



U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 11 2017

The Honorable Paul D. Ryan  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Speaker:

We write to provide our views on H.R. 4243, the “VA Asset and Infrastructure Review Act of 2017,” as reported by the House Committee on Veterans’ Affairs on November 8, 2017. H.R. 4243 would create an Asset and Infrastructure Review Commission (Commission) to make recommendations to the President on infrastructure use within the Department of Veterans Affairs. The Department of Justice objects to a provision in the Act that raises serious constitutional concerns by interfering with communication within the Executive Branch. We also wish to recommend several amendments to clarify certain provisions of the bill.

**1. Requirement to Publish Communications (Section 108(a))**

Section 108(a) would provide that “[n]ot later than 24 hours after the transmission or receipt of any communication under this title that is transmitted or received by a party specified in paragraph (2), the Secretary of Veterans Affairs shall publish such communication online.” Parties specified in paragraph (2) include “[t]he Secretary of Veterans Affairs,” “[t]he Commission,” and “[t]he President.” This provision would infringe on the deliberative process and presidential communications components of executive privilege and would be unconstitutional.

Communications to or from the Secretary, the Commission, and the President under the Act would include material protected by the presidential communications and deliberative process components of executive privilege. *See Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 8-10 (2008) (“Executive privilege . . . extends to all Executive Branch deliberations, even when the deliberations do not directly implicate presidential decisionmaking.”); *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) (“The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations.”). Because section 108(a) would compel the disclosure of such material, the provision raises serious separation of powers concerns. Accordingly, we recommend making

section 108(a)(1) precatory, either by changing the word “shall” to “should” or by including at the end of the section a phrase such as, “as the Secretary deems appropriate.”

**2. Application of NEPA to Property Disposal (Section 105(c))**

Section 105(c)(2)(B) contains a series of provisions addressing the applicability of the National Environmental Policy Act (NEPA) to VA property disposal processes under this Act.

It is unclear whether it is the Commission or the VA which will be selecting the “receiving facility” under these provisions (i.e., the facility to which functions would be transferred from a facility that is to be closed or realigned). Assuming it is the Commission that will do so, we recommend adding the phrase “by the Commission” after the term “selected” in subparagraphs (ii) and (iii) of this section in order to clarify this point.

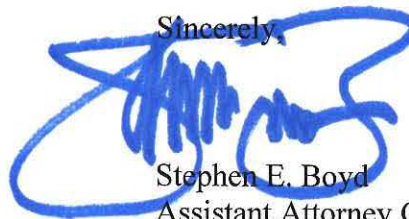
**3. Application of CERCLA to Property Transfers (Section 105(e))**

Section 105(e) provides VA with authority, “subject to” Section 120(h) of the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), to transfer property to a recipient who agrees to perform all required environmental remediation.

However, CERCLA Section 120(h) requires, among other things, an agency to include in a deed a covenant warranting that the agency has taken all necessary response actions at a property. It is thus not clear how the VA could carry out the contemplated transfer of property (to a recipient who agrees to perform required remediation) “subject to [CERCLA 120(h)].” We recommend that the drafters’ intent behind this provision be made clear.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Stephen E. Boyd  
Assistant Attorney General

cc: The Honorable Nancy Pelosi  
Minority Leader