Investigating the Detention of Terror Suspects in the U.S. and the U.K.

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Introduction

The terror organization Al-Qaeda executed an estimated fourteen terror attacks against countries around the world including Tunisia, Yemen, Kuwait, Indonesia, Spain, the United Kingdom, and the United States in 1990's and 2000's. These attacks altered the political landscape of every country involved, often resulting in significant changes in legislation to facilitate the prevention of future attacks. For example, within the United States Congress passed the Authorization of the Use of Military Force granting the President war-time powers. President Bush opened Guantanamo Bay to imprison terror suspects and issued executive orders authorizing indefinite pre-charge detention. In contrast, while the United Kingdom Prime Minister proposed an extension of pre-charge detention to 45 days, the British Parliament refused to extend pretrial detention beyond 28 days. I will examine pre-charge detention after 9/11 in the U.S. and 7/7 in the U.K. to analyze the infringements on human rights. I conclude that the two countries reacted so differently due to differing governmental structures and experiences with terror.

Thesis

The differences in policy can be attributed to the actions of the executive and legislative branches immediately following the terror attacks. I will show that these actions set the tone for subsequent legislation and created the gap between the policies of the two countries. First and

most importantly, in the American case President Bush declared a War on Terror and his administration classified terror-related prisoners as enemy combatants, while in the UK Prime Minister Blair and Parliament never considered the fight against terror to be a war. This ideological framing and its judicial implications thus allowed each country to uphold very different standards in the detention of terror-related suspects. Secondly, differences in executive power strongly influenced the passage of detention legislation. The declaration of war and Bush's interpretation of increased power as commander-in-chief prevented Congress from contesting his initial order to detain suspects at Guantanamo Bay. This resulted in a protracted argument among the President, Congress, and the Supreme Court about the legality of indefinite pre-charge detention. In contrast, Blair's power did not increase following terrorist attacks, and in fact Parliament voted against the Government for the first time since 1997 by stripping out 90-day detention from the Terrorism Bill. In this paper, I explain why the two countries reacted so differently to similar attacks. I conclude in part that the differing responses reflect the differences in governmental structure and experiences with terror.

First, I will examine the state of anti-terror policy in each government before 7/7 and 9/11, respectively. Next, I will summarize the differences in policy outcomes in each government after the terror attacks. I will then present my explanations for the differences in policy outcomes. I will detail the stronger checks and balances present in the United States government and stronger codified human rights legislation. I will explain the irony that the United States passed policy infringing on human rights by showing that the checks and balances were weakened by the executive branch during the aftermath of 9/11. I will then discuss the history of terror in each country and how this impacted the country's attitude toward terror. I will show that the United States framed the fight against terror as a war, and that this temporary attitude toward

the battle against terror made the government more likely to pass policy infringing on human rights. In contrast, the United Kingdom understood the long-term nature of battles against terror and were reluctant to pass policy infringing on human rights due to the potential long-term ramifications.

United Kingdom: The State of Anti-Terror Policy before 7/7

In 2000, the United Kingdom passed the Anti-Terrorism Act in order to streamline the governmental response to terror attacks and to comply with the European Union's requirement that anti-terror legislation be put into one code that complies with human rights requirements (Beckman 55). The U.K. 2000 Anti-Terrorism Act was enacted in February 2001, when terrorism in the U.K. was at a low level for the first time in nearly half a century. The Labour Party, led by Tony Blair, used the opportunity of relative peace to consolidate and codify all of the previous anti-terror legislation (Beckman 57). The Anti-Terrorism Act prohibited police detentions in order to adhere to the EHCR, and eliminated the power to detain terrorist suspects for an indefinite period without promise of a trial date. This act also specifies that "a constable may arrest without warrant a person whom he reasonably suspects to be a terrorist."(Beckman 57), which is a considerable power considering that the act defines a terrorist as "not only being a principal/perpetrator of a terrorist act, but also includes a whole range of accomplice activities that are considered "terrorist" as well, such as having a membership in an organization that supports terrorism and providing financial support for terrorist groups" (Beckman 61). The Act also allows for suspects arrested for terrorism to be held for 48 hours without charge, and an additional five days if petitioned. It is important to note that this act set firm guidelines to address terrorism in the United Kingdom and drew upon the UK's history with terrorism.

United States: The State of Anti-Terror Policy Pre-9/11

The key anti-terror legislation passed in the United States before 9/11 was the Anti-Terrorism and Effective Death Penalty Act of 1996. The original proposal granted strong powers to law enforcement in addressing terror, but the ongoing investigation of FBI misconduct regarding the Branch Davidians made Congress reluctant to grant powers to the FBI (Beckman 25). Importantly, this act allowed the President to "use all necessary means, including covert action and military force, to destroy international infrastructure used by international terrorists" (Beckman 26). This act also included several other key provisions regarding terrorism, but very few regarding pre-charge detention. The act was written to address domestic terrorism, and contained very few provisions to address international threats.

United Kingdom: The State of Anti-Terror Policy After 7/7

In the United Kingdom, the majority of the debate about detainee detention was held on the floor of Parliament. In the Terrorism Act 2006, the executive branch proposed an amendment to extend the maximum detention period from fourteen days to ninety days (Vermeule 1162). All of the Conservative and Liberal MP's were against this measure, and the Labour MP's voted against their party's agenda with a resulting detention period of 28 days. This was interesting for two reasons. First, it is an example of the rare occurrence of the House of Commons voting against legislation proposed by the government. Newspapers referred to this incident as "Tony Blair's Darkest Day" and many feel that is was the reason he stepped down from government. While compromises like this between the U.S. Congress and the President is very common, this was a dramatic change in U.K. politics. Second, it is interesting to consider that neither the Prime Minister nor the Parliament ever considered indefinite pre-charge detention as a possibility, as

the U.S. did. Unlike in the United States, the Terrorism Act of 2006 was not challenged by the High Court because previous acts had already been taken to the High Court.

United States: The State of Anti-Terror Policy After 9/11

On September 14, 2001, the United States Congress passed the Authorization for the Use of Military Force (AUMF), granting the President war-powers in order to fight terrorism. The general section of this Act grants the President the following powers:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons (findlaw.com)

While this generously provides the power to use necessary and appropriate force to prevent future acts of international terrorism, it in fact provides the executive branch with less power than the President requested. The White House initially drafted a bill including the power "to deter and to pre-empt any future acts of terrorism or aggression against the United States"(Vermeule 1159). Congress refused to grant such expansive powers and significantly limited these powers in the legislation described above. Despite the limitations in the act Congress passed, the AUMF still granted the President unprecedented war-time powers by granting power to prevent future acts of terrorism.

The Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Patriot) Act was written by Attorney General John Ashcroft. President Bush urged Congress to move quickly on the legislation in order to swiftly fight terrorism. Congress passed the extensive legislation in 45 days, and "most agree that the legislation was subject to very little debate and scrutiny and some senators and congressmen admitted to not even reading all of the provisions contained in the proposed legislation before voting" (Beckman 27). The law passed easily in both houses with bi-partisan support.

The Patriot Act includes provisions that allow for increased surveillance of U.S. citizens, a new definition of domestic terrorism, and many other controversial issues. The Act also includes several changes related to the detention of terrorism suspects. First, the Attorney General has the power to detain any alien suspected of engagement in activities dangerous to national security, and detain them for 7 days without a trial. If the Attorney General certifies the person as a "suspected terrorist", the detention can be extended to six-month renewable periods. Further, and more often utilized, is the provision allowing the Immigration and Naturalization Service to detain a person without charge for 48 hours, and in the event of an emergency, the ability to detain the person for a reasonable period of time without charge. The federal government also began justifying pre-trial detention with a 22-year-old federal law, the Material Witness Statute, which was created to allow the government to hold witnesses in order to testify in the case, particularly when the witnesses may flee or disappear.

The Patriot Act is an extensive piece of legislation involving many significant changes to executive powers and judicial procedures. A comparable piece of legislation would often involve longer debate and would rarely receive such bi-partisan support. The era of fear and sadness in the United States compelled the government to responds swiftly and decisively.

As stated by a then-member of the CIA, “After 9/11, the gloves came off”(Forsythe 20). President Bush utilized his wartime powers from the AUMF to open Guantanamo Bay and claimed that prisoners held at Guantanamo Bay were not subject to the Geneva Conventions. The Geneva Conventions provide protection for all prisoners captured during war, whether in combat or not, no matter their country of origin. The final protocol of the Convention was ratified by Congress in 1949 and the executive branch is required to follow it. John Yoo of the OLC instead “declared that Bush had the executive authority either to suspend the Geneva Conventions or to creatively interpret the treaties as allowing him to “determine” that their restrictions did not apply to the war against Al Qaeda and the Taliban […] There was no precedent giving a country the authority to suspend its commitment to a humanitarian treaty such as the Geneva Conventions, or to interpret them into meaninglessness” (Savage 146). Bush followed this memo’s interpretation and declared that all suspected Al Qaeda and Taliban detainees were unlawful combatants who did not qualify for Geneva Conventions protections. This interpretation allowed Bush to send Al Qaeda and Taliban suspects to the Guantanamo Bay prison and detain them without charge indefinitely. It was later discovered that of the detainees at Guantanamo Bay, only 8 percent “had committed attacks on U.S. forces or its allies, while another 30 percent were actual “members” of a terrorist group or the Taliban, though they had not fought. Sixty percent had no definitive connection to Al Qaeda or the Taliban” (Savage 148). This grievous injustice could have been rectified if the detainees were charged and given a trial under their Geneva Convention rights. Beyond violating the Geneva Conventions, the decision to hold prisoners without charge went against the Constitution, Bill of Rights, and the Non-Detention Act of 1971 passed after the imprisonment of Japanese Americans in “relocation

camps." This Act states "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress".

Yaser Esam Hamdi is an American citizen who was captured in Afghanistan, and Jose Padilla is an American citizen who was locked up after being captured on U.S. soil. Hamdi was initially sent to Guantanamo Bay, but upon learning that Hamdi was an American citizen officials transferred him to a naval base on U.S. soil in order to avoid investigations of the Guantanamo Bay facilities, but was still treated as an enemy combatant. Padilla was held under the "material witness" law discussed earlier, until Bush declared him an enemy combatant as well. Lawyers filed cases on behalf of both detainees, which eventually were brought to the Supreme Court. The Supreme Court dismissed the Padilla case because it was filed in the wrong jurisdiction, and ruled that "the President had the wartime authority to hold Hamdi without charges as an enemy combatant" (Savage 193) because Congress had voted to give the President war powers in the resolution on September 14, 2001. However, the Court also ruled that Hamdi must receive a hearing in which he could challenge his designation as an enemy combatant.

In response to the Supreme Court's ruling that prisoners must be able to challenge their detention before an impartial judge in Hamdi v. Rumsfeld, the Pentagon created Combatant Status Review Tribunals to determine enemy combatant status. In Hamdan v. Rumsfeld, the Supreme Court ruled that these Combatant Status Review Tribunals were illegal because they violate the Geneva Conventions. In response to this ruling and at the request of the President, Congress passed the Military Commissions Act (2006), legalizing the use of military commissions and interstingly preventing the Geneva Conventions from being applied. The Supreme Court then ruled in Boumedienne v. Bush (2008) that the Military Commissions Act was unlawful.

The contrast between the treatment of detainee detention in the United States and United Kingdom following their respective terrorist attacks is an interesting study in the contrasting systems of government. I will now explain the irony that the United States, with a codified Bill of Rights and a strong system of checks and balances, implemented indefinite pre-charge detention while the United Kingdom Parliament, in a rare show of power against the Prime Minister, refused to allow the government to hold prisoners without charge for more than 28 days.

Comparing and Contrasting Policy Processes

In this section, I will explain the differing policy processes in the United States and United Kingdom, and present the irony that the United States, with the stronger system of checks and balances and protections of civil rights, implemented indefinite pre-charge detention.

When the Federalists crafted the Constitution of the United States, they looked to the British government as an example, resulting in similar governmental structures in the U.S. and the U.K. However, the Founders were fearful of any one person becoming too powerful and deliberately divided power among each branch of government, providing each branch with the means to check the other branches in order to prevent dictatorship. The U.S. Constitution creates a bi-cameral Congress and a Supreme Court. Congress acts as a check on the President in several key areas, first and foremost through having the sole power to legislate. While the President can veto bills passed by Congress, if enacted into law they must be passed as Congress wrote them. The Supreme Court ruled that the President cannot use line-item vetoes, although the President's power to use signing statements is a matter of current debate discussed later. Congress also holds the power to set the budget and enact taxes, to declare war, to ratify treaties, and to impeach the President. Congress checks itself through the interplay of the two branches, the

House of Representatives and the Senate, which often disagree with each other. Because the support of both houses is needed to pass a bill, bicameralism often makes legislation difficult or impossible to pass. The President serves as a check on Congress through the ability to veto legislation, the power to wage wars authorized by Congress, and the power to faithfully uphold the law.

The powers of the Supreme Court are separated from those of the legislative and executive branches. The Court rules on cases that have been appealed through lower levels of courts and exercises judicial review, which was established in the landmark case *Marbury v. Madison*. In *Marbury v. Madison*, the Court first voided an act passed by Congress that conflicted with the Constitution, exercising judicial review. This established a precedent for the Supreme Court to uphold the Constitution and acting as a check on Congress and the Executive branch when their actions violate the Constitution. Thus, the Supreme Court acts as the modern-day interpreter of the Constitution, examining how current issues would be interpreted under the Constitution.

The government of the United Kingdom has never had a written constitution but instead operates under a *de facto* constitution consisting of the amalgamation of Acts of Parliament, traditions, customs, and conventions (Watts 28). Currently, the Monarch holds the power to choose her Prime Minister and to call and dissolve Parliament, the legislative branch. However, in practice, she chooses the leader of the party with a plurality in the House of Commons, and the Parliament is called and dissolved only at the suggestion of the Prime Minister. The power of tradition and custom in the United Kingdom is so strong that Parliament has not enacted checks on this power of the Monarch into law. The evolving nature of the government of the United Kingdom can be seen in the significant changes made to the make-up of government in the past

twenty years. Currently, the legislative branch consists of bicameral houses, the House of Commons and the House of Lords. The members of the House of Commons are elected through the "First Past the Post" system, usually resulting in two key parties having strong majorities in the House. The Prime Minister, the operating head of the Queen's executive branch, is appointed as the Leader of the political party with a majority in the Commons. Thus, the Prime Minister always operates with a plurality in the legislative branch, which is compounded by the stronger rewards for party loyalty and the importance of this loyalty to future career prospects (Stapenhurst 184). It is very rare for the House of Commons to vote against legislation proposed by the Prime Minister because Members of Parliament (MP's) nearly always vote along party lines due to the threat of party discipline. The second house of the legislative branch is the House of Lords; Lords are appointed to life terms. The House of Lords reviews all legislation and often makes more extensive revisions than the Commons because the Lords rarely spend time initiating legislation. The Lords are unable to veto an act passed by the Commons but can delay bills by up to 30 days.

The Lords of Appeal in Ordinary, or Law Lords, operated as the highest court in the United Kingdom until the Constitutional Reform Act 2005 created a Supreme Court whose jurisdiction began in October 2009. Before the passage of the Human Rights Act of 1998, the Law Lords were able to exercise judicial review on three broad grounds: that the body who passed the law had exceeded its powers, that it had breached the rules of procedural fairness, or that the law passed had been so unreasonable that no reasonable person could have taken it. (Beetham 28). Similar standards of judicial review to those of the United States were proposed in the famous *Dr. Bonham's Case* but the British legal system values the sovereignty of Parliament,

an elected body, over all else and thus the powers of judicial review are very weak (Beckman 54).

The Human Rights Act made significant changes to the standards of judicial review in the United Kingdom. The Act was passed as a legislative enactment of the United Kingdom's ratification of the European Court of Human Rights. The Act "makes all public officials directly accountable in the courts for actions that interfere with basic civil and political rights set out in the European Convention" (Beetham 28). This provision altered the power of judicial review because the courts of the United Kingdom were previously charged solely with upholding the rule of the sovereign Parliament. Since the Act was passed by Parliament, it altered the powers of judicial review of the Supreme Court. The Court now judges whether every action interferes with the rights guaranteed under the European Court of Human Rights (Beetham 28). However, it is unclear how often the courts will exercise this power. Recently, the judiciary branch has deferred to the executive branch when it exercises its royal prerogative. This is in contrast to the United States, in which the Supreme Court can and does serve as a check on actions of the executive branch (Beetham 28).

These key differences in the separation of powers result in very different legislative styles in the two governments despite such similar structures of government. This can be seen clearly by contrasting the ease of passing bills proposed by the executive in each country. In the United Kingdom, legislation proposed by Prime Minister Tony Blair was always passed by the Commons between 1997 and 2005 (Jones 1). Legislation proposed by the "government", or party in power, is very rarely defeated in the House of Commons because of strong party loyalty and discipline. In the United States, the President's party often does not have a majority in Congress, and therefore the President and members of Congress must compromise on most legislation

passed. Further, members of Congress frequently vote against legislation proposed by their own party, and face no party discipline. Members of Congress often consider themselves accountable only to their constituents, while members of Parliament are accountable to both their party and their constituents.

Further, the lack of a written constitution or bill of rights in the United Kingdom means that the protection of civil rights is more tenuous. The United Kingdom follows the laws and statutes passed by Parliament through the ages, which means the constitution can by changed by a simple majority vote in both chambers of the Parliament, or even with the assent of just the House of Commons and a slight delay by the House of Lords (Beckman 52). Before the passage of the Human Rights Act, the United Kingdom operated assuming any rights not taken away by legislation were protected. This meant that Parliament was careful to protect civil rights in the laws they passed, however there were no checks on Parliament's defense of civil rights.

United States: Expansion of Executive Power

I will now show how the Bush-Cheney administration expanded executive power during their terms, preventing the legislative and judicial branches from effectively checking the executive branch.

James Madison discussed the importance of separating the powers of the Congress and the executive branch in the Federalist papers. The Founders were particularly wary of the President becoming a King and thus gave Congress the authority to pass laws, and the President the authority to enforce them. The President was given the power to veto bills, but the veto would be over-ridden by a supermajority vote in Congress. Through the years, some Presidents have gained executive power over Congress, while others have lost the power to Congress after

scandals such as Watergate. This push for power crosses party lines, with both Republican and Democratic Presidents expanding presidential power.

The Federalist Society is a network of lawyers who believe in Unitary Executive Theory, the driving force behind the Bush-Cheney administration's philosophy on executive power. This theory is rooted in President Theodore Roosevelt's view of the powers of the presidency: "My belief was that it was not only the president's right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by its laws" (Roosevelt 1925, 357). This theory is rooted in an expansive reading of the President's power as stated in Article 2 Section 2 of the Constitution:

> The executive Power shall be vested in a President of the United States of America. […] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

The Unitary Executive Theory contends that the President is vested with these powers: "The president's absolute power to remove subordinate policy-making officials; the president's authority to direct the way in which subordinates exercise discretionary executive power; and the president's power to veto or nullify those officials' exercise of discretionary executive power" (Schier 62). Vice-President Cheney began his term "determined to expand the power of the presidency" (Savage 8). He charged the Office of Legal Counsel (OLC), the lawyers who interpret the legality and constitutionalism of the President's actions, with the directive of "seizing any opportunity to expand presidential power" (Savage 73). This is of primary

importance because the President must legally obey any decisions of the OLC, and while the OLC's decisions can be struck down as unconstitutional, the President must only adhere to the decisions of the OLC, often explained in memorandums, to stay within the law. Brysk describes lawyer's skill in arguing almost anything: "It needs to be appreciated that the structure of legal argument and its normative architecture is such that it is always possible for a seasoned lawyer to present a logically coherent legal argument to support a preferred political course of action" (Brysk 19). The OLC complied with many of the executive branch's requests for additional power, most notably regarding the executive's power to withhold information from Congress, and the power to disregard legislation the executive considers unconstitutional. The head of the OLC, John Yoo, wrote a memo shortly after 9/11 "asserting that no statute passed by Congress could limit the war powers of the commander in chief; as authority for this claim, Yoo cited his own academic writings six times in thirty-two footnotes"(Savage 82). The Bush administration exercised this war-power through issuing executive orders, significantly altering the operations of the executive branch, and reinterpreting laws passed by Congress. Importantly, the Bush administration attempted to prevent the Supreme Court from hearing cases regarding Guantanamo Bay, claiming the information was too sensitive to be analyzed. This slowed the already lengthy process of bringing a case to the Supreme Court, preventing the Supreme Court from ruling quickly.

President Bush also used signing statements to exercise his executive power in a way no other president has. He attached signing statements to many of the bills he signed into law during his presidency. While signing statements had been utilized by past presidents, President Bush wrote 82 signing statements in his first term alone, essentially stating that he would not follow some or all of 82 bills passed by Congress, including a bill including new regulations for military

prisons, and the McCain Torture Ban. The legality of signing statements is still under dispute, although most agree that signing statements cannot be used to alter the meaning behind the bill passed by Congress (Savage 95).

Without the expansion of executive power, the Supreme Court and Congress would have likely prevented the President from detaining prisoners indefinitely. Although Congress initially supported granting war-time powers to Congress, they later realized the need for some sort of trial. Although the Military Commissions Act was of questionable legality, it showed Congress' commitment to implementing some sort of trial for detainees. If the President had consulted Congress sooner instead of issuing executive orders justified using Unitary Executive Theory, detainees would have likely received trials earlier.

Experiences with Terror

The United Kingdom suffered repeated terrorist attacks from the Provisional Irish Republican Army in Northern Ireland since the 1960's ("Provisional IRA: War, Ceasefire, Endgame" bbc.co.uk). The repeated terrorist attacks have several implications for the UK's current stance on civil rights in the fight against terror. First, the experience of fighting terrorism meant that the secret services were well-equipped to anticipate and address terrorism. Anti-terror legislation evolved through the struggles with the PIRA. The PIRA was a group of "Europe's most sophisticated and committed terrorists" and the United Kingdom strengthened both anti-terror legislation and law enforcement throughout the "Troubles" (Orttung 108). Despite this experience with terror, much of the UK legislation regarding terror allowed law enforcement officials the same tools to fight terror as were available for criminal offenses. Many of the legislation that provided law enforcement with more powerful anti-terror tools could only be applied to the conflicts in Northern Ireland, such as the Prevention of Terrorism Act of 1989. The

remaining anti-terror legislation "could have been described as a hodgepodge of different laws, and different police and intelligence organizations" (Beckman 55).

Conversely, the United States had little experience with terrorism at home prior to the 9/11 attacks. Beckman describes the American mindset about terror:

> While Americans have always been warily[sic] of terrorist acts abroad, especially after heinous attacks upon Americans at the Beirut compound in 1983 (killing 241 American service members) and the bombing of the 1988 Pan Am Flight 103 over Lockerbie, Scotland (killing 270 people, including 189 Americans), there was a sense that these attacks occurred elsewhere and not on U.S. soil. (Beckman 25)"

The failed attack on the World Trade Center in 1993 and the Oklahoma City bombing began to change this attitude in the 1990's, although Americans still viewed terror attacks as a domestic issue and not an international threat.

The differences in national attitude as a result of differing experiences with terrorism impacted the willingness of the legislative bodies to give more power to the executive. In the U.S., 9/11 was compared to Pearl Harbor by many scholars (Brysk 20), while U.K. citizens were more likely to view the attacks of 7/7 as another, different terror attack. This familiarity allowed the United Kingdom Parliament to recognize the potential permanency of any of their actions. In the United States, the fight against terror was framed as a war, implying a more temporary nature. If the U.S. Congress had recognized the potential permanency of their actions, they would have been less likely to grant the President expansive wartime powers, and more likely to check the executive branch's actions at Guantanamo Bay.

Conclusions

It is of paramount importance to analyze infringements on human rights. While it is easy to sacrifice human rights for public safety, as in the case of detaining suspected terrorists, this comes at an extremely high cost. As seen in the United States, it is easy for a few key individuals to make extreme changes to policy when the government is not allowed to operate as intended. The United Kingdom serves as a counter-example in which the checks and balances of the system worked as intended, resulting in policy that protects human rights.

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