

**Calendar No. 704**

108TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
108-350 }

HOMELAND SECURITY CIVIL RIGHTS AND  
CIVIL LIBERTIES PROTECTION ACT OF 2004

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R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 2536

TO ENUMERATE THE RESPONSIBILITIES OF THE OFFICER FOR  
CIVIL RIGHTS AND CIVIL LIBERTIES OF THE DEPARTMENT OF  
HOMELAND SECURITY, TO REQUIRE THE INSPECTOR GENERAL  
OF THE DEPARTMENT OF HOMELAND SECURITY TO DESIGNATE  
A SENIOR OFFICIAL TO INVESTIGATE CIVIL RIGHTS COM-  
PLAINTS, AND FOR OTHER PURPOSES



SEPTEMBER 20, 2004.—Ordered to be printed

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HOMELAND SECURITY CIVIL RIGHTS AND CIVIL  
LIBERTIES PROTECTION ACT OF 2004

SEPTEMBER 20, 2004.—Ordered to be printed

Ms. COLLINS, from the Committee on Governmental Affairs,  
submitted the following

REPORT

[To accompany S. 2536]

The Committee on Governmental Affairs, to whom was referred the bill (S. 2536) to enumerate the responsibilities of the Officer for Civil Rights and Civil Liberties of the Department of Homeland Security, to require the Inspector General of the Department of Homeland Security to designate a senior official to investigate civil rights complaints, and for other purposes, having considered the same reports favorably thereon with an amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 2536, the Homeland Security Civil Rights and Civil Liberties Protection Act of 2004, is to enumerate the responsibilities of the Officer for Civil Rights and Civil Liberties of the Department of Homeland Security, to require the Inspector General of the Department of Homeland Security to designate a senior official to investigate civil rights complaints, and for other purposes.

## II. BACKGROUND AND NEED FOR LEGISLATION

### BACKGROUND OF THE OFFICER FOR CIVIL RIGHTS AND CIVIL LIBERTIES

In the wake of the terrorist attacks on September 11, 2001, the country was awakened to the fact that it faced a new type of threat, and “many policy makers recognized that the government had not changed to meet these new threats.”<sup>1</sup> Congress realized that “[t]he responsibility for protecting the nation’s citizens and critical assets on U.S. soil was spread among dozens of departments and agencies, with no shared strategic vision or effective means of coordination.”<sup>2</sup> In responding to this new threat, Congress acted deliberately and quickly in passing Public Law 107–296, the Homeland Security Act of 2002, which created the Department of Homeland Security. On November 25, 2002, President Bush signed the Homeland Security Act of 2002 into law.

In enacting the Homeland Security Act, Congress understood the importance of providing checks and balances to protect civil rights and civil liberties. To this end, Congress created within the Department, three positions devoted wholly or in part to ensuring respect for civil liberties as the Department carries out its mandate to protect the homeland. These positions are the Officer for Civil Rights and Civil Liberties, the Privacy Officer, and the Department’s Inspector General. These three officials have crucial roles in assessing actions of the Department that may affect personal privacy, civil rights, and civil liberties. While the Homeland Security Act created these offices to help ensure basic liberties are protected as the government improves protection of the homeland, the Act only generally described the role and responsibility of the Officer for Civil Rights and Civil Liberties. In addition, the Act did not provide for statutory guidance on how these offices should work together to address issues related to civil rights and civil liberties. In particular, existing law establishes the Officer for Civil Rights and Civil Liberties and requires the Officer to: (1) review and assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials of the Department; and (2) make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer.

On April 16, 2003, President Bush appointed Daniel W. Sutherland as the Officer for Civil Rights and Civil Liberties. Since that time, the Office for Civil Rights and Civil Liberties developed a broad strategic plan for the Office that includes responsibilities not specified in statute, and the Officer has focused on coordinating with other key offices with the Department including the Privacy Officer and the Office of Inspector General.

### NEED FOR LEGISLATION

The protection of civil rights and civil liberties is crucially important in a Department whose programs and activities affect individuals on a day-to-day basis. The nature of the mission of the Department of Homeland Security makes safeguards especially important. The Department is now our country’s biggest law enforcement

<sup>1</sup> Senate Report 107–175, p. 1.

<sup>2</sup> *Ibid.*

agency. It has more Federal officers with arrest and firearm authority than the Department of Justice.<sup>3</sup> Department personnel have contact with thousands of people every day. In addition, many of the Department's programs and activities such as US VISIT, the Computer Assisted Passenger Pre-screening System (CAPPS II), other transportation screening processes, and immigration policies and programs have the potential, if not scrutinized, to affect individual liberties. In this post-9/11 world, the Department must be especially sensitive to maintaining civil liberties as it works to strengthen security and detect and deter terrorist attacks.

The Department's Vision Statement recognizes this imperative by stating that by "[p]reserving our freedoms, protecting America . . . we secure our homeland."<sup>4</sup> In addition, the Department states that one of its Guiding Principles is to protect civil rights and civil liberties.<sup>5</sup>

As previously mentioned, the Officer for Civil Rights and Civil Liberties has developed a broad strategic plan for the Office and has focused on coordinating with other key offices in the Department including the Privacy Officer and the Office of Inspector General (OIG). On September 2, 2003, the Officer and OIG entered into a Memorandum of Understanding (MOU) further clarifying the respective roles of those offices with respect to civil rights and civil liberties issues.

The Department has taken additional steps to make the protection of civil rights and civil liberties a priority within the Department. The Officer currently reports directly to the Secretary. The Officer, in addition to his statutory duties, provides proactive legal and policy advice to senior Department officials related to civil rights and civil liberties issues. The Officer also acts as the Department's equal employment opportunity officer. The stated mission of the Office for Civil Rights and Civil Liberties is "to protect civil rights and civil liberties and to support homeland security by providing the Department with constructive legal and policy advice on the full range of civil rights and civil liberties issues the Department will face, and by serving as an information and communication channel with the public regarding all aspects of these issues."<sup>6</sup> This stated mission is much broader than the statutory authority provided to the Officer in the Homeland Security Act, and the proactive approach taken by the Office better ensures that programs and activities of the Department are designed and implemented to better ensure the protection of liberties.

The Officer has been active in a number of areas. According to his June 2004 report to Congress, the Officer is providing advice on preventing racial profiling, providing input regarding identity documents, the US VISIT system, and CAPPS II, giving guidance to the Department regarding the detention of immigrants, strengthening the training of law enforcement on relevant issues through the Federal Law Enforcement Training Center, and ensur-

<sup>3</sup>Federal Law Enforcement Officers, 2002, Bureau of Justice Statistics Bulletin, August 2003, p. 5.

<sup>4</sup>Department of Homeland Security Strategic Plan Summary, 2004.

<sup>5</sup>Ibid.

<sup>6</sup>Strategic plan for the Office for Civil Rights and Civil Liberties, Department of Homeland Security, September 2003, p. 1.

ing Department's programs and activities are sensitive to the needs of people with disabilities.<sup>7</sup>

While the Department has made significant strides in creating a framework within the Department that can effectively help minimize the impact of its programs and activities on the freedoms of individuals, much of the current authority of the Officer for Civil Rights and Civil Liberties is not codified in statute. The lack of statutory authority may impact the effectiveness of the Officer in the future.

THE HOMELAND SECURITY CIVIL RIGHTS AND CIVIL LIBERTIES  
PROTECTION ACT OF 2004

S. 2536 would codify the responsibilities the Officer currently carries out. S. 2536 would require the Officer to: (1) assist the Department with the development, implementation, and review of policies and procedures in order to ensure civil rights and liberties issues are considered; (2) oversee compliance with constitutional, statutory, and other requirements related to civil rights and liberties of people affected by Department programs; and (3) investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General decides to investigate. These responsibilities, while not currently codified into law, are being carried out currently by the Officer. For example, the MOU between the Inspector General and the Officer ensures that, while the Officer may investigate certain cases, the IG has first right of refusal to investigate. S. 2536 is intended to maintain the IG's first right of refusal.

The bill also clarifies the Officer's existing responsibility to review and assess information related to abuses of civil rights, civil liberties and profiling. Current law provides that the Officer review and assess information "alleging" such abuses. The use of the term "alleging" has raised questions as to whether there must be a specific allegation to trigger this authority. In addition, S. 2536 would amend the existing authority to include religion as a category of profiling that would be reviewable by the Officer.

S. 2536 would also correct conflicting statutory language regarding the appointment of the Officer. Currently, Section 705 of the Homeland Security Act (6 U.S.C. 345(a)) states that the Secretary shall appoint the Officer; however, Section 103(d) of the Homeland Security Act (6 U.S.C. 113(d)) states that the Officer is appointed by the President. In practice, the current Officer was appointed by the President. The bill would strike the conflicting Section 705 language to ensure future Officers are presidentially appointed. This will further strengthen the authority of the Officer.

The bill will also help to clarify that the Officer for Civil Rights and Civil Liberties and the Privacy Officer should coordinate on issues of mixed jurisdiction and that the authorities provided to the Officer for Civil Rights and Civil Liberties should not impact the authority of the Privacy Officer. The bill also clarifies that the Officer for Civil Rights and Civil Liberties as well as the Privacy Officer report directly to the Secretary. The intent of the provisions related to the Privacy Officer is to clarify the role of the Officer for

<sup>7</sup> See Report to Congress on Implementation of Section 705 of the Homeland Security Act and the Establishment of the Office for Civil Rights and Civil Liberties, Department of Homeland Security, June 2004.

Civil Rights and Civil Liberties with respect that the Privacy Officer and to encourage, where appropriate, coordination between those two officers. The provisions of S. 2536 are not intended to diminish the existing authority of the Privacy Officer. The Committee understands that, as the full Senate considers S. 2536, the Department may propose additional changes to S. 2536 to further clarify the language.

The Homeland Security Civil Rights and Civil Liberties Protection Act of 2004 strengthens the ability of the Department's Inspector General to safeguard civil rights and civil liberties by requiring the Inspector General to designate a senior official within the OIG to coordinate investigation of abuses, ensure public awareness of complaint procedures, and coordinate the OIG's work with that of the Officer for Civil Rights and Civil Liberties. This position is similar to one Congress created within the Office of the Inspector General of the Department of Justice when it passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.<sup>8</sup>

Finally, the Homeland Security Civil Rights and Civil Liberties Protection Act of 2004 amends the mission statement of the Department of Homeland Security to ensure that actions taken by the Department to protect the homeland do not diminish civil liberties and civil rights. This important revision ensures that the protection of civil rights and civil liberties continues to be a priority of the Department, as reflected in the Department's own Strategic Plan.

The Committee also recognizes that the Secretary has vested other authorities, such as equal employment opportunity, in the Office for Civil Rights and Civil Liberties. The absence of this responsibility in S. 2536 should not be construed as discouraging the Officer's continued role in this area; however, as with many in other departments and agencies, the designation of the EEO officer is customarily left to the discretion of the agency or department head.

### III. LEGISLATIVE HISTORY

S. 2536 was introduced on June 17, 2004 by Senators Collins and Wyden and was referred to the Committee on Governmental Affairs. On July 21, 2004, the Committee considered S. 2536. Senator Collins offered an amendment, which the Committee agreed to by voice vote. The amendment clarifies that the Officer for Civil Rights and Civil Liberties is appointed by the President; clarifies the role of the Officer with respect to reviewing and assessing information regarding abuses of civil rights, civil liberties and profiling; and adds religion to the categories of profiling that the Officer should review and assess. The Committee ordered the bill reported, as amended, by voice vote.

### IV. SECTION-BY-SECTION ANALYSIS

Section 1 titles the bill as the Homeland Security Civil Rights and Civil Liberties Protection Act of 2004.

Section 2 amends the mission of the Department of Homeland Security to include ensuring that the civil rights and civil liberties

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<sup>8</sup>Public Law 107-56 (2001), Section 1001.

of persons are not diminished by the efforts, activities, and programs aimed at securing the homeland.

Section 3 amends the role and responsibilities of the Officer for Civil Rights and Civil Liberties by clarifying that the Officer reports directly to the Secretary; clarifying that the Officer may review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, and religion; adding that the Officer assists the Secretary, directorate, and offices of the Department in developing and reviewing policies and procedures to ensure protection of civil rights and civil liberties; adding that the Officer oversees compliance with constitutional, statutory, regulatory, policy, and other requirements related to civil rights and civil liberties affected by Department activities and programs; adding that the Officer coordinates with the Privacy Officer regarding issues that have both privacy as well as civil rights and civil liberties implications, and investigating complaints and information indicating possible abuses of civil rights or civil liberties, unless that Inspector General determines that such complaint should be investigated by the Inspector General.

Section 4 requires the Inspector General of the Department to designate a senior official within the Office of Inspector General who shall be responsible for coordinating the OIG with respect to investigations of abuses of civil rights and civil liberties; receiving and reviewing complaints and information alleging abuses of civil rights and civil liberties by employees or officials of the Department, independent contractors, or grantees of the Department; initiating investigations of alleged abuses of civil rights and civil liberties; ensuring that personnel with the OIG receive sufficient training to conduct such investigations; consulting with the Officer for Civil Rights and Civil Liberties; providing the Officer for Civil Rights and Civil Liberties with information regarding the outcome of investigations; referring civil rights and civil liberties matters that the IG has decided not to investigate to the Officer for Civil Rights and Civil Liberties; ensuring the OIG publicizes the procedures for filing complaints and the status of investigations; and informing the Officer for Civil Rights and Civil Liberties of weaknesses, problems, and deficiencies within the Department relating to civil rights or civil liberties.

Section 5 amends section 222 of the Homeland Security Act of 2002 related to the Privacy Officer by clarifying that the Privacy Officer reports directly to the Secretary and requiring the Privacy Officer to coordinate with the Officer for Civil Rights and Civil Liberties on matters that involve privacy issues as well as civil rights and civil liberties.



## V. ESTIMATED COST OF LEGISLATION

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, August 4, 2004.*

Hon. SUSAN M. COLLINS,  
*Chairman, Committee on Governmental Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MADAM CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2536, the Homeland Security Civil Rights and Civil Liberties Protection Act of 2004.

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

Sincerely,

ELIZABETH ROBINSON  
(For Douglas Holtz-Eakin, Director).

Enclosure.

*S. 2536—Homeland Security Civil Rights and Civil Liberties Protection Act of 2004*

S. 2536 would amend the Homeland Security Act to codify and strengthen the authority of the Officer for Civil Rights and Civil Liberties at the Department of Homeland Security (DHS). The officer would be responsible for developing plans to ensure that civil liberties are protected and incorporated in the department's policies. The legislation also would clarify the roles of the department's Officer of Civil Rights and Civil Liberties and the Privacy Officer on issues of mixed jurisdiction. In addition, S. 2536 would establish a senior staff position within DHS's Office of Inspector General responsible for coordinating civil rights and civil liberty investigations.

CBO estimates that implementing S. 2536 would cost less than \$500,000 a year, subject to the availability of appropriated funds. The legislation would codify and expand the current practices of the Office for Civil Rights and Civil Liberties at DHS, but it would not add significantly to the office's costs. Based on information from the Office of Inspector General, CBO expects that the new senior staff position would not significantly increase that office's operating costs. Enacting the legislation would not affect direct spending or revenues.

S. 2536 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of states, local, or tribal governments.

The CBO staff contact is Matthew Pickford. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

## VI. 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. CBO states that there are no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and no costs on state, local, or tribal governments. The legislation contains no other regulatory impact.

## VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic and existing law, in which no change is proposed, is shown in roman):

## UNITED STATES CODE

TITLE 5—GOVERNMENT ORGANIZATION AND  
EMPLOYEES

## TITLE 5—APPENDIX

## Inspector General Act of 1978

## § 8I. Special provisions concerning the Department of Homeland Security

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General of the Department of Homeland Security shall be under the authority, direction, and control of the Secretary of Homeland Security with respect to audits or investigations, or the issuance of subpoenas, that require access to sensitive information concerning—

\* \* \* \* \*

(e) Notwithstanding any other provision of law, in carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Homeland Security shall have oversight responsibility for the internal investigations performed by the Office of Internal Affairs of the United States Customs Service, the Office of Inspections of the United States Secret Service, the Bureau of Border Security, and the Bureau of Citizenship and Immigration Services. The head of each such office or bureau shall promptly report to the Inspector General the significant activities being carried out by such office or bureau.

*(f)(1) The Inspector General of the Department of Homeland Security shall designate a senior official within the Office of the Inspector General, who shall be a career member of the civil service at the equivalent to the GS-15 level or a career member of the Senior Executive Service, to perform the functions described in paragraph (2).*

*(2) The senior official designated under paragraph (1) shall—*

*(A) coordinate the activities of the Office of Inspector General with respect to investigations of abuses of civil rights or civil liberties;*

*(B) receive and review complaints and information from any source alleging abuses of civil rights and civil liberties by employees or officials of the Department and employees or officials of independent contractors or grantees of the Department;*

*(C) initiate investigations of alleged abuses of civil rights or civil liberties by employees or officials of the Department and employees or officials of independent contractors or grantees of the Department;*

(D) ensure that personnel within the Office of Inspector General receive sufficient training to conduct effective civil rights and civil liberties investigations;

(E) consult with the Office for Civil Rights and Civil Liberties regarding—

(i) alleged abuses of civil rights or civil liberties; and

(ii) any policy recommendations regarding civil rights and civil liberties that may be founded upon an investigation by the Office of Inspector General;

(F) provide the Officer for Civil Rights and Civil Liberties with information regarding the outcome of investigations of alleged abuses of civil rights and civil liberties;

(G) refer civil rights and civil liberties matters that the Inspector General decides not to investigate to the Officer for Civil Rights and Civil Liberties;

(H) ensure that the Office of the Inspector General publicizes and provides convenient public access to information regarding—

(i) the procedure to file complaints or comments concerning civil rights and civil liberties matters; and

(ii) the status of investigations initiated in response to public complaints; and

(I) inform the Officer for Civil Rights and Civil Liberties of any weaknesses, problems, and deficiencies within the Department relating to civil rights or civil liberties.

\* \* \* \* \*

## UNITED STATES CODE

### TITLE 6—DOMESTIC SECURITY

#### CHAPTER 1—HOMELAND SECURITY ORGANIZATION

##### DEPARTMENT OF HOMELAND SECURITY

#### § 111. Executive department; mission

(a) ESTABLISHMENT.—There is established a Department of Homeland Security, as an executive department of the United States within the meaning of title 5, United States Code.

(b) MISSION.—

(1) IN GENERAL.—The primary mission of the Department is to—

(A) prevent terrorist attacks within the United States;

(B) reduce the vulnerability of the United States to terrorism;

(C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States;

(D) carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning;

(E) ensure that the functions of the agencies and subdivisions within the Department that are not related di-

rectly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress;

(F) ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland; **[and]**

*(G) ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland; and*

**[(G)]** (H) monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.

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## UNITED STATES CODE

### TITLE 6—DOMESTIC SECURITY

#### CHAPTER 1—HOMELAND SECURITY ORGANIZATION

##### INFORMATION ANALYSIS AND INFRASTRUCTURE PROTECTION INFORMATION SECURITY

#### § 142. Privacy officer

The Secretary shall appoint a senior official in the Department, *who shall report directly to the Secretary*, to assume primary responsibility for privacy policy, including—

(1) assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information;

(2) assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974 [5 USCS § 552a];

(3) evaluating legislative and regulatory proposals involving collection, use, and disclosure of personal information by the Federal Government;

(4) conducting a privacy impact assessment of proposed rules of the Department or that of the Department on the privacy of personal information, including the type of personal information collected and the number of people affected; **[and]**

*(5) coordinating with the Officer for Civil Rights and Civil Liberties to ensure that—*

*(A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and*

*(B) Congress receives appropriate reports on such programs, policies, and procedures; and*

**[(5)]** (6) preparing a report to Congress on an annual basis on activities of the Department that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974 [5 USCS § 552a], internal controls, and other matters.

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## UNITED STATES CODE

## TITLE 6—DOMESTIC SECURITY

## CHAPTER 1—HOMELAND SECURITY ORGANIZATION

## MANAGEMENT

## § 345. Establishment of Officer for Civil Rights and Civil Liberties

[(a) IN GENERAL.—The Secretary shall appoint in the Department an Officer for Civil Rights and Civil Liberties, who shall—]

(a) *IN GENERAL.—The Officer for Civil Rights and Civil Liberties, who shall report directly to the Secretary, shall—*

[(1) review and assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials of the Department; and] *(1) review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department;*

(2) make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer[.];

(3) *assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities;*

(4) *oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;*

(5) *coordinate with the Privacy Officer to ensure that—*

*(A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and*

*(B) Congress receives appropriate reports regarding such programs, policies, and procedures; and*

(6) *investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.*