CASE NOS. 09-6108 and 09-6123

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

STEVEN DALE GREEN, DEFENDANT-APPELLANT.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

REPLY BRIEF FOR APPELLANT

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Table of Contents

Table of Cases, Statutes, and other Authorities

Cases

Statutes

Other Authorities

Appellant's Reply Brief

Comes the appellant, Steven Dale Green, pursuant to Fed.R.App.P. 28(c), and respectfully submits the following reply brief.

Issues to which the Brief is addressed

I. The Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §3261) is unconstitutional because it violates the separation of powers, the non-delegation doctrine, and Equal Protection and Due Process under the Fifth Amendment.

A. Constitutionality of MEJA (United States' Brief, pp. 38-55)

The issue here is not whether Congress has the right to criminalize the conduct for which appellant and his military co-accused were prosecuted. Rather, this case presents the question of whether Congress has improperly ceded its constitutional role to the Executive. "[T]he Supreme Court has adopted two main methods of analyzing statutes under the separation of powers doctrine: functionalism and formalism." *United States v. Polizzi*, 549 F.Supp.2d 308, 401 (E.D.N.Y. 2008) vacated on other grounds in *United States v. Polouizzi*, 564 F.3d 142 (2nd Cir. 2009) (other citations omitted).

> The functional approach, as adopted by the majority in *Mistretta* [*v. United States*, 488 U.S. 361(1989)], inquires whether 'one branch ... assumes a function that is more properly entrusted to another...' Considered is the extent to which an act 'prevents the [branch] from accomplishing its constitutionally assigned functions...' The method is flexible, allowing blurring between boundaries of the three branches so

long as power over a branch's core function is not usurped by another.

Polizzi, 549 F.Supp.2d 308, at 401 (other citations omitted).

> The formalist approach, as exemplified by the majority opinion in [*INS v.*] *Chadha*, [462 U.S. 919 (1983)] is more rigid. It invalidates a law that does not keep a branch within its 'prescribed sphere of power,' allowing less commingling of functions... This approach requires a two-step analysis: first, characterizing the power being exercised, and second, determining whether that power is within the appropriate branch.

United States v. Polizzi, 549 F.Supp.2d at 401-402 (other citation omitted). "[A] positive ascription of power to a particular branch may be taken to imply a negative prohibition on the exercise of a similar power by the other two branches." *United States v. Williams*, 15 F.3d 1356, 1361 (6th Cir. 1994) *cert*. denied 513 U.S. 966 (1994). Thus, if Congress has the power to determine jurisdiction in criminal cases, then that task cannot be performed by the Executive Branch.

The "formalist approach" seems the better suited analysis for MEJA because the power being exercised involves procedures for the adjudication of criminal offenses, more specifically, the judicial system in which the crimes are to be prosecuted, i.e., jurisdiction. As Green's case demonstrates, MEJA grants the Executive Branch unfettered discretion to prosecute crimes committed outside the United States by members of the Armed Forces under either the federal criminal code or the UCMJ. Granting the Executive Branch unrestricted discretion to determine

which of the two disparate jurisdictional systems to apply violates the separation of powers doctrine and constitutes an unconstitutional delegation by the Congress to the Executive Branch of the exclusive power and responsibility of Congress to determine what conduct is subject to criminal sanction, fix the sentence for crimes, and set forth the procedures for the adjudication of criminal cases. The government claims there was only one available forum - federal court - in which to prosecute Green. As discussed below, there were other forum options available to the government and the circumstances of this case show that the government had unrestricted discretion in deciding the forum for Green's prosecution. The unrestricted discretion to choose the forum in which to prosecute results from Congress ceding its power to the Executive Branch thereby rendering MEJA unconstitutional.

The government argues (brief, p. 40) that after Congress enacts a criminal law its task is finished and that the Attorney General and the United States Attorneys have "the responsibility for deciding whether, when and whom to prosecute under that law." That, however, does not eliminate the constitutional infirmity in MEJA because the statute allows the executive the unfettered discretion to choose the forum in which to prosecute. There are no limits to that discretion because, as Green's case illustrates, it can be used to commence a prosecution in either the military or civilian judicial system as the Executive sees fit.

The Army was made aware of the crimes on the day they occurred - March 12, 2006, - when Green admitted his involvement to his superior, Sgt. Yribe. (R. 92, Defendant's Motion to Dismiss, pp. 8-9). Green again reiterated his involvement in those crimes when Yribe questioned him about the incident on the following day - March 13, 2006. *Id*. at p. 9. At that point, the Army could have commenced a prosecution of Green but for Yribe's attempt to cover-up the involvement of U.S. soldiers in those crimes. The Army's response, which was triggered by Yribe's coverup and his desire to separate Green from the military, was to discharge Green, ostensibly putting him beyond the reach of the UCMJ. See 18 U.S.C. §3261(d)(1). Green, however, was beyond the reach of the UCMJ only by virtue of the government's chosen course of action. Green did not elect to be discharged. It was initiated solely by the government and was therefore beyond his control. Thus, the government's decision to prosecute Green differently from his similarly situated and equally culpable co-accused violated procedural and substantive due process as well as equal protection.

Furthermore, the government was not without available forum options in this case. It could have accepted Green's offer to re-enlist and subject himself to the UCMJ or it could have prosecuted all of the other soldiers (Cortez, Spielman, Barker, and Howard) in federal court with Green. See 18 U.S.C. §3261(d)(2). Green was

discharged on May 16, 2006; he was arrested for the crimes against the Al-Janabi family on June 30, 2006; and he was indicted on November 2, 2006. (R. 36, Indictment; R. 136, Opinion, p. 1; R. 284, PSR ¶¶12, 21).The other four participants were charged with those crimes in June or July 2006. (R. 92, Defendant's Motion to Dismiss, p. 11; R. 136, Opinion, pp. 1-2). Barker was sentenced in November, 2006; Cortez was sentenced in February, 2007; and Howard was sentenced in March, 2007. (R. 284, PSR ¶¶14-16). Thus, with the return of the indictment against Green, the time line in this case would have allowed for the federal court prosecution of the co-accused although they were still in the military and subject to the UCMJ. See 18 U.S.C. §3261(d)(2). To the extent that the government had the aforementioned prosecutorial options available to it, MEJA is unconstitutional because it places no restriction on the government's discretion to choose a forum in which to prosecute. For the reasons set forth in Green's original brief, the disparity in his treatment *vis-a-vis* his co-accused underscores the constitutional flaws in MEJA since the chronology of events shows the unrestricted discretion vested in the Executive Branch by MEJA.

The constitutional disparity inherent in MEJA is further reflected in the difference between treatment of civilians and former soldiers like Green. The UCMJ extends military criminal jurisdiction not only to members of the armed forces serving in Iraq but also to civilians, who "[i]n time of declared war or a contingency operation

[are] serving with or accompanying an armed force in the field." 10 U.S.C. §802, Art. 2(a)(10).[1] MEJA, however, extends civilian criminal jurisdiction to members of the armed forces, who were in Iraq and subject to the UCMJ at the time of the offense, if they are no longer subject to the UCMJ when the prosecution commenced. 18 U.S.C. §§3261(a) and (d)(1). It seems a strange irony that civilians can be prosecuted under the UCMJ, a system of justice intended and designed to deal with military personnel, while a former soldier like Green must, according to the government, be prosecuted in a civilian court.

The government (brief, p. 41) acknowledges that MEJA "increases the Executive Branch's power by creating a new law for prosecutors to decide to enforce in order to fill a preexisting void ..." The government insists that this "expansion" is "constitutionally mandated" but, as Green's case demonstrates, that argument overlooks the central flaw in MEJA i.e., the unlimited discretion given to prosecutors leads to unequal and unfair treatment of similarly situated co-defendants. The government (brief, p. 43) claims that Green's constitutional argument "rests on a faulty premise" because "a military prosecution was not an available option here ..."

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[1]A "contingency operation" is defined as a military operation that "is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. . . ." 10 U.S.C. §101(13)(A).

(citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)).[2] If a military prosecution was not an option (which Green does not concede), it was only as a result of Yribe's cover-up and the Army's hasty discharge of Green. Yribe's misconduct created a jurisdictional hook into federal court that did not exist when the crimes were committed. As noted above, a military prosecution was an option since Green offered to re-enlist for the purpose of subjecting himself to the UCMJ but the Army declined the offer without explanation. (R. 92, Motion to Dismiss, Exhibits (EX) 6, 7, and 8; R. 136, Opinion, p. 2).[3] And even if the re-enlistment option were not exercised, there was the option of prosecuting all of the military co-accused and Green in federal court thereby eliminating the unequal and unconstitutional treatment of Green. Thus, the options available to the government refute its claim (brief p. 44) that "the only available 'choice' was between prosecuting Green in the civilian criminal justice system under the MEJA or allowing Green to escape prosecution." Indeed, the

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[2] Exceptions to *Toth* arise where a discharge does not defeat subsequent court-martial jurisdiction. See e.g., Rules for Courts-Martial (RCM) 202(a)(2)(B)(iii)(a)(1) (discharged soldier reenters military service); RCM. 202(a)(2)(B)(iii)(c) (discharged soldier remains in the custody of the Armed Forces); and RCM 202(a)(2)(B)(iii)(d) (discharged soldier fraudulently obtained his discharge).

[3] The government acknowledges (brief, p. 45, n.12) that Green could have re-enlisted but it maintains that he has not challenged the validity of the Army's decision to deny him re-enlistment. Green has indeed challenged the validity of that decision insofar as it resulted in his unconstitutional prosecution in a civilian court.

government admits (brief, p. 46, n.13) that MEJA (18 U.S.C. §§3261(d)(2)) "grants civilian prosecutors discretion to prosecute servicemembers who commit criminal acts with non-military persons under the MEJA, even though the military would have had jurisdiction as well." The fact remains that the government had the option of prosecuting Green in a military court and declined to do so.

The government also portrays this case as a simple "choice of forum" decision that prosecutors routinely make, but as this case illustrates, there are important constitutional issues that stem from such decisions especially when they result in the unequal treatment of similarly situated co-defendants who are engaged in the same criminal conduct. Thus, the government's analogy to the decision whether a defendant who commits a crime in the District of Columbia should be prosecuted in federal court or the local court is inapposite because Green's case is not one that presents a mere "forum-selection" issue. (United States Brief, pp. 50-51).

If multiple defendants were involved in the same criminal acts committed against a particular individual or family in the District of Columbia, surely the government would not prosecute one defendant in federal court and prosecute the co-defendants in the local court. According to the government, a "split prosecution" was necessary in Green's case because it had no other choice. Green has shown that the government had other forum choices but, more importantly, the government was able

to make that choice because through MEJA Congress created two, incompatible and unequal systems of criminal justice and improperly delegated to the Executive Branch the unfettered discretion to choose which of those two systems will apply to persons who engage in criminal conduct while they are members of the Armed Forces. In the context of Green's case, the fact that the co-accused were still in the military and subject to the UCMJ is irrelevant because civilian prosecutors can, if they so choose, prosecute them in federal court under §3261(d)(2). That circumstance underscores the unfettered discretion that Congress impermissibly bestowed on the Executive Branch through MEJA. Thus, MEJA's scope is not as narrow as the government suggests.

Congress has not unlawfully delegated its legislative power if the legislation in question articulates "an intelligible principle" that governs the exercise of the delegated legislative power ..." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). See also *Touby v. United States*, 500 U.S. 160, 165 (1991). As Green's case demonstrates, something more than an "intelligible principle" is required when Congress authorizes another Branch of government to promulgate regulations that contemplate criminal sanctions. Green's case involves a wholesale delegation of an exclusive legislative function to the Executive Branch, i.e. the determination of criminal jurisdiction. MEJA delegates to the Executive Branch Congress' power to choose which jurisdiction to apply in a given case and as Green's

case shows, there are no limits or constraints on the exercise of this delegated legislative power by the Executive Branch.

The government (brief, p. 54, n.16), however, concludes that MEJA "easily passes 'intelligible principle' scrutiny" because it "clearly delineates the general policy objective (prosecuting civilian ex-soldiers for foreign-soil criminal conduct)..." The government further notes that civilian prosecutors are entrusted with the administration of the statute which "defines the boundaries of exercises of this authority in how it defines the criminal conduct." *Id*. The government, however, views MEJA much too narrowly. First, the "general policy objective" of the statute is not limited to prosecuting ex-soldiers who are no longer subject to the UCMJ. Green's case demonstrates that although members of the Armed Forces may be subject to the UCMJ, they are not beyond the reach of MEJA. See §3261(d)(2). Thus, MEJA's scope is much broader than the government's view of it. Second, the exercise of the civilian prosecutor's authority under MEJA is not constrained by "how it defines criminal conduct." The civilian prosecutor's discretion is not limited by the type of criminal conduct that an individual commits. Rather, as the government argues on p. 62 of its brief, it is the "legal status" of the perpetrator that is the decisive factor, i.e. whether he is currently a civilian or is currently subject to the UCMJ (and even if he is subject to the UCMJ, as shown above, that does not preclude a

prosecution in a civilian court). Thus, the "intelligible principle" on which MEJA purportedly rests is subject to the unlimited exercise of a civilian prosecutor's discretion.

Furthermore, to the extent the government argues that the "intelligible principle" doctrine is not relevant because Congress has set forth definitive sentences in MEJA and specified the conduct that is criminal, the government's reliance (brief, p. 54) on *United States v. Batchelder*, 442 U.S. 114 (1979) and *United States v. Allen*, 160 F.3d 1096, 1108 (6th Cir. 1998) is misplaced. *Batchelder* and *Allen* involved the prosecutor's charging decision in a federal (civilian) court. In contrast to Green's case, *Batchelder* and *Allen* did not involve the delegation of authority to decide whether a military or civilian court would be the site of the prosecution. Moreover, Green's case does not involve a **routine** exercise of the authority delegated by Congress to the Executive, since the latter has essentially the unrestricted discretion to choose the legal system in which to prosecute the case.

B. Exercise of Prosecutorial Discretion (United States' Brief, pp. 56-68)

Viewing Green's case simply as a matter of exercising discretion, the government (brief, p. 67) citing *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008) maintains that "the discretion conferred on prosecutors ... is flatly inconsistent with a presumption of uniform treatment." That statement, however, oversimplifies

the issue in Green's case because it presumes that there are limits on the exercise of prosecutorial discretion. But as Green has shown in his original brief, the effect of MEJA is unconstitutional because it gives prosecutors the unfettered discretion to decide whether a defendant should be tried in the military or civilian criminal justice system. Even if "uniform treatment" is not constitutionally required, equal protection of the law is constitutionally required and necessarily limits a prosecutor's discretion. As Green's case shows, the government has the unilateral ability to discharge a service member and thereby subject him or her to prosecution in federal court. And, as Green's case further demonstrates, the exercise of such unilateral power can result in an equal protection violation.

In the exercise of its discretion, the government insists (brief, pp. 57, 63) that federal court was "the only available forum" in which to prosecute Green but, as previously noted, a military prosecution would have occurred if Yribe had not tried to coverup the crimes committed against the Al-Janabi family or if Green had been allowed to re-enlist. And the government had the further option of trying **all** of the defendants in federal court under §3261(d)(2) thereby avoiding unequal treatment of similarly situated defendants. In any event, the government argues (brief, p. 59) that Green cannot show that the charging decision adversely affected him. The fact is that Green was adversely affected by that decision because, unlike Barker, Cortez, and

Spielman who are eligible for parole after 10 years in spite of their convictions for premeditated murder (among other charges), Green is not eligible for parole. The government's unequal treatment of Green deprived him of any opportunity to even be considered for parole. And even if a military judge "reasonably could have concluded" that Green was not entitled to parole eligibility (United States Brief, p. 60, n. 18), that military judge at least had the discretion to make that decision as opposed to the district judge here, who had no choice but to impose a sentence of life without parole.

The government (brief, p. 61) attempts to refute Green's equal protection argument by asserting that he is not similarly situated to his co-accused because he alone was discharged from the military and thus did not share the same "legal status" as his co-accused. (United States' brief, p. 62). That effort to distinguish the defendants overlooks the fact that they were all engaged in committing the same criminal acts in a single criminal episode and, as discussed above, it was indeed possible to have tried **all** of the defendants in the same forum whether it was a military court or a federal court. Moreover, the purported difference in the defendants "legal status" cannot be attributed to any action by Green because it resulted 1) from his discharge, which was initiated by the Army, or 2) the Army's refusal to allow him to re-enlist for purposes of a military prosecution, or 3) the government's decision not

to prosecute Cortez, Barker, Spielman, and Howard in federal court with Green pursuant to §3261(d)(2).[4] "Equal protection claims can be brought by a 'class of one,' where the plaintiff alleges that the state treated the plaintiff differently from others similarly situated and that there is no rational basis for such difference in treatment." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 710 (6th Cir. 2005) citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). There is, however, no rational basis for the "difference in treatment" between Green and his co-accused because, as previously shown, the government had the options of allowing Green to re-enlist or prosecuting all the defendants in federal court. While acknowledging that arbitrariness can amount to an equal protection violation (United States' Brief, p. 62-63), the government citing *United States v. Moore*, 543 F.3d at 900, nevertheless maintains "an exercise of prosecutorial discretion cannot be successfully challenged merely on the ground that it is irrational or arbitrary." (See United States' brief, p. 64, n.19). Green's case, however, can be distinguished from *Moore*.

In *Moore,*543 F.3d at 893, the defendant was indicted in federal court for his involvement in two drug transactions. Those transactions were referenced in a state

[4] It should be noted that the Army has discretion where the discharge is based on a personality disorder. See Army Regulation (AR) 635-200, 5-13 which entitled "Separation because of personality disorder" and provides in pertinent part, "[A] soldier **may** be separated for personality disorder ... that interferes with assignment or with performance of duty ..." Emphasis added.

court indictment which did not charge Moore with any crime. *Id*. In response to Moore's argument that he should receive a two level reduction pursuant to Sentencing Guideline (USSG) §3B1.2(b) as a minor participant in the offense, the government explained that "the evidence against the defendants in the state case 'differs wildly,' and that '[t]o just comment that other people are getting different sentences there for substantially the same thing ignores the fact that the evidence in that case is very different as to each defendant.'" *Moore*, 543 F.3d at 895. That the evidence between the state and federal cases in *Moore* "differs wildly" is one substantial distinction from Green's case in which all of the defendants engaged in the same criminal conduct that occurred in a single criminal episode.

On appeal, Moore made a class-of-one equal protection argument that he was "intentionally treated differently from others similarly situated" because he was subjected to a harsher sentence than the state defendants. *Id*. at 897 (other citations omitted). The Seventh Circuit rejected that argument because Moore was not "similarly situated" to the state defendants. The court found that "the separate federal and state prosecutions necessarily involved at least two decision-makers, one federal and one state; this alone works against a finding of similarity." *Id*. (Other citations omitted). In Green's case there was, of course, but one decision maker - the United States Attorney. That is another basis on which *Moore* can be distinguished from

Green. And, unlike *Moore*, Green's argument is not merely that his case involves a matter of prosecutorial discretion. Rather, Green's argument centers on the basic constitutional flaw underlying MEJA, i.e., it gives the Executive Branch unfettered discretion to decide which justice system is to be the site of the prosecution and as Green's case reflects it is not one in which the government had no choice but to prosecute only him in a civilian court.

Finally, with respect to Green's due process argument, the government (brief, p. 66, n. 20) recognizes that the "piggybacking proviso" of §3261(d)(2) allows the prosecution of the co-accused and Green in federal court. The government argues, however, that Green's claim that all of the co-defendants should have been subject to civilian prosecution "is an open question since, at the time the crimes were committed, all of the actors were subject to military authority." (United States' Brief, p. 66, n. 20). The issue is not "an open question" because MEJA permits a federal court prosecution of Green and his co-accused. The statute provides:

> No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless ... an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

18 U.S.C. §3261(d)(2). Even if it were assumed that the government had no choice but to prosecute Green in district court (a point which Green does not concede) all of

the co-defendants could have been prosecuted in federal court and thereby eliminate the disparate treatment of Green.

II. Appellant was subject to the Uniform Code of Military Justice (UCMJ - 10 U.S.C. §801 *et seq*.). The district court was therefore without jurisdiction to try him under the Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §3261).

A. Green's discharge was invalid. (United States' Brief, pp. 23-38)

The government views a service member's discharge to be complete when a discharge certificate (Dept. of Defense Form 214) and final pay are ready for him. (United States' Brief, p. 30). See 10 U.S.C. §1168a. Green acknowledged that those two components of the discharge process were met. (Appellant's Brief, p. 44). The discharge, however, is not complete until the service member undergoes a mandatory clearing process. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F.2006). As Green noted in his original brief (pp. 43-44), the clearing process is not simply an administrative task but is an essential element of a valid discharge and is therefore essential to establishing *in personam* jurisdiction. *United States v. King*, 27 M.J. 327, 329 (C.M.A.1989). Therefore, insisting on compliance with the components of the clearing process identified on pp. 44-49 of Green's brief is not "hypertechnical" (United States' brief, pp. 34-35) because Army Regulations (AR) make it clear that the military, i.e., the government, has the burden of ensuring compliance with all

aspects of clearing process. See e.g., AR 635-10, 3-1, AR 635-10, 3-14(b), AR 635-10, 2-(f)(1)(a), and AR 635-200, 5-13. (Appellant's brief, pp. 44-49).

The government also seems to suggest (brief, p. 35, n.10) that Green waived any challenge to the validity of his discharge by his offer to re-enlist and subject himself to the UCMJ. But Green's willingness to re-enlist was not a concession of the validity of his discharge. As far as the Army was concerned the discharge was valid. If the Army accepted Green's request to re-enlist, it might be argued that his re-enlistment waived any defects in the discharge process but the Army's rejection of the re-enlistment offer rendered that point moot. Thus, Green can still challenge the validity of his discharge in this appeal.

The government argues (brief, pp. 37-38) that Green is not entitled to relief even if the Army failed to strictly comply with all of the requirements of the clearing process because he was neither prejudiced thereby nor deprived of his substantial rights. But as Green demonstrated in his original brief (pp. 16-40), he was indeed prejudiced and deprived of substantial rights because his prosecution in a civilian court resulted in grossly disparate treatment from his co-accused who were prosecuted by court-martial. For the reasons set forth in his original brief and in this brief, Green's discharge was invalid and at the time he was accused of the Iraq crimes he was subject to the UCMJ.

Conclusion

For the foregoing reasons, appellant Steven Dale Green, respectfully submits that he is entitled to the relief requested in his original brief.

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Certificate of Compliance

I certify that this reply brief complies with the type-volume limitation under Fed.R.App.P. 32(a)(7)(B) by containing 4475 words.

s/ Frank W. Heft, Jr.

Certificate of Service

I hereby certify that on March 15, 2010, I electronically filed the foregoing brief with the clerk of the court by using the ECF system. I also certify that on March 15, 2010, the foregoing brief was served on the following counsel of record at their email addresses through ECF: Michael A. Rotker, Attorney, Department of Justice at Michael.Rotker@usdoj.gov, Monica Wheatley, Assistant United States Attorney at Monica.Wheatley@usdoj.gov and Terry M. Cushing, Assistant United States Attorney at Terry.Cushing@usdoj.gov.

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