

Calendar No. 727

115TH CONGRESS }
2d Session }

SENATE

{ REPORT
115-424 }

CIVIL RIGHTS COLD CASE RECORDS
COLLECTION ACT OF 2018

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 3191

TO PROVIDE FOR THE EXPEDITIOUS DISCLOSURE OF RECORDS
RELATED TO CIVIL RIGHTS COLD CASES, AND FOR OTHER
PURPOSES



DECEMBER 10, 2018.—Ordered to be printed

—
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CIVIL RIGHTS COLD CASE RECORDS COLLECTION ACT OF 2018

DECEMBER 10, 2018.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 3191]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 3191) to provide for the expeditious disclosure of records related to civil rights cold cases, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 3191, the Civil Rights Cold Case Records Collection Act of 2018, establishes a records collection at the National Archives and Records Administration (NARA) to ensure the physical integrity and eventual public availability of records related to civil rights cold cases.

II. BACKGROUND AND THE NEED FOR LEGISLATION

On October 26, 1992, recognizing the historical significance of the law enforcement records related to the assassination of President John F. Kennedy, President George H.W. Bush signed into law the

President John F. Kennedy Assassination Records Collection Act of 1992 (Kennedy Collection Act).¹ It established a special collection at NARA for records related to President Kennedy's assassination, a process for Federal agencies to transfer records to NARA, and a review board to determine how and when to make records public.² The bill also established a process for the President to delay the release of records as appropriate.³

On October 21, 2017, President Donald J. Trump announced via Twitter that “[s]ubject to the receipt of further information, I will be allowing, as President, the long blocked and classified JFK FILES to be opened.”⁴

On October 26, 2017, Advanced Placement U.S. Government students at Hightstown High School in New Jersey called for the release of not only the Kennedy records, but also records related to civil rights cold cases from 1940 to 1979.⁵ The students created draft legislation modeled after the process established in the Kennedy Collection Act.⁶

Records related to civil rights cold cases are valuable for researchers, journalists, historians, and those interested in solving these unsolved crimes. Under the current process, citizens can request files from the Department of Justice (DOJ) and other agencies through the Freedom of Information Act (FOIA).⁷ While a valuable tool for the release of Federal records to the public, FOIA has exemptions for the release of records that make it less useful for requesting records from a law enforcement agency.⁸ Specifically, FOIA exemption 7 prevents the disclosure of “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings [. . .]”⁹ Because civil rights cold cases are by their very definition unsolved crimes, public disclosure of records related to these cases could reasonably be expected to interfere with law enforcement proceedings. The incompatibility of FOIA with records inherently linked to open criminal cases shows the necessity of a special process for the release of civil rights cases that are 39 to 78 years old.

The older these unsolved cases become, the less likely they are to be solved by DOJ, and, in fact, public disclosure of information may actually increase the likelihood of enforcement by crowdsourcing the materials. Illustrating this point, author and journalist Stanley Nelson stated with regard to withheld and redacted DOJ civil rights records that “[i]f the FBI doesn’t want to do the work, share the unredacted files with journalists—we’ll do

¹ Presidential Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992, (Oct. 26, 1992), available at <https://www.gpo.gov/fdsys/pkg/PPP-1992-book2/pdf/PPP-1992-book2-doc-pg2004-2.pdf>.

² “President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 (1992).”

³ *Id.*

⁴ Donald J. Trump (@realDonaldTrump), Twitter (Oct 12, 2017, 5:53 AM), available at: <https://twitter.com/realDonaldTrump/status/921716470140325889>.

⁵ *With JFK files open, students say open civil rights killings files, too*, Clarion Ledger (Oct. 26, 2017), <https://www.clarionledger.com/story/news/local/journeytojustice/2017/10/26/jfk-files-open-students-say-open-civil-rights-killings-files-too/802665001/>.

⁶ *Id.*

⁷ 5 U.S.C. § 552 (2018).

⁸ *Id.*

⁹ *Id.* at § 552(b)(7).

it.”¹⁰ Another example is the case of Emmet Till, a 14-year-old African American who was abducted and brutally murdered in 1955 after he allegedly flirted with a white woman named Carolyn Bryant, and grabbed her either by the hand or waist.¹¹ In 2007, the Federal Bureau of Investigations (FBI) released recovered court transcripts that were later used by author Timothy B. Tyson as the basis of his interview of Bryant who recanted, telling Tyson regarding her court testimony about Till’s alleged sexual aggression toward her that “[y]ou tell these stories for so long that they seem true, but that part is not true.”¹²

Recognizing the potential sensitivity of the information contained in civil rights cold case records, the Civil Rights Cold Case Collection Act of 2018 establishes a process nearly identical to the Kennedy Collection Act, which also dealt with extremely sensitive and classified information. The Civil Rights Cold Case Collection Act of 2018 establishes a special collection at NARA for civil rights cold cases and requires Federal agencies with records related to civil rights cold cases to transmit them to NARA. Civil rights cold cases are defined as those occurring between 1940 and 1979 and include cases related to conspiracy against rights, deprivation of rights under color of law, cases related to federally protected activities, peonage and involuntary servitude, violations of the Fair Housing Act, and those cases related to Federal laws that would be enforced by the DOJ Civil Rights Division.

The legislation allows Federal agencies to transmit records separately for a protected collection that will be reviewed periodically for public disclosure. It also establishes a review board to make determinations about the public disclosure of records. The review board terminates four years after enactment. Any record that is not disclosed will be automatically disclosed 25 years after the date of enactment of the legislation unless the head of the agency that transmitted the record requests additional postponement.

The bill lays out specific grounds for the postponement of public disclosure of records. For example, the release can be postponed if it would harm national security, reveal classified information, or reveal the name or identity of a living individual who provided confidential information to the United States where it would put that informant at risk of physical harm. It also prevents the release of information that could endanger the life or physical safety of any person or interfere with ongoing law enforcement proceedings. Finally, the legislation exempts records that contain personnel and medical files.

III. LEGISLATIVE HISTORY

Senator Doug Jones (D–AL) introduced S. 3191, the Civil Rights Cold Case Records Collection Act of 2018, on July 10, 2018, with Senators Claire McCaskill (D–MO) and Kamala Harris (D–CA). On

¹⁰ *With JFK files open, students say open civil rights killings files, too*, Clarion Ledger (Oct. 26, 2017), <https://www.clarionledger.com/story/news/local/journeytojustice/2017/10/26/jfk-files-open-students-say-open-civil-rights-killings-files-too/802665001/>.

¹¹ Jason Parham, *Emmett Till’s Murder: What Really Happened That Day in the Store?*, The New York Times (Jan. 27, 2017), available at <https://www.nytimes.com/2017/01/27/books/review/blood-of-emmett-till-timothy-b-tyson.html?module=inline>.

¹² Jason Parham, *Emmett Till’s Murder: What Really Happened That Day in the Store?*, The New York Times (Jan. 27, 2017), available at <https://www.nytimes.com/2017/01/27/books/review/blood-of-emmett-till-timothy-b-tyson.html?module=inline>.

July 26, 2018, Senator Ted Cruz (R-TX) was added a cosponsor. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 3191 at a business meeting on September 26, 2018. During the business meeting, a modified substitute amendment was offered by Senator Jones and accepted by unanimous consent. The amendment addressed feedback from NARA and the DOJ. The bill, as amended, was ordered reported favorably *en bloc* by voice vote. Senators Johnson, Portman, Lankford, Enzi, Hoeven, McCaskill, Carper, Heitkamp, Peters, Hassan, Harris, and Jones were present.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the Civil Rights Cold Case Records Collection Act of 2018.

Section 2. Definitions

This section defines terms necessary to the legislation, including archivist, civil rights cold case, civil rights cold case record, collection, executive agency, review board, and other terms.

Section 3. Civil Rights Cold Case Records Collection at the National Archives and Record Administration

This section establishes a Civil Rights Cold Case Records Collection at the National Archives and requires NARA to prepare a subject guidebook and index to the collection and to establish criteria for agencies to use when transmitting records.

It also requires that the collection include a copy of each civil rights cold case record which has not previously been provided to NARA, but will be under this legislation, as well as civil rights cold cases already in NARA's custody.

This section requires that all civil rights cold case records transmitted to the collection for public disclosure be available to the public within 60 days and be prioritized for digitization. It also authorizes NARA to require fees for copying documents. This section discusses the composition of the collection's contents. These include a copy of each civil rights cold case record, a disclosure of records, fees for copying, and transmission to the national archives. Furthermore, it specifies the periodic review of postponed civil rights cold case records and the digitization of records. NARA is also required to keep secure those records submitted for the collection for which public disclosure has been postponed.

Subsection (e) requires any Federal agency in possession of a civil rights cold case record to transmit that record within two years for the collection without any redactions. Separately, for records that the review board established under section 5 has determined postponement from public disclosure is warranted, shall be submitted to the protected Collection not available to the public. This subsection also establishes a process for the Attorney General to withhold records related to cases that the Attorney General reasonably believes will be reopened within two years.

Subsection (f) establishes a process by which civil rights cold cases whose public disclosure has been postponed be re-evaluated

for disclosure on an annual basis. Additionally, following the termination of the review board four years after enactment, this subsection requires that all postponed records be released after 25 years unless the head of the agency that provided the record requests additional postponement.

Finally, section (3) contains a Congressional finding that the public release may significantly affect victims of crimes and their next of kin and requires that to the greatest extent possible, they be notified 7 days in advance of any public release.

Section 4. Grounds for postponement of public disclosure of records

This section specifies the grounds which would prevent records from being made public. Subsection (1) allows postponement where disclosure would damage national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations; or reveal classified information.

Subsection (2) allows postponement where disclosure would reveal the name or identity of a living individual provided confidential information to the U.S. where it would pose a substantial risk of harm.

Subsection (3) allows postponement where disclosure would pose an unwarranted invasion of personal privacy.

Subsection (4) allows postponement where disclosure would compromise an understanding of confidentiality between the government and a cooperating informant, where the harm to that understanding outweighs the public interest in the records.

Subsection (5) allows postponement where disclosure would endanger an individual's life or physical safety.

Subsection (6) allows postponement where disclosure would interfere with ongoing law enforcement proceedings.

Section 5. Establishment and powers of the Civil Rights Cold Case Records Review Board

This section establishes the Civil Rights Cold Case Records Review Board. Subsection (b) delineates the appointment process for five individuals to serve on the review board, timelines for appointments, groups qualified to recommend appointments, and the qualifications required for members of the review board.

Subsection (c) requires that all members be processed for the necessary security clearances in an expedited manner.

Subsection (d) requires that vacancies be filled in the same manner as initial appointments. Subsection (e) requires that the board vote to elect a chairperson and subsection (f) delineates the process for the removal of board members. Subsection (g) sets compensation for board members at level IV of the Executive Schedule and allows for travel expenses.

Subsection (h) requires the review board to consider and render decisions about Federal agencies' requests to postpone public disclosure of civil rights cold case records. Subsection (i) gives the review board power to obtain access to civil rights cold case records, direct agencies to make available additional information, records, or testimony which the review board believes is required to make determinations. It also gives the review board the right to subpoena records and testimony, require agencies to account in writing for the destruction of records, receive information from the public

about the existence of certain records, and to hold hearing and administer oaths.

This section requires the review board to cooperate with the oversight functions of Congress, provide support staff and services from the General Services Administration, allows it to issue regulations, and provides for the termination of the review board.

Section 6. Review board personnel

This section outlines the process for the appointment and removal of a chief of staff of the review board, including the qualifications, duties, and required security clearances for the position. It also describes the process for the hiring of support staff and grants the board authority to create advisory committees.

Section 7. Review of records by the review board

This section outlines the requirements for the retention of records by Federal agencies related to the work of the review board and the process and timeline for the review board to begin reviewing civil rights cold case records. This section also requires public disclosure, through NARA, of all records it determines are civil rights cold case records unless postponement of disclosure is warranted.

If postponement of a civil rights cold case records is warranted, the review board is required to determine if any portion of the record can be segregated and released or if a summary of the record could be provided in its place.

This section also requires the review board to report to the NARA with information about the records that warrant postponement and to the originating agency if it intends to make a record public.

Section 7 also sets out a process for the President to assert authority to withhold documents cleared for release by the board, and requires a periodic review to determine if the President still wishes to assert that authority.

Finally, this section requires that the review board report annually to Congress about its activities.

Section 8. Disclosure of other information and additional study

This section gives the review board the authority to ask the Attorney General to petition courts to unseal grand jury information or other records under seal of court. The Attorney General has discretion whether to make the petition, but must respond to the review board within 45 days.

Section 8 also contains a Sense of Congress that the Attorney General should assist the review board in good faith to unseal relevant records, as well as a Sense of Congress that all Federal agencies should cooperate with the review board to seek the disclosure of all information relevant to civil rights cold cases.

Section 9. Rules of construction

This section establishes that the requirements of the bill supersede all other laws, except section 6103 of the Internal Revenue Code of 1986, and any personnel and medical files exempted by the Privacy Act. It also clarifies that nothing in the legislation should

be construed to limit the right of individuals to request information under the Freedom of Information Act.

Section 10. Authorization of appropriations

This section authorizes appropriations of such sums as are necessary for the review board.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 3, 2018.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3191, the Civil Rights Cold Case Records Collection Act of 2018.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 3191—Civil Rights Cold Case Records Collection Act of 2018

Summary: S. 3191 would make federal information about investigations of unsolved civil rights cases more readily available to the public. The bill would authorize the National Archives and Records Administration (NARA) to create a collection of unsolved civil rights cases. In addition, the legislation would establish a Civil Rights Cold Case Review Board (Review Board) to determine which records can be released to the public.

CBO estimates that implementing S. 3191 would cost \$10 million over the 2019–2023 period; such spending would be subject to the availability of appropriated funds.

Enacting S. 3191 could affect direct spending by agencies that are authorized to use receipts from the sale of goods, fees, and other collections to cover operating costs; therefore, pay-as-you-go procedures apply. Because most agencies can adjust the amounts collected as operating costs change, CBO estimates that any net changes in direct spending by those agencies would be negligible. In addition, NARA can charge and spend fees to cover some or all of its costs to process certain requests. CBO estimates, however,

that any net increase in fees collected under the bill would be negligible. Enacting the bill would not affect revenues.

CBO estimates that enacting S. 3191 would not significantly increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 3191 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary effect of S. 3191 is shown in the following table. The costs of the legislation primarily fall within all budget functions 750 (administration of justice) and 800 (general government).

	By fiscal year, in millions of dollars—					
	2019	2020	2021	2022	2023	2019–2023
INCREASES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	1	3	2	2	2	10
Estimated Outlays	1	3	2	2	2	10

Basis of estimate: For this estimate, CBO assumes that S. 3191 will be enacted near the end of 2018. Estimated outlays are based on historical spending patterns for similar activities.

S. 3191 would require NARA to establish a collection of federal records about unsolved civil rights cases that occurred between 1940 and 1979. The collection would be made available to the public. The bill also would establish a Civil Rights Cold Case Records Review Board. Five members would be appointed by the President with the advice and consent of the Senate. The board would facilitate the review, transmission to NARA, and public disclosure of government records related to the unsolved cases. It would terminate five years after enactment.

Information from the Department of Justice (DOJ) Cold Case Initiative indicates that there are about 115 unsolved civil rights cases that the department is aware of. Using information from NARA, CBO expects that the cost of implementing this bill would be similar to the John F. Kennedy Assassination Records Review Board. That board re-examined records related to the assassination investigation that federal agencies considered too sensitive to release to the public to consider which records should be released to the public; CBO expects that the board established under S. 3191 would be similar. CBO estimates that implementing the bill would cost about \$2 million annually and \$10 million over the 2019–2023 period, subject to the availability of appropriated funds. Those amounts would cover personnel and other administrative costs to evaluate which documents could be released publicly. If more cold cases are reopened following the enactment of S. 3191 there would be additional costs in future years to evaluate those additional records.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. S. 3191 could affect direct spending by agencies that are not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any changes in direct spending would be negligible. In addition, NARA can charge and spend fees to cover some or all of the costs to process certain requests. CBO

estimates, however, that any net increase in fees collected under the bill would be negligible. The bill would not affect revenues.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 3191 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

Mandates: S. 3191 contains no intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Federal costs: Matthew Pickford; Mandates: Andrew Laughlin.

Estimate reviewed by: Kim P. Cawley, Unit Chief, Natural Resources Cost Estimate Unit; H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because this legislation would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.