

BODY CAMERAS AND CBP:

PROMOTING SECURITY, TRANSPARENCY AND
ACCOUNTABILITY AT OUR NATION'S BORDERS



**NATIONAL
IMMIGRATION
FORUM**



BODY CAMERAS AND CBP:

Promoting security, transparency and accountability at our nation's borders

JAMES R. LOPEZ

DIVISION CHIEF (RETIRED)
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT

JACINTA S. MA

DIRECTOR OF POLICY AND ADVOCACY
NATIONAL IMMIGRATION FORUM

JOSH BREISBLATT

POLICY ANALYST
AMERICAN IMMIGRATION COUNCIL

ACKNOWLEDGMENTS

Thank you to Cindy Garo and True Indigo Design for their assistance with this report.

ABOUT THE AUTHORS

James Lopez is a current member of the Board of Directors for the National Immigration Forum and the former Chief of the East Patrol Division for the Los Angeles County Sheriff's Department, where he worked for 34 years.

Jacinta Ma is the Director of Policy and Advocacy for the National Immigration Forum.

Josh Breisblatt is a Policy Analyst at the American Immigration Council and former Policy and Advocacy Manager at the National Immigration Forum.

ABOUT THE NATIONAL IMMIGRATION FORUM

The National Immigration Forum advocates for the value of immigrants and immigration to our nation. Founded in 1982, the Forum plays a leading role in the national debate about immigration, knitting together innovative alliances across diverse faith, labor, immigrant, veterans and business constituencies in communities across the country. Coming together under the Forum's leadership, these alliances develop and execute legislative and administrative policy positions and advocacy strategies. Leveraging our policy, education and communications expertise, the Forum works for comprehensive immigration reform, sound border security policies, balanced enforcement of immigration laws and to ensure that new Americans have the opportunities, skills and status to reach their fullest potential.

Publication Date: November 6, 2015

TABLE OF CONTENTS

Executive Summary	6
Introduction	8
Recommendations	9
The Benefits of Body-worn Cameras	10
Transparency and Accountability	10
Reducing Use-of-Force Incidents and Civilian Complaints	11
Video Evidence Leads to Speedy Resolutions	13
Scenario-based Training	13
Potential Drawbacks of Body-worn Cameras	14
Do Body-worn Cameras Violate the Right to Privacy?	14
Are There Limits on Where CBP Can Use Body Cameras?	15
When Should Body-Worn Cameras Be Recording?	16
How Should Data Be Stored?	18
Implementation and Training	18
Financial Resources	20
Conclusion	20

EXECUTIVE SUMMARY

With more than 60,000 employees including about 46,000 gun-carrying customs officers and Border Patrol agents, Customs and Border Protection (CBP) is the largest law enforcement agency in the country and one of the largest in the world. The agency has a challenging and important job covering vast and varied terrain; coordinating with different municipal, state and tribal jurisdictions; and encountering populations as different as an unaccompanied child, a drug trafficker, a potential terrorist and a tourist crossing the border, all while protecting our nation's security. On a typical day in 2015, CBP processed 1,026,234 passengers and pedestrians; 293,285 incoming international air passengers and crew; 54,008 passengers and crew on arriving by ship or boat; 678,941 incoming land travelers; 70,334 truck, rail and sea containers; and 307,680 incoming privately owned vehicles.¹

Recognizing these challenges, members of Congress have supported ensuring that the agency has state-of-the-art technology so it can do its job well. One type of technology CBP does not have yet is body-worn cameras.

While incorporating body-worn cameras as an everyday part of 21st-century policing has gained significant momentum in recent years, the public debate has generally left CBP out of the discussion.

This report examines the benefits of requiring body-worn cameras for all CBP agents and

officers, as well as the privacy concerns for the public, agents and officers related to implementing body cameras. It also addresses the barriers to implementation of body-worn cameras at CBP. We conclude that the benefits of body-cameras to CBP and the public greatly outweigh any of the potential drawbacks.

The initial evidence strongly suggests that body-worn cameras lead to fewer complaints and assaults against officers, creating a win-win for the public and law enforcement. Studies also have shown that body-worn cameras have other significant benefits for law enforcement agencies. They lead to the quicker resolution of cases, which has increased transparency, and they can work to exonerate officers quickly in many cases. Body-worn cameras have given state and local law enforcement departments real scenarios that officers and agents face, which these departments can use to teach best practices and fix problem areas.

Implementing body-worn cameras also has potential drawbacks in the form of privacy concerns, not only for the public but for law enforcement officials themselves. For CBP to implement body-worn cameras successfully, it will have to create a clear policy regarding when cameras must be on and who controls them. A best practice emerging from the experience of state and local police agencies is to record all interactions with the public. CBP also must

¹ U.S. Customs and Border Protection, <http://www.cbp.gov/sites/default/files/documents/cbpsnapshot-20150403.pdf>, (last visited Sept. 24, 2015).

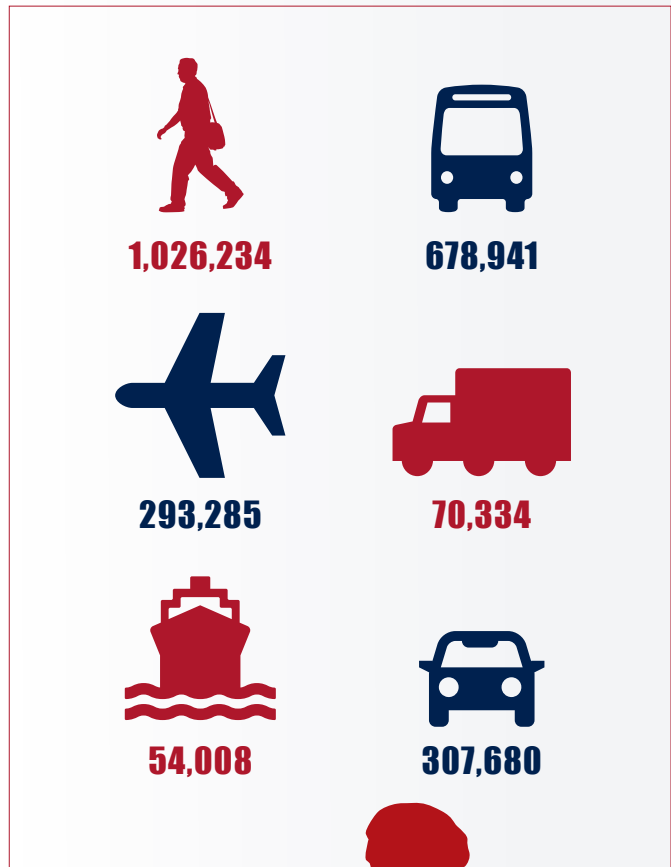
2015

ON A TYPICAL DAY, CBP PROCESSED:

develop policies regarding how long to store data and what information will be accessible to the public. In addition, different recording laws across states and Native American reservations present unique challenges.

After conducting a feasibility study in early 2015, CBP has been slow to move forward with implementation of body-worn cameras. For an agency in which more than 2,000 incidents of misconduct were reported over a seven-year period,² implementation of body-worn cameras across CBP would be a significant step toward repairing the agency's image.

Despite the barriers, the National Immigration Forum believes CBP can and should overcome the challenges associated with implementing body cameras.



² U.S. Gov't Accountability Office, *Border Security: Additional Actions Needed to Strengthen CBP Efforts to Mitigate Risk of Employee Corruption and Misconduct (2012)*, available at <http://www.gao.gov/products/GAO-13-59>



INTRODUCTION

In the past few years, body-worn cameras have emerged as a tool in everyday policing across the United States. Many of the country's major police departments have begun piloting or already have implemented body-worn cameras for their officers.³ Since the police shooting of an unarmed African American man in Ferguson, Missouri, in 2014, the discussion around body-worn cameras has only increased, and more and more cities and counties are announcing plans to incorporate them. However, the public discussion largely has omitted the nation's largest law enforcement agency: Customs and Border Protection (CBP).

With more than 60,000 employees, CBP is one of the largest law enforcement agencies in the world.⁴ Its approximately 46,000 gun-carrying customs officers in the Office of Field Operations and Border Patrol agents make it the largest law enforcement agency in country.⁵ CBP likely will only continue to grow. Since 2000, the number of Border Patrol agents on the southwest border has grown from a little more than 11,000 to more than 20,000 today.⁶

During his presidency, President Obama has called the tension between law enforcement and communities a national problem. Yet, in the president's fiscal year 2016 budget, a new initiative that would provide \$263 million for body

WITH MORE THAN 60,000 EMPLOYEES, CBP IS ONE OF THE LARGEST LAW ENFORCEMENT AGENCIES IN THE WORLD.

cameras and training for local law enforcement agencies across the country did not include CBP.⁷

Despite the lack of attention from the media and the White House, in late 2014 CBP began testing whether they should implement body-worn cameras for the agency.⁸ However, the agency's commissioner called the implementation of body-worn cameras "complicated" and "expensive," and CBP has not requested funding from Congress.

This paper examines the available evidence on body-worn cameras to ascertain the potential benefits and drawbacks of Customs and Border Protection implementing body-worn cameras across the agency. In the end, the great potential benefits to the public as well as the agency outweigh the potential drawbacks. As the largest law enforcement agency in the nation, CBP has an opportunity to become the prime example of a modern, transparent law enforcement agency with the smart implementation of body-worn cameras.

³ *Is Your Police Force Wearing Body Cameras?*, Vocativ, **Nov. 15, 2014**, <http://www.vocativ.com/usa/justice-usa/police-force-wearing-body-cameras/>.

⁴ **U.S. Customs and Border Protection**, <http://www.cbp.gov/about> (last visited Sept. 16, 2015).

⁵ **Garrett M. Graff**, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, Politico, **Nov./Dec. 2014**, <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220>.

⁶ **U.S. Customs and Border Protection**, <https://www.cbp.gov/sites/default/files/documents/cbpsnapshot-20150403.pdf> and <https://www.cbp.gov/newsroom/stats/previous-year/accomp-yr06#> (last visited Sept. 24, 2015).

⁷ **Carrie Dann & Andrew Rafferty**, *Obama Requests \$263 Million for Police Body Cameras Training*, **NBCNews.com**, **Dec. 1, 2014**, <http://www.nbcnews.com/politics/first-read/obama-requests-263-million-police-body-cameras-training-n259161>.

⁸ **Kevin Johnson**, *Border Patrol to Test Body Cameras on Agents*, **USA Today**, **Sept. 18, 2014**, <http://www.usatoday.com/story/news/nation/2014/09/18/border-body-cameras/15832351/> <http://abcnews.go.com/blogs/politics/2014/09/customs-and-border-protection-to-investigate-officer-misconduct-test-body-cameras/>.

RECOMMENDATIONS

1

Customs and Border Protection should implement body-worn cameras across the agency. This includes all agents in the Border Patrol, officers in the Office of Field Operations and agents in the Office of Air and Marine.

2

CBP should develop and implement a detailed working policy that clearly states the regulations for use of body cameras. Policies must include: when cameras must be on, how long data is stored, the chain of command for how that data is controlled and protocols for engagements with the public. CBP needs to have clear, universal policies in place when it comes to using body-worn cameras and storing data.

3

CBP should implement a policy that body cameras must be on for all interactions with the public except when unlawful, unsafe or impractical. Because studies have shown that when agents have control of the body camera it is used less often and does not catch all public interactions, CBP would need to develop and implement a policy that is clear to CBP agents regarding when cameras need to be on, when it is acceptable for them to be off, and consequences if agents do not follow the policy.

4

Once CBP has rolled out body-worn cameras to all agents and officers, the agency should contract with an outside party such as an academic institution to conduct an evaluation of the program, including examining the number of complaints against agents and excessive-use-of-force incidents before and after implementation, potential future costs, and effectiveness of the cameras. CBP should share evaluation results with the public.

THE BENEFITS OF BODY-WORN CAMERAS

2005-2015

45

KILLED BY CBP AGENTS

2005-2012

2,170

INCIDENTS OF MISCONDUCT

Customs and Border Protection has had an increasing problem addressing allegations of excessive use of force and other misconduct. Since 2005 at least 45 people have been killed by agents. Between 2005 and 2012, 2,170 incidents of misconduct by CBP agents were reported, and 144 current or former CBP employees were arrested or indicted for corruption-related activities. With information often difficult to come by, investigations may take years without any consequences for the agents involved.⁹ A 2014 report from the American Immigration Council focuses on more than 800 complaints against Border Patrol agents between January 2009 and January 2012, of which 97 percent resulted in no action being taken against the officer.¹⁰ It is notable that no officer or agent has been held accountable for a deadly force incident.¹¹ Meanwhile, in a June 2015 report, the Homeland Security Advisory Council found that CBP is susceptible to corruption and needs to add 200 criminal investigators to its Internal Affairs staff, an increase of 175 percent.¹² These numbers have resulted in the perception that CBP is an out-of-control agency that is unaccountable to the public. While every law enforcement agency faces challenges with accountability and legitimacy, the implementation of a body-worn camera system would be an important step in improving CBP's image.

TRANSPARENCY AND ACCOUNTABILITY

In today's on-demand culture, with technology constantly changing and improving, it is no surprise that body-worn cameras for law enforcement have begun to catch on. The inherent benefits are obvious: When law enforcement agents have an encounter with the public, body-worn cameras will create a record of the event that can be shared with the public to dispel any accusation of wrongdoing on the part of the officers. Because anyone with a cell phone can now record interactions with law enforcement, having a record from the officer's perspective makes inherent sense. A joint report by the U.S. Department of Justice and the Police Executive Research Forum (PERF) noted, "Body-worn cameras can help improve the high-quality public service expected of police officers and promote the perceived legitimacy and sense of procedural justice that communities have about their police departments."¹³ For CBP, this type of record could prove invaluable when investigating allegations of misconduct.



⁹ See *Force at the Border*, The Ariz. Rep., <http://www.azcentral.com/news/projects/border-deaths/>.

¹⁰ See *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, Am. Immigr. Council, **May 4, 2014**, <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>; see also **U.S. Gov't Accountability Office**, *supra* note ii.

¹¹ See **Bob Ortega**, *CBP: No agents disciplined for deadly force since 2004*, THE ARIZ. REP., **Sept. 12, 2014**, <http://www.azcentral.com/story/news/arizona/investigations/2014/09/12/customs-border-agents-not-disciplined-investigations-continue/155272071>.

¹² See **Homeland Security Advisory Council**, *Interim Report of the CBP Integrity Advisory Panel 5-6, 9 (2015)*, <http://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>.

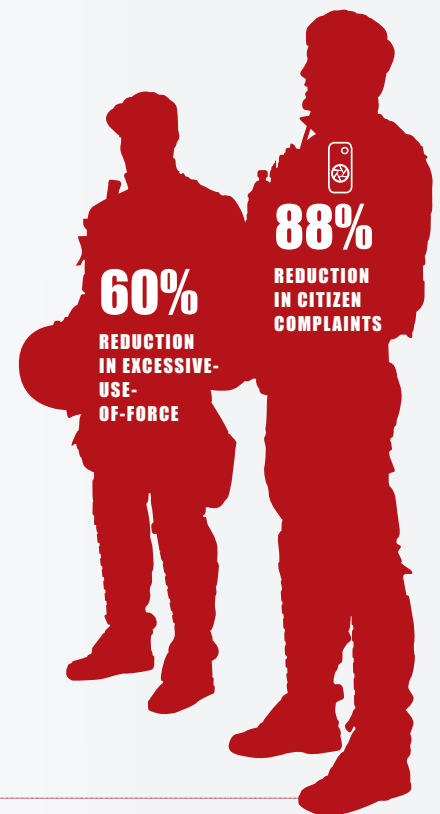
¹³ **Police Executive Research Forum**, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned v (2014)*, available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

Agents on patrol along the border may be on their own for hours at a time, so complaint investigations can be difficult to substantiate given limited evidence beyond the agent's own account of an incident. At ports of entry some cameras already exist, but none are worn by the officers who have hundreds of encounters with the public in a single shift.

The surveillance cameras at ports of entry already have shown CBP the potential value of body cameras. In July 2014, a Boy Scout Scoutmaster alleged that a CBP officer drew his firearm and pointed it at the troop. This very serious allegation sparked multiple news articles, and the Department of Homeland Security Office of Inspector General launched an investigation.¹⁴ Video footage of the incident proved that the allegation was unsubstantiated. The Office of Inspector General was able to issue a public statement exonerating CBP and the officer within a month.¹⁵ This example shows the potential benefits of body-worn cameras not only to CBP but also to the public. Because video footage existed, the entire investigation took two weeks, and the resolution was made public. Contrast that response with responses to many earlier excessive-use-of-force incidents that took years to investigate and in which the Department of Homeland Security (DHS) shared no information with the public.¹⁶ Video footage of all encounters with the public would instill confidence that all incidents would be investigated fairly. It would also help to end the perception that CBP operates with impunity in many cases.¹⁷

REDUCING USE-OF-FORCE INCIDENTS AND CIVILIAN COMPLAINTS

Several studies have found that use-of-force incidents and civilian complaints drop with the use of body-worn cameras.¹⁸ A study in 2012 in which the Rialto Police Department in California employed body-worn cameras revealed a 60 percent reduction in excessive-use-of-force incidents and an 88 percent reduction in citizen complaints following camera deployment compared with the previous year.¹⁹ Also in 2012, Arizona State University conducted a yearlong study with the Mesa Police Department, assigning cameras to 50 officers and not providing cameras to another 50 officers to act as the control group. That study revealed that officers without cameras had three times as many complaints as officers with cameras. Officers with cameras had 40 percent fewer total complaints and



¹⁴ See e.g. **Todd Starnes, Opinion, Troop Leader: Customs and Border Agent Held Boy Scout at Gunpoint, Fox News, July 24, 2014**, <http://www.foxnews.com/opinion/2014/07/24/troop-leader-border-agent-held-boy-scout-at-gunpoint/>; **Abby Ohlheiser, Troop Leader Says Border Protection Officer Pointed Gun at Boy Scout's Head; Agency is Investigating, Wash. Post, July 23, 2014**, <http://www.washingtonpost.com/news/post-nation/wp/2014/07/23/troop-leader-says-border-patrol-agent-pointed-gun-at-scouts-head-agency-is-investigating/>.

¹⁵ **Press Release, Office of Inspector General, Allegation of CBP Gun Incident with Boy Scouts Unsubstantiated (Aug. 18, 2014)**, http://www.oig.dhs.gov/assets/pr/2014/oigpr_081814.pdf.

¹⁶ See e.g. **Bob Ortega, Secrecy Continues to Shroud Killings by Border Agents, USA Today, Sept. 14, 2014**, <http://www.usatoday.com/story/news/nation/2014/09/14/border-deaths-agents-transparency/1562991/>.

¹⁷ **Graff, supra note v.**

¹⁸ **Michael D. White, Police Officer Body-Worn Cameras: Assessing the Evidence 6 (2014)**, available at <https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>.

¹⁹ **Police Executive Research Forum, supra note xiii, at 5 (citing William Farrar, Operation Candid Camera: Rialto Police Department's Body-Worn Camera Experiment, The Police Chief, Jan. 2014, at 20-25). See generally Tony Farrar, Police Found., Self-Awareness to Being Watched and Socially-Desirable Behavior: A Field Experiment on the Effect of Body-Worn Cameras on Police Use-of-Force 8-10 (2013)**, <http://www.policefoundation.org/publication/self-awareness-to-being-watched-and-socially-desirable-behavior-a-field-experiment-on-the-effect-of-body-worn-cameras-on-police-use-of-force/>.

BODY CAMERAS REDUCE ASSAULTS



“EVERYONE IS ON THEIR BEST BEHAVIOR WHEN THE CAMERAS ARE RUNNING. THE OFFICERS, THE PUBLIC — EVERYONE.”

75 percent fewer use-of-force complaints during the pilot program than during the previous year, when they were not wearing cameras.²⁰ A 2014-2015 study of the Orlando Police Department’s body camera pilot program found that use-of-force incidents dropped 53 percent and civilian complaints against those officers dropped 65 percent.²¹ A fourth study, conducted in the United Kingdom, found a 14 percent drop in citizen complaints.²²

For any agency as large as CBP, a drop in complaints would result in a huge cost savings from a reduction in litigation and resources necessary to investigate and defend against complaints.²³ The body-worn camera study in Rialto looked at the cost of investigation in various cities and concluded that on average, each complaint costs \$20,000 to investigate.²⁴ With many avenues to file complaints against CBP and records not consolidated in one place, CBP does not release the total number of complaints filed against the agency each year, so potential savings from a reduction in complaints are difficult to calculate.²⁵ However, as a comparison, New York City, which has one of the largest law enforcement agencies in the country, spends about \$152 million a year on police misconduct, including litigation and investigation costs.²⁶ A significant drop in complaints against CBP could lead to savings in the tens of millions of dollars.

Evidence suggests that body-worn cameras decrease assaults on officers as well. A 2012 study in Aberdeen, Scotland, deployed body-worn cameras to about 30 percent of its police force.²⁷ During the study there were 62 assaults on officers but only one assault on an officer wearing a body camera. The study concluded that if officers with body-worn cameras had been assaulted at the same rate as those officers without, they would have been assaulted 18 times instead of one. While assaults on Border Patrol agents are down significantly (by two-thirds since 2008), in fiscal year 2015 there were still 390 assaults on Border Patrol agents. Body-worn cameras could help further reduce the number of assaults.²⁸

While these studies are relatively new and small, the trend is quite clear. To date, no study shows assaults and complaints increasing or even holding steady. As Ron Miller, former police chief of Topeka, Kansas, said in the Police Executive Research Forum report, “Everyone is on their best behavior when the cameras are running. The officers, the public — everyone.”²⁹

²⁰ Police Executive Research Forum, *supra* note xiii, at 6.

²¹ Nick Wing, *Study Shows Less Violence, Fewer Complaints When Cops Wear Body Cameras*, *Huffington Post*, Oct. 13, 2015, http://www.huffingtonpost.com/entry/police-body-camera-study_561d2ea1e4b028dd7ea53a56.

²² White, *supra* note xviii at 22.

²³ See Yvonne Wenger, *City Council Panel Pushes Ahead with Body Camera Legislation*, *Balt. Sun*, Oct. 28, 2014, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-police-cameras-hearing-20141028-story.html>; see also Uri Friedman, *Do Police Body Cameras Actually Work?*, *The Atlantic*, Dec. 3, 2014, <http://www.theatlantic.com/international/archive/2014/12/do-police-body-cameras-work-ferguson/383323/>.

²⁴ Eugene P. Ramirez, *A Report on Body Worn Cameras 10 (2014)*, available at https://www.bja.gov/bwc/pdfs/14-005_Report_BODY_WORN_CAMERAS.pdf.

²⁵ See Bob Ortega, *Report: Border Patrol Ignores Complaints Against Agents*, *The Ariz. Rep.*, May 7, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/05/07/report-border-patrol-ignores-complaints-agents/8796145/>.

²⁶ Susan Fotovich McCabe, *Lenexa’s Digital Ally Arms Police Departments with Body and Dash Cameras*, *Kan. City Star*, Jan. 1, 2015, <http://www.kansascity.com/news/business/technology/article5314641.html>.

²⁷ White, *supra* note xviii, at 17 and 22.

²⁸ U.S. Customs and Border Protection, <http://www.cbp.gov/newsroom/stats/cbp-use-force> (last visited Oct. 19, 2015). See also, Bob Ortega, *Assaults on Border Patrol Agents Fall Sharply*, *The Ariz. Rep.*, Jan. 1, 2015, <http://www.azcentral.com/story/news/local/arizona/2015/01/02/border-patrol-assaults-fall/21175493/>.

²⁹ Police Executive Research Forum, *supra* note xiii, at 5.

VIDEO EVIDENCE LEADS TO SPEEDY RESOLUTIONS

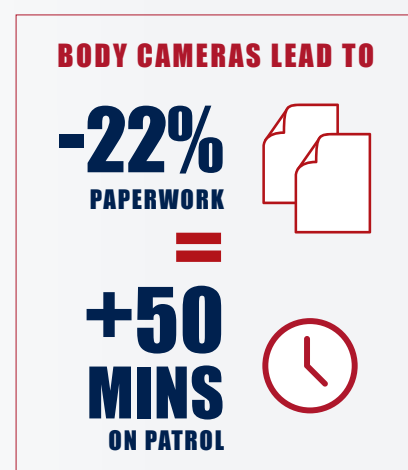
Another benefit from the use of body-worn cameras is quicker resolution when officers are accused of wrongdoing. Camera footage is often used as evidence. Body-worn cameras could save agents, officers and government attorneys much-needed time. In a study by the International Association of Chiefs of Police, 91 percent of prosecutors used video evidence, and 58 percent reported reduced time spent in court.³⁰ Moreover, 93 percent of police-misconduct cases in which video was available resulted in the officer's exoneration, and at least half of the complaints were immediately withdrawn when the complainant learned video evidence existed.³¹ Studies in the United Kingdom showed that for agents using the cameras, time spent doing paperwork was reduced by more than 22 percent and agents were able to spend about an extra 50 minutes of their nine-hour shifts on patrol.³² Currently, Border Patrol agents spend nearly half their time doing paperwork, which limits the time they spend actually on patrol.³³

SCENARIO-BASED TRAINING

Body-worn cameras also can help with real-life training scenarios or to teach officers best practices. According to the joint study by the Police Executive Research Forum and the Department of Justice, 94 percent of the police agencies that responded to their survey and use body-worn cameras use camera footage in administrative reviews and correct problems in the department: "Many police officials that PERF consulted said that body-worn cameras have allowed them to identify potential weaknesses within their agencies and to develop solutions for improvement, such as offering new training programs or revising their departmental policies and protocols."³⁴

This type of training could be especially important for Customs and Border Protection. As an agency with a high turnover rate (up to 30 percent of Border Patrol officers leave within their first 18 months)³⁵ but congressionally mandated to employ 21,370 Border Patrol agents and 23,375 border officers, CBP is under constant pressure to train and deploy new agents.³⁶ Furthermore, at CBP's Advanced Training Center in Harpers Ferry, West Virginia, where officials examine incidents that occur in the field in order to craft and modify policies, body-worn

“MANY POLICE OFFICIALS THAT PERF CONSULTED SAID THAT BODY-WORN CAMERAS HAVE ALLOWED THEM TO IDENTIFY POTENTIAL WEAKNESSES WITHIN THEIR AGENCIES AND TO DEVELOP SOLUTIONS FOR IMPROVEMENT, SUCH AS OFFERING NEW TRAINING PROGRAMS OR REVISING THEIR DEPARTMENTAL POLICIES AND PROTOCOLS.”



³⁰ International Association of Chiefs of Police, *The Impact of Video Evidence on Modern Policing*, <http://www.theiacp.org/portals/0/pdfs/IACPIn-CarCameraReport.pdf> (last visited October 7, 2015).

³¹ *Id.*

³² White, *supra* note xviii, at 24.

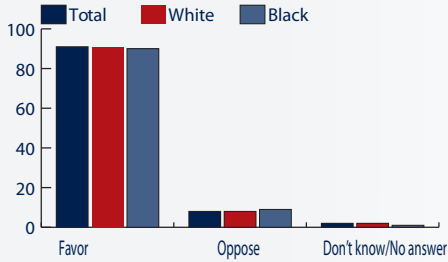
³³ U.S. Dep't of Justice, *Redeployment of Headquarters Agents to the Field*, <http://govinfo.library.unt.edu/npr/library/status/sstories/jus3.htm>, (last visited Sept. 16, 2015).

³⁴ Police Executive Research Forum, *supra* note xiii, at 8.

³⁵ Clayton Browne, *The Employee Turnover for the Border Patrol*, *Hous. Chron.*, <http://work.chron.com/employee-turnover-border-patrol-19955.html> (last visited Sept. 16, 2015).

³⁶ H.R. 240, 114th Cong. (1st Sess. 2015), <http://www.gop.gov/bill/h-r-240-department-of-homeland-security-appropriations-act-2015/>.

DO YOU **FAVOR** OR **OPPOSE** ON-DUTY POLICE OFFICERS WEARING VIDEO CAMERAS WHICH WOULD RECORD EVENTS AND ACTIONS AS THEY OCCUR?



cameras will provide valuable additional footage and information about everyday events in the field, allowing policy makers to better tailor their guidelines and trainings for agents and officers.³⁷

The potential benefits of body-worn cameras are significant, for both the public and the agency. Any given measure may change perceptions and increase public trust, even if its practical effects are small. With body-worn cameras, the practical effects — officer safety, public safety, reduced cost and improved training — are potentially huge. Body-worn cameras are also overwhelmingly supported by the American public. Public polls show that Americans strongly support body-worn cameras on active-duty law enforcement officers.³⁸

POTENTIAL DRAWBACKS OF BODY-WORN CAMERAS

Implementing body-worn cameras does not come without potential drawbacks. As the PERF report states, adopting body-worn cameras should not be taken lightly. The most significant concerns relate to privacy, not only of the public but also of officers. Adoption also entails logistical challenges that all law enforcement agencies will have to overcome. As a federal law enforcement agency, CBP faces some unique challenges. With sufficient planning and procedures, CBP should be able to overcome many of these obstacles and avoid others altogether.

DO BODY-WORN CAMERAS VIOLATE THE RIGHT TO PRIVACY?

Customs and Border Protection will need to answer many questions regarding how, when and where body-worn cameras can be used. First, will body cameras violate the constitutional right to privacy guaranteed by the Fourth Amendment? No specific law or court ruling raises privacy concerns related to body-worn cameras, and what little jurisprudence exists on this issue appears to favor law enforcement.³⁹ “Video surveillance does not in itself violate a reasonable expectation of privacy,” the Ninth Circuit has held. “Videotaping of suspects in public places, such as banks, does not violate the Fourth Amendment; the police may record what they normally may view with the naked eye.”⁴⁰ At and between ports of entry along the northern and southern borders, the majority of CBP’s surveillance work is done in public locations.

³⁷ *CBP Inaugurates Educational Facility at West Virginia Training Center*, **Gov’t Sec. News**, May 23, 2011, http://www.gsnmagazine.com/article/23392/cbp_inaugurates_educational_facility_west_virginia.
³⁸ *Americans Remain Divided in Views on Race Relations*, **CBSNews.com**, <http://www.cbsnews.com/news/americans-remain-divided-in-views-on-race-relations/> (last updated Dec. 10, 2014) (91% of adults polled Dec. 6-9, 2014 support body cameras). **YouGov**, *Overwhelming support for body cameras*, **YouGov.com**, <https://today.yougov.com/news/2015/05/07/body-cams/> (last visited Sept. 24, 2015) (88% of Americans polled from April 27-29, 2015 support body cameras). **Rasmussen Reports**, *Voters strong support body cameras for cops*, http://www.rasmussenreports.com/public_content/politics/general_politics/april_2015/voters_strongly_favor_body_cameras_for_cops (last visited Sept. 24, 2015) (70% of likely voters April 29-30, 2015 polled support uniform cameras for police officers).
³⁹ *Ramirez*, *supra* note xxiv, at 6.
⁴⁰ *Id.* (citing *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991)).

However, CBP potentially could encounter privacy-related issues from body camera recordings when aiding local law enforcement. Many times CBP is the largest law enforcement agency in rural areas and responds to routine police calls that would normally be in the purview of local law enforcement.⁴¹ In some rural areas, the Border Patrol even has been responsible for taking 911 calls.⁴² This arrangement results in Border Patrol agents regularly entering private homes of local populations. Individuals may have some expectation that their interactions with local law enforcement will not be recorded. In states and localities where body-worn camera policies have not yet been established, privacy issues for CBP could arise. As part of its program to adopt body cameras, CBP would need to develop a policy for use of body cameras in these types of situations. Development of this policy must include opportunities for robust public input.

However, for an overwhelming majority of situations, when individuals encounter CBP, they do not have a reasonable right to privacy that a body-camera recording would violate.

ARE THERE LIMITS ON WHERE CBP CAN USE BODY CAMERAS?

The large geographic areas that fall under Customs and Border Protection's authority raise unique concerns regarding use of body-worn cameras. In many instances, the Border Patrol is operating not on federal land but on state land, where policies regarding body-worn cameras may be different or may not exist. The Border Patrol is responsible for the entire northern and southern borders between ports of entry. CBP currently has the authority, "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle."⁴³ CBP has interpreted this language to mean that it can operate within 100 miles of any border in the United States, and it regularly sets up roadblocks and checkpoints.⁴⁴ Office of Field Operations officers are stationed at all ports of entry in the United States, including air, land and sea ports. Therefore, CBP's potential jurisdiction as an agency covers a great deal of the United States, and it would need to take care to honor state and local laws as it implements the use of body-worn cameras.

Individual states have laws governing when recordings are permissible. Some states require that both parties involved in a recording must give consent to being recorded. Other states require only one-party consent, and some have waived these requirements for law enforcement.⁴⁵



WILL BODY CAMERAS VIOLATE THE CONSTITUTIONAL RIGHT TO PRIVACY GUARANTEED BY THE FOURTH AMENDMENT?

⁴¹ See e.g. *Federal, Local Law Enforcement Team Up to Fight Crime*, U.S. Customs and Border Protection, Jan. 18, 2013, <http://www.cbp.gov/newsroom/local-media-release/2013-01-18-050000/federal-local-law-enforcement-team-fight-crime>; see also *Testimony of Ronald Vitiello, Deputy Chief, U.S. Border Patrol, U.S. Customs and Border Protection, Before the House Committee on Homeland Security, Subcommittee on Border and Maritime Security: "Border Security and Enforcement – Department of Homeland Security's Cooperation with State and Local Law Enforcement Stakeholders, U.S. Department of Homeland Security, May 2, 2011, [hereinafter Testimony of Ronald Vitiello]* <https://www.dhs.gov/news/2011/05/02/written-testimony-cbp-house-homeland-security-subcommittee-border-and-maritime>.

⁴² *Testimony of Ronald Vitiello*, *supra* note xli.

⁴³ **§ 8 U.S.C. § 1357(a)(3) (2014)**, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title8/pdf/USCODE-2011-title8-chap12-subchapII-partIX-sec1357.pdf>.

⁴⁴ **S ACLU, Customs and Border Protection's (CBP's) 100-Mile Rule**, https://www.aclu.org/sites/default/files/assets/13_08_01_aclu_100_mile_cbp_zone_final.pdf.

⁴⁵ See **Police Executive Research Forum**, *supra* note xliii, at 14.

According to the Police Executive Research Forum report, the states that require both parties to consent to a recording have waivers for law enforcement, but if a state does not have a policy, it would have to be addressed before CBP could use a body camera in that state.⁴⁶

For example, in the state of Washington, the Seattle Police Department determined in 2011 that body-worn cameras would violate state law because of the state's dual-consent requirement, even though the state made an exception for dashboard cameras.⁴⁷ But in 2014, the state attorney general ruled that recording by police is an exemption.⁴⁸ In 2015, Maryland considered a bill that would create an exemption so that law enforcement can begin to implement the use of body-worn cameras as soon as possible.⁴⁹ Although only a few states have dual-consent laws, many are moving in the direction of creating exceptions for law enforcement. CBP will have to examine the laws of each state where it operates.

Also, along the border are not only many states with unique state laws, but also Native American tribes, which the United States recognize as sovereign nations. For example, the Tohono O'odham Nation has a border with Mexico that measures just over 44 miles, which the Border Patrol monitors.⁵⁰ As a sovereign nation, the Tohono O'odham Nation must approve of CBP actions and thus would need to consent to CBP's use of body-worn cameras on their land in the same way they have agreed to checkpoints being built on their land.⁵¹ CBP has been able to work with Native American tribes in the past and should be able to do so on this issue as well.

WHEN SHOULD BODY-WORN CAMERAS BE RECORDING?

Should body-worn cameras always be on? How much discretion and control should officers have regarding this question? These questions have spurred much debate.

Organizations such as the American Civil Liberties Union (ACLU) attempt to strike a balance between privacy and the need for officers not to have too much control over when they record.⁵² They have expressed great concern that if officers are not required to keep their cameras on at all times, key moments will not be recorded.⁵³

A Mesa, Arizona, Police Department study bears out this concern. In the study, different groups of officers used different policies. One asked officers to make

⁴⁶ *Id.* at 14 and 40.

⁴⁷ White, *supra* note xviii, at 27.

⁴⁸ Amelia Dickson, Local Staffing, *Police Shootings and Body Cameras Discussed at Lacey Police Meeting*, *The Olympian*, Apr. 14, 2015, <http://www.theolympian.com/2015/04/14/3677869/local-staffing-police-shootings.html>.

⁴⁹ Nate Rabner, *Police Conduct, Drug Crime Sentencing Focus of General Assembly's Proposed Reforms*, *Md. Rep.*, Apr. 23, 2015, <http://marylandreporter.com/2015/04/23/police-conduct-drug-crime-sentencing-focus-of-general-assemblys-proposed-reforms/>.

⁵⁰ U.S. Customs and Border Protection, <http://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/tucson-sector-arizona/casa-grande-station>.

⁵¹ Resolution of the Tohono O'odham Legislative Council: Supporting the United States Department of Homeland Security, Customs and Border Protection to Gain Control of the International Border within the Tohono O'odham Nation with a Trial Tactical Checkpoint, <http://tolc-nsn.org/docs/actions07/07679.pdf>.

⁵² See Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All*, ACLU, at 1-2 March 2015, https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf.

⁵³ *Id.*

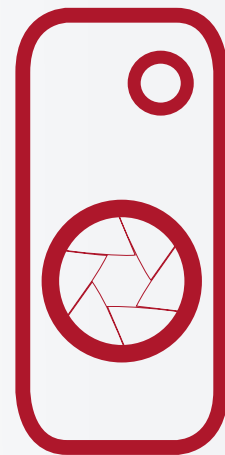
every effort to activate their cameras, and the other gave the officers discretion. The less restrictive policy resulted in more than 40 percent less video footage.⁵⁴

The most common law enforcement approach has been to require cameras to be active for all law enforcement encounters and turned off only with supervisor approval, according to the PERF study. Some law enforcement agencies make one exception: When an officer has control of a camera and it is not practical to turn it on, the officer can explain in writing why the camera was not turned on during a particular incident.⁵⁵ But an idle camera gathers no evidence. Already, multiple police departments around the country have faced claims of verbal abuse or excessive use of force in incidents for which cameras under officers' control were not turned on at the appropriate time.⁵⁶

These examples suggest that officers should not control when body-worn cameras are on. Officers, however, may have concerns regarding constant recording that could capture potentially embarrassing or unflattering statements regarding co-workers or supervisors, and in some situations not allowing officers to control body cameras is impractical. In any case, CBP should have the clearest and strictest policy possible — one that at least requires body-worn cameras be on for all encounters with the public.

This standard would be higher than the one discussed in the PERF report, which noted that some officers want the discretion because of encounters with informants and concerns about a chilling effect on encounters with crime victims or witnesses.⁵⁷ For CBP, interactions with informants is minimal. While Border Patrol agents regularly encounter victims of smuggling or potential asylum seekers, there is no way to know whom they are about to encounter. Privacy concerns of members of the public in their encounters is less relevant for CBP. While local police officers might interact with the public frequently,⁵⁸ Border Patrol agents spend a great deal of time alone or just with another agent. Additionally, Border Patrol agent encounters with the public are much more frequently encounters in which they need to enforce the law, and privacy concerns in those instances would be diminished.

Many policies regarding police use of body cameras discuss potential concerns around officers having cameras in private homes, yet another situation that will arise much less frequently for CBP. Border Patrol officers often operate between ports of entry or at checkpoints, and Office of Field Operations officers operate solely at



⁵⁴ White, *supra* note xviii, at 8-9.

⁵⁵ Police Executive Research Forum, *supra* note xiii, at 13.

⁵⁶ *Id.* at pg 8; Stanley, *supra* note lii, at 2.

⁵⁷ Police Executive Research Forum, *supra* note xiii, at 12-14. However, the ACLU has developed model legislation that would permit officers to turn off their camera at the request of a crime victim. ACLU, *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, <https://www.aclu.org/model-act-regulating-use-wearable-body-cameras-law-enforcement> (last visited Sept. 24, 2015).

⁵⁸ Stanley, *supra* note lii, at 3.

ports of entry. When CBP acts in support of local law enforcement, it usually plays a backup role. However, when CBP officers are first on the scene of an incident and enter private homes,⁵⁹ officers would need to state that their recording device is active. This policy would aid CBP in its quest for greater transparency.

Once CBP adopts a policy on body-worn cameras and provides clear guidance to officers regarding their use, it is essential that CBP publicly announce the policy and clearly post it online and at ports of entry to fully inform the public. Not only is it important for people to know they are being recorded, but evidence suggests that when people know they are being recorded, their behavior is better.⁶⁰

HOW SHOULD DATA BE STORED?

Data from body-worn cameras is another major concern for officers and the public. Because CBP is the nation's largest law enforcement agency, storing data will be critical. CBP will need to ensure that all data is stored in a system secure against hacking and officer tampering.

The overwhelming majority of the footage will not be relevant and should be deleted relatively quickly. Many law enforcement agencies recommend that data be deleted after 60 to 90 days if it is not needed.⁶¹ Some agencies may consider preserving the footage for a longer period because some legal claims may have a longer statute of limitations, and if an agency deletes video footage and an incident then becomes an issue of a claim or lawsuit, it may seem that the “best evidence” was intentionally deleted. CBP will need to develop a system to flag certain footage when an incident occurs, or when a complaint or lawsuit alleges excessive force. The agency also will need to determine whether officers are able to review footage before making an incident report and if supervisors can regularly review data. Clear policies regarding control of this data will demonstrate transparency and accountability to the public.

IMPLEMENTATION AND TRAINING

Customs and Border Protection has slowly begun testing body-worn cameras. In October 2014, the agency announced it was going to start a three-month pilot program at its training centers in West Virginia and New Mexico. In February, it announced it would begin field testing at specific sectors along the southern and northern borders with all components of CBP, including Border Patrol, Office of Field Operations officers and Air and Marine personnel.



⁵⁹ Testimony of Ronald Vitiello, *supra* note xli.

⁶⁰ Police Executive Research Forum, *supra* note xliii, at 5-6; Farrar, *supra* note xix, at 2-3, 10; White, *supra* note xviii, at 20-23.

⁶¹ Police Executive Research Forum, *supra* note xliii, at 17.

Once the field test ends, CBP will conduct an evaluation to determine whether to extend the pilot to the entire agency, and if so, when. Many law enforcement agencies have stated that this type of incremental implementation is key to gain officer buy-in. Multiple pilot programs have shown a shift in officers' feelings toward the cameras once they began wearing them, from opposition to support.⁶²

Collective bargaining could be a barrier to implementation of body-worn cameras throughout the agency. Body-worn cameras likely will constitute a "change in working conditions," which would require negotiation between the Border Patrol union and CBP. It will be important for CBP to engage the union early and often in the process. Having support from union leadership will be vital to winning over rank-and-file officers. Given the benefits of fewer assaults on officers and increased transparency that will improve public relations for officers, body cameras will likely be supported by the union so long as DHS addresses officer concerns such as personal liability for replacing damaged body cameras.⁶³ Neither PERF nor the Department of Justice reported collective bargaining as a stumbling block for implementation at local police departments.⁶⁴

As body-worn cameras are implemented, CBP must provide extensive training to all new and existing agents and officers on the policies related to body-worn cameras and their use. Because CBP is the largest law enforcement agency in the country, body-worn cameras may need to be phased in over a multiyear time frame; it would be difficult to train more than 40,000 agents and officers all at once.

Since the implementation of body-worn camera programs, many agencies have provided examples of situations in which having cameras have saved countless hours of investigative effort; enhanced transparency; provided irrefutable evidence in high-risk, controversial incidents; protected officers and the agency from public and media scrutiny; and enhanced the confidence of the communities they serve. Anecdotally, although many officers initially balk at the idea of body-worn cameras, within a very short time period many could not imagine working in the field without them.⁶⁵ For example, at the Post Falls Police Department in Idaho, the police chief stated, "Early on, I think a lot of officers were very skeptical... I think the majority of the officers now realize it's a big benefit to them. A lot of officers come up to me and say, 'I wouldn't do police work without one now.'"⁶⁶ Examples like these suggest that body-worn cameras have become an invaluable tool to the law enforcement profession.

“EARLY ON, I THINK A LOT OF OFFICERS WERE VERY SKEPTICAL... I THINK THE MAJORITY OF THE OFFICERS NOW REALIZE IT'S A BIG BENEFIT TO THEM. A LOT OF OFFICERS COME UP TO ME AND SAY, 'I WOULDN'T DO POLICE WORK WITHOUT ONE NOW.'”

⁶² See *Police Executive Research Forum*, *supra* note xiii, at 27; *White*, *supra* note xviii, at 28-29. See also *Ramirez*, *supra* note xxiv, at 14-15.

⁶³ See *PoliceOne.com, Poll Results: Cops speak out about body cameras*, <http://www.policeone.com/police-products/body-cameras/articles/7790682-Poll-Results-Cops-speak-out-about-body-cameras/> (last visited Sept. 24, 2015) (finding that almost 29% of surveyed believed body cameras were a physical liability).

⁶⁴ *Police Executive Research Forum*, *supra* note xiii, at 26-27; *White*, *supra* note xviii, at 7-8.

⁶⁵ For example, in the *Orlando Police Department*: <http://www.tampabay.com/news/publicsafety/university-of-south-florida-study-body-cameras-help-police-do-their-jobs/2249453>, *Post Falls, Idaho Police Department*: <http://www.theatlantic.com/technology/archive/2014/12/how-one-small-idaho-city-has-used-body-cameras/383482/>, and the *University of Kentucky Police Department*: <http://kykernel.com/2015/08/24/uk-polices-body-cameras-build-trust-between-police-students/>, all reported that their officers were skeptical about body cameras before using and afterwards supported body cameras.

⁶⁶ *Robinson Meyer, How One Small Idaho City has Embraced Body Cameras, The Atlantic, Dec. 8, 2014*, <http://www.theatlantic.com/technology/archive/2014/12/how-one-small-idaho-city-has-used-body-cameras/383482/>.

FINANCIAL RESOURCES

The costs of implementing body-worn cameras across Customs and Border Protection will be substantial. Many law enforcement agencies have reported that they spent between \$800 and \$1,200 per camera.⁶⁷ New York City estimated that the total cost of outfitting every officer with a body-worn camera would be \$32 million.⁶⁸

Although costs will be substantial, CBP should find success seeking appropriations from Congress. CBP's budget has been rising steadily and currently stands at more than \$13 billion per year.⁶⁹ CBP has been able to pay for its pilot programs without any additional appropriations, and Congress has been very willing to provide CBP funds for whatever it needs to secure our nation's borders.⁷⁰

Moreover, savings resulting from the use of body-worn cameras should offset some of the costs. Evidence suggests that body-worn cameras can save a great deal of money thanks to fewer investigations. Excessive-use-of-force incidents should decrease, and complaints will be resolved more quickly.⁷¹ Although it is not possible to estimate these cost savings because CBP does not list the number of complaints it receives per year, for comparison, New York City spends hundreds of millions of dollars per year addressing complaints.⁷²

CONCLUSION

Customs and Border Protection, the nation's largest law enforcement agency, has a significant opportunity to be a leader in 21st-century policing by implementing body-worn cameras across the agency. To assist the dedicated CBP agents who work every day to keep our nation's border secure, our elected officials and policymakers must look seriously at how to adopt body-worn cameras at CBP. The many potential benefits to the agency include increasing officer and public safety, increasing transparency and rebuilding public confidence, all of which will make CBP more effective. These advantages greatly outweigh potential drawbacks, including those related to privacy.

CBP will need to have a detailed policy that clearly states how, when and where body-worn cameras will be used. But, for an agency that has had more than 2,000 misconduct incidents in the past few years, body-worn cameras would be a momentous step in regaining the public trust.

If CBP does not continue with implementation of body-worn cameras, it risks being the only large and most notable law enforcement agency that does not have such a program in place.

⁶⁷ Police Executive Research Forum, *supra* note xiii, at 32.

⁶⁸ McCabe, *supra* note xxvi.

⁶⁹ See U.S. Dep't of Homeland Security, *Budget-in-Brief Fiscal Year 2016 38 (2015)*, http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

⁷⁰ Press Release, S. Comm. on Appropriations, *FY16 Homeland Security Appropriations Bill Gains Subcommittee Approval (June 16, 2015)*, <http://www.appropriations.senate.gov/sites/default/files/hearings/061615-FY16-DHS-Subcommittee-Markup-Web.pdf>; H.R. 3128, 114th Cong. (1st Sess. 2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/3128/text>.

⁷¹ Ramirez, *supra* note xxiv, at 21.

⁷² McCabe, *supra* note xxvi, at 28-29.



**NATIONAL
IMMIGRATION
FORUM**

WWW.IMMIGRATIONFORUM.ORG