Statement on Signing the Civil Rights Cold Case Records Collection Act of 2018

January 8, 2019

Today, I have signed into law S. 3191, the "Civil Rights Cold Case Records Collection Act of 2018" (the "Act"). The Act provides for the review and, where possible, the release of records of criminal investigations relating to alleged Federal civil rights violations between 1940 and 1980 ("cold case records"). These records, however, include information in the possession of any branch of the Government and could encompass even recently created records that "relate to" alleged civil rights violations from that period. I fully support the goals of the Act; however, it raises several serious constitutional concerns.

First, section 4 of the Act, which enumerates exceptions from the general requirement to release cold case records, could be read to compel disclosure of material covered by executive privilege. Section 4 does not explicitly protect records containing confidential executive branch deliberations, which fall within the deliberative process component of executive privilege. It does provide some protection for law enforcement and national security information, albeit on narrow grounds. In any event, my responsibility to protect these categories of information comes from the Constitution and cannot be limited by statute.

Absent this protection, certain interests the Act seeks to safeguard, such as the integrity of the law enforcement process, could be harmed. Investigators and prosecutors must be free to conduct candid internal deliberations, and persons identified in investigatory files—such as victims, witnesses, and others—must be protected from unwarranted reprisals. Section 4 provides that records should not be disclosed if doing so would cause identifiable or describable harm to national security or law enforcement, invade personal privacy, risk substantial harm to cooperating witnesses or confidential informants, or interfere with ongoing law enforcement proceedings. These exceptions protect the confidentiality of certain deliberative material, sensitive law enforcement information, and other privileged information, but there may be circumstances that require the postponement of the disclosure of documents beyond what is expressly provided for under the Act. I cannot abdicate my constitutional responsibility to protect such information when necessary. Accordingly, I have signed the Act on the understanding that the public disclosure of records may be postponed where necessary to protect executive privilege.

Similarly, section 3(f) of the Act could require disclosure, without regard to executive privilege, after 25 years of the date of enactment. This section provides that a record may be exempted from disclosure based on identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations. I will interpret this provision consistent with my authority under the Constitution to protect confidential executive branch materials. Section 3(f)(4)(A)(iii), however, suggests that the Archivist of the United States would need to concur in any decision of the President to continue to exempt such records beyond the 25-year mark. Because the Archivist is an official within the executive branch subject to plenary presidential supervision, and because executive privilege is a core Article II prerogative of the President, I do not understand this provision to empower the Archivist to countermand a decision of the President to exempt records.

Related constitutional concerns arise with respect to the provision purporting to give the Civil Rights Cold Case Records Review Board—the agency established by the Act and charged with reviewing the decision of a Government office to postpone disclosure of cold case records—the authority to compel agency heads to provide cold case records to the Board, as well as with the provision giving certain congressional committees "access to any records held or created by the Review Board." My Administration will treat these provisions of the Act consistent with the President's authority under the Constitution to protect confidential executive branch materials and to supervise and guide executive branch officials. In addition, my Administration will follow the standard for automatic declassification and the categories of protected information set forth in section 3.3(b) of Executive Order 13526, of December 29, 2009, as well as in any subsequent revisions to that order.

Second, section 5 of the Act raises serious concerns under the Appointments Clause of the Constitution. That provision vests in the Review Board responsibility to assess the applicability of statutory grounds for withholding records and, in some cases, to make final decisions for the executive branch on whether to disclose potentially privileged information in covered records. The members of this Review Board will be principal officers, for whom the President has the sole power of nomination and the Senate has the sole power of advice and consent. Yet section 5(b) purports to set restrictive qualifications for the members and to direct the appointment of any replacement members, in the event of vacancies, within 60 days. These provisions conflict with the constitutional division of responsibility between the President and the Congress in appointing principal officers. I will make every effort to heed them but, consistent with my constitutional authorities, will treat the qualifications as advisory and will treat the timing requirement as permitting appointments after 60 days when additional time is necessary for me to find appropriate candidates to appoint to the Review Board.

Third, section 5(f) of the Act purports to protect the members of the Review Board from removal by the President except on grounds of "inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties." The Review Board will be responsible for determining whether, when, and to whom to disclose potentially privileged information in cold case records. The Congress may not insulate decision makers who exercise core executive functions from plenary presidential supervision. I will, therefore, comply with these removal restrictions only insofar as they comport with my constitutional responsibility to supervise the executive branch, including the protection of information subject to executive privilege.

Relatedly, section 5(i)(2) of the Act provides that a Federal court may enforce a subpoena issued by the Review Board pursuant to a "lawful request of the Review Board." I have signed the Act on the understanding that the Board must request judicial enforcement of a subpoena through the Department of Justice, consistent with 28 U.S.C. 516 and the President's supervisory authority under Article II of the Constitution.

Finally, the Administration considers civil rights cold case records to be a matter of public importance. I have, therefore, signed this Act without generally endorsing the establishment of independent agencies to review and facilitate the declassification and release of Government records. I also note that the Act does not contain any authorization of funds to be appropriated for its implementation, which will likely place a significant strain on agency resources. I encourage the Congress to appropriate such funds.

DONALD J. TRUMP

NOTE: S. 3191, approved January 8, was assigned Public Law No. 115–426.

Categories: Bill Signings and Vetoes : Civil rights Cold Case Records Collection Act of 2018, signing statement.

Subjects: Law enforcement and crime : Cold case records, standards of release; Legislation, enacted : Civil Rights Cold Case Records Collection Act of 2018; Presidency, U.S. : Constitutional role and powers.

DCPD Number: DCPD201900008.