable of the Act with a substantial level of efficiency.

V. The Amount of Funds Needed.

Using as a base figure the \$300 million that LEAA has projected as necessary merely to comply with existing court orders, and adding to that figure approximately \$180 million estimated as necessary for construction, expansion, and renovation in a dozen large cities where the federal needs are greatest ^{12/} and an additional \$100 million for renovation of small jails not presently under court order, the sum of \$580 million would be an appropriate benchmark. Of course these figures are estimates, and the need for funds is greater than is reflected by these figures. Moreover, it cannot be determined which areas of the country would be eligible for funds under the unemployment formula used in the Act. Nevertheless, \$580 million appears to be a reasonable working estimate. A substantially smaller program would do no more than enable localities to comply with court orders. A substantially larger program might lead to undesirable inefficiency in expenditure.

Conclusion: A sum of money between \$500 million and \$600 million can effectively be expended for this purpose in the coming year.

VI. Arguments Against Such a Program.

The chief arguments against this program would be anti-prison sentiment and the existence of greater priorities.

The arguments regarding anti-prison sentiment, ^{13/} can be disposed of on the merits. In any event, the force of any such arguments could be reduced by concentrating initially on renovation of existing facilities since many of those who are opposed to prison expansion are strongly in favor of modernizing existing facilities.

^{12/} They would be selected from among those cities targeted for MCC construction.

^{13/} Such sentiment is divided among those who believe that no one should be incarcerated and those who feel that tax money should not be wasted building "country clubs" for criminals.

The arguments regarding priorities are of greater concern, since many localities may indeed have more urgent needs. Certainly institutions for the mentally retarded, hospitals, and the like will to many be more attractive projects than jails. Nevertheless, given the national preoccupation with the problem of crime and the potential of such a construction program for helping indirectly to meet that problem, the expenditure for prison facilities seems clearly justifiable. Moreover, since the sum suggested is only one-fourth of that authorized, other priorities should be able to be dealt with under the Act.

Conclusion: There appear to be no insurmountable arguments against such a program.

Recommendation

The first recorded reference to building a jail in America appears to be a 1632 order by the city of Boston requiring "a people pen to be constructed with all convenient speed." We still tend to address the issue only when, under all the circumstances, we find it convenient. The Public Works Employment Act seems to have made addressing the problem surprisingly convenient at this time, and the opportunity should not be lost.

TAB.
B



215 00 21 4 39

Mr. James Cannon
Assistant to the President
for Domestic Affairs
The White House
Washington, D. C. 20500

OCT 21 1976

Dear ~~Mr. Cannon~~

This is in reply to your request for comments regarding your Draft Memorandum transmitting the Department of Justice proposal that the President direct that up to 25% of the \$2 billion appropriation for Title I of the Public Works Employment Act of 1976 ("LPW") be expended for State and local correctional facilities. In the alternative you propose for the President's consideration: (1) encouragement of State and local government to submit LPW requests for correctional facilities, with EDA to give high priority to these applications, or (2) calling upon such governments to give priority attention to such facilities when applying for Title I funds.

It is our position that the LPW Act does not authorize this Department (a) to set aside a portion of LPW funds for a specified type of facility, or (b) to set a high priority for correctional facilities. Therefore of the three opinions presented by you, the last option remains as the only one without legal objection.

The LPW requires grants to be for public works projects submitted by State or local governments when the projects are related to existing plans and programs of a local or regional nature. (Section 108(d) and (g) of LPW.) The only priority authorized for projects by LPW is for the minimum and maximum amounts to be granted within a State (§108(a)) and for local government projects (§108(b)). Because of the time constraints contained in LPW, the projects of necessity and design are those that have been planned but have not been built because of lack of funding. Consequently the statute

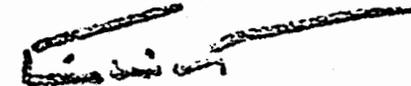


does not authorize the Federal Government to set aside funds for specified facilities or to create a priority for such facilities.

While we would not of course question the legality of the third suggested option, calling upon State and local governments to give priority attention to construction, renovation, and repair of correctional facilities in applying for Title I funds, we do question the wisdom of involving the President in such a move at this late date. Notice has already been published in the Federal Register that EDA will begin receiving applications under the LPW program on October 26, 1976. Our communications with prospective applicants strongly indicate that applications already prepared or now in final stages of completion and involving requests for many times the amount of program resources available will be filed in the very early days of the program. We urgently suggest that any effort toward a dramatic change in the program at this late date would not be well received by the many thousands of State and local officials who have developed their proposals and kindled their expectations on the freedom of choice which is now implicit in the program.

Attached for your information are the published LPW regulations and a copy of the LPW application.

Sincerely,



Elliot L. Richardson

Enclosure

TAB
C

Criticism of the Department of Commerce view that Public Works Employment Act funds may not be dedicated for construction of local penal facilities

It is the view of the Department of Commerce that funds authorized under Title I of the Public Works Employment Act of 1976 may not be dedicated for a particular purpose, and thus that the Department of Justice proposal to dedicate a substantial portion of such funds for the construction and renovation of local penal facilities is not permissible under the Act. We disagree.

The view of the Commerce Department is set forth in the following paragraph of the letter dated October 21, 1976:

"The LPW requires grants to be for public works projects submitted by State or local governments when the projects are related to existing plans and programs of a local or regional nature. (Section 108 (d) and (g) of LPW.) The only priority authorized for projects by LPW is for the minimum and maximum amounts to be granted within a State (§108(a)) and for local government projects (§108(b)). Because of the time constraints contained in LPW, the projects of necessity and design are those that have been planned but have not been built because of lack of funding. Consequently the statute does not authorize the Federal Government to set aside funds for specified facilities or to create a priority for such facilities."

The first sentence appears to suggest that the Act requires that the funds be spent only on existing plans. The sections cited for this position, however, do not establish such a requirement. Section 108(d) merely states the formula for priorities under the Act as they are related to unemployment rates. Section 108(g) simply requires that the specific requests of local communities be related to existing regional development plans "so as to avoid harmful or costly inconsistencies or contradictions" Moreover, even if the Act did contain such a requirement, the fact is that there is an abundance of well-developed, existing plans for local penal facilities. Indeed, this was pointed out in the initial Department of Justice memorandum as a strong factor in support of the practicality of the Justice proposal.

The second sentence states that the only priorities "authorized" under the Act are the minimum and maximum amounts available to each state and the preference for local projects. In fact, there are other priorities, such as that mentioned in section 108(d), but it is misleading to refer to these as the only priorities authorized since to do so suggests that other priorities are not authorized. In fact, these are the only priorities required, and nothing in the Act limits or bars the Executive Branch from inserting other priorities.

The broad language of section 103(a) of the Act suggests strongly that the discretion lodged in the Secretary can be exercised as he sees fit unless constrained by the specific restrictions established elsewhere in the Act. The contrary assumption of the Department of Commerce would ultimately lead to the conclusion that Congress has granted the Secretary discretion to act only in a haphazard fashion and has barred him from acting in an orderly fashion. Yet the regulations issued by the Department of Commerce in implementation of the Act indicate that Commerce previously has taken a different view. Those regulations establish priorities beyond those specified in the Act and mentioned by Commerce. For example, priorities of a virtually absolute nature are given for projects under \$5 million and for projects taking less than two years to complete. See 41 FR 35673 (proposed sections 13 CFR 316.10 (g) and (h)).

In short, there is no legal basis for assuming that the Act limits the discretion of the Secretary in any way other than as explicitly set forth in the Act itself. None of the explicit limitations interfere with the discretion of the Secretary to secure a collateral benefit from the legislation by allocating a portion of the funds for particular purposes serving both state and national interests.* Thus a portion of the funds may properly be set aside for the purpose urged by the Department of Justice.

* Neither would the use of the funds in the manner proposed be restricted by the Impoundment Control Act of 1974 (31 U.S.C. 1400-1407). That Act curtails executive discretion only to the extent that such discretion is applied to withhold or delay the expenditure of appropriated funds.

Criticism of the Department of Commerce view that Public Works Employment Act funds may not be dedicated for construction of local penal facilities

It is the view of the Department of Commerce that funds authorized under Title I of the Public Works Employment Act of 1976 may not be dedicated for a particular purpose, and thus that the Department of Justice proposal to dedicate a substantial portion of such funds for the construction and renovation of local penal facilities is not permissible under the Act. We disagree.

The view of the Commerce Department is set forth in the following paragraph of the letter dated October 21, 1976:

"The LPW requires grants to be for public works projects submitted by State or local governments when the projects are related to existing plans and programs of a local or regional nature. (Section 108 (d) and (g) of LPW.) The only priority authorized for projects by LPW is for the minimum and maximum amounts to be granted within a State (§108(a)) and for local government projects (§108(b)). Because of the time constraints contained in LPW, the projects of necessity and design are those that have been planned but have not been built because of lack of funding. Consequently the statute does not authorize the Federal Government to set aside funds for specified facilities or to create a priority for such facilities."

The first sentence appears to suggest that the Act requires that the funds be spent only on existing plans. The sections cited for this position, however, do not establish such a requirement. Section 108(d) merely states the formula for priorities under the Act as they are related to unemployment rates. Section 108(g) simply requires that the specific requests of local communities be related to existing regional development plans "so as to avoid harmful or costly inconsistencies or contradictions" Moreover, even if the Act did contain such a requirement, the fact is that there is an abundance of well-developed, existing plans for local penal facilities. Indeed, this was pointed out in the initial Department of Justice memorandum as a strong factor in support of the practicality of the Justice proposal.

The second sentence states that the only priorities "authorized" under the Act are the minimum and maximum amounts available to each state and the preference for local projects. In fact, there are other priorities, such as that mentioned in section 108(d), but it is misleading to refer to these as the only priorities authorized since to do so suggests that other priorities are not authorized. In fact, these are the only priorities required, and nothing in the Act limits or bars the Executive Branch from inserting other priorities.

The broad language of section 103(a) of the Act suggests strongly that the discretion lodged in the Secretary can be exercised as he sees fit unless constrained by the specific restrictions established elsewhere in the Act. The contrary assumption of the Department of Commerce would ultimately lead to the conclusion that Congress has granted the Secretary discretion to act only in a haphazard fashion and has barred him from acting in an orderly fashion. Yet the regulations issued by the Department of Commerce in implementation of the Act indicate that Commerce previously has taken a different view. Those regulations establish priorities beyond those specified in the Act and mentioned by Commerce. For example, priorities of a virtually absolute nature are given for projects under \$5 million and for projects taking less than two years to complete. See 41 FR 35673 (proposed sections 13 CFR 316.10 (g) and (h)).

In short, there is no legal basis for assuming that the Act limits the discretion of the Secretary in any way other than as explicitly set forth in the Act itself. None of the explicit limitations interfere with the discretion of the Secretary to secure a collateral benefit from the legislation by allocating a portion of the funds for particular purposes serving both state and national interests.* Thus a portion of the funds may properly be set aside for the purpose urged by the Department of Justice.

* Neither would the use of the funds in the manner proposed be restricted by the Impoundment Control Act of 1974 (31 U.S.C. 1400-1407). That Act curtails executive discretion only to the extent that such discretion is applied to withhold or delay the expenditure of appropriated funds.

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

December 6, 1976

MEMORANDUM FOR JIM CONNOR

FROM: ALAN GREENSPAN 

This is in response to your request for my comments on the December 6 memo on earmarking \$500 million of Federal funds for state and local government correctional institutions, under the Public Works Employment Act of 1976.

The purpose of the Act was to let state and local governments allocate the funds among public works projects in the way they deemed most efficient. State and local governments are presumably the best judge of their own requirements with regard to correctional institutions and other projects. Experience indicates that when constraints are imposed on the resource allocation for public works projects, in some areas projects with low priorities may be funded while other, high priority projects, cannot be funded. I do recognize the special law enforcement problems created by crowded and antiquated correctional facilities. Although there is a Federal interest, state and local governments can apply for funds for correctional institutions if they feel such a need.

I, therefore, urge the adoption of option 3, that the Attorney General's proposal be rejected.



THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date:

Time:

FOR ACTION:

- Jack Marsh
- Alan Greenspan
- Bill Seidman
- Max Friedersdorf

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date:

Monday, December 6

Time:

2:00 p. m.

SUBJECT:

Cannon memo (12/2) re: Public Works Employment Act:
Prison Construction and Renovation

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

Alan Greenspan - option 3 with comments
Jack Marsh - option 2
Max Friedersdorf - Recommend approval of option 3
Seidman - option 3

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

Time:

FOR ACTION: Jack Marsh
Alan Greenspan
Bill Seidman
Max Friedersdorf

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: Monday, December 6

Time: 2:00 p. m.

SUBJECT:

Cannon memo (12/2) re: Public Works Employment Act:
Prison Construction and Renovation

ACTION REQUESTED:

 For Necessary Action For Your Recommendations Prepare Agenda and Brief Draft Reply For Your Comments Draft Remarks

REMARKS:

*Recommended Approval
- Option 3 -*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date:

Time:

FOR ACTION:

Jack Marsh
Alan Greenspan
Bill Seidman
Max Friedersdorf

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date:

Monday, December 6

Time:

2:00 p. m.

SUBJECT:

Cannon memo (12/2) re: Public Works Employment Act:
Prison Construction and Renovation

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

*Optim
3 - approve
jws*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

in substantial embarrassment to the Administration for its failure to alert State and local officials of the dedication of prison funds in timely fashion.

The alternative recommendation advanced by the Attorney General, to require "high priority" treatment for applications for prison funds would appear to be administratively workable, albeit burdensome, at this stage. Although EDA has all but finalized its consideration of applications for Title I funds, the application period could be extended slightly for the purpose of receiving additional grant requests for the construction or improvement of prison facilities.

Attached (at Tab A) is a copy of the Attorney General's proposal. Also attached are copies of the objections to the proposal which have been raised by Commerce and OMB (at Tab B) and Justice's reponse to those objections (at Tab C).

ACTION

Three options are available to you with regard to the proposal advanced by the Attorney General. An affirmative decision in this regard would be reinforced in your State of the Union message.

1. Direct the Secretary of Commerce to earmark up to one-fourth of the funds available under Title I (\$500 million) to be expended on construction, renovation or repair of State and local correctional facilities. [Principal recommendation of the Attorney General.]

Approve _____ Disapprove _____

2. Direct the Assistant Secretary for Economic Development to give high priority to applications for Title I funds to construct, renovate or repair correctional facilities. [Alternative recommendation of the Attorney General. Recommended by Counsel's Office and the Domestic Council.]

Approve _____ Disapprove _____

3. Advise the Attorney General that you have rejected his proposal. [Recommended by OMB and Commerce.]

Approve _____ Disapprove _____