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Obama administration revives historic role

ABA committee will evaluate judicial candidates before nomination

At the request of the Obama administration, the ABA Standing Committee on the Federal Judiciary has resumed its historical role in evaluating the professional qualifications of potential nominees for the federal bench on a prenomination basis.

The Standing Committee was first asked into the prenomination process by President Eisenhower in 1953 and evaluated potential nominees for every president since then until 2001, when the Bush administration announced that it would not submit names of potential nominees to the Standing Committee in advance of their nominations. At the request of the Senate Judiciary Committee, the ABA committee continued to provide its evaluations of the professional qualifications of nominees after the president submitted their names to the Senate.

“The Standing Committee and the ABA look forward to working with the new administration,” ABA President H. Thomas Wells Jr. said, “The Standing Committee makes a unique contribution to the process by conducting an extensive peer review of each potential nominee’s integrity, professional competence, and judicial temperament,” he explained, emphasizing that the Standing Committee does not consider a potential nominee’s ideological or political philosophy. Its work is fully insulated from, and completely independent of, all other activities of the ABA and is not influenced by ABA policies, he said.

Each evaluation typically includes 40 or more confidential interviews with a broad spectrum of lawyers, judges and others who are in a position to evaluate the potential nominee’s professional qualifications. At the conclusion of each evaluation, the investigator submits to the Standing Committee chair a detailed Informal Report on the potential nominee that includes a recommended rating. After reviewing it for thoroughness, the chair discusses the findings of the Informal Report with a designated administration official.

If the White House requests the Standing Committee’s rating of the prospective nominee, a Formal Report is prepared by the evaluator and distributed to Committee members for their consideration. Each member then votes the prospective nominee “well qualified,” “qualified” or “not qualified,” and the rating is transmitted to the White House on a confidential basis. Once the President

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LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Independence of the Legal Profession. No legislation has been introduced to reverse the privilege-waiver and employee rights provisions in the Justice Department's policy and other similar federal agency policies that instruct federal law enforcement officials to consider these factors in determining whether corporations and others should receive credit for cooperation – hence leniency – in government investigations. The Justice Department issued new privilege waiver guidelines 8/28/08. The Securities and Exchange Commission announced a new guidance on 10/14/08. P.L. 110-322 (S. 2450) adopted new Rule of Evidence 502 regarding inadvertent disclosure of privileged materials.</p>			<p>President signed P.L. 110-322 (S. 2450) on 9/19/08.</p>	<p>Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.</p>
<p>Health Care Law. The president held a Forum on Health Reform at the White House on 3/5/09. Numerous bills have been introduced and hearings held on various aspects of the health care system. H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p>	<p>Judiciary Subcommittee held a hearing on H.R. 1478 on 3/25/09.</p>			<p>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. See page 5.</p>
<p>Judicial Independence. P.L. 111-8 (H.R. 1105) waived Section 140 to allow federal judges to receive a 2.8 percent cost-of-living increase for fiscal year 2009. S. 220 and H.R. 486 would create an inspector general for the judicial branch to investigate claims of misconduct against federal judges.</p>	<p>H.R. 486 was referred to the Judiciary Committee on 2/9/09.</p>	<p>S. 220 was referred to the Judiciary Committee on 1/13/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 7.</p>
<p>Legal Services Corporation. P.L. 111-8 (H.R. 1105), omnibus fiscal year 2009 appropriations legislation, includes \$390 million for LSC.</p>	<p>House passed H.R. 1105 on 2/25/09. Appropriations subc. held a hearing on 4/1/09.</p>	<p>Senate passed H.R. 1105 on 3/10/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p>Supports an independent, well-funded LSC. See page 6.</p>

Hearing focuses on indigent defense

Witnesses appearing March 26 before a House Judiciary subcommittee underscored the crisis the states are facing in providing legal representation to indigent defendants in criminal cases.

“A chronic, persistent indigent defense crisis has reached a point of system breakdown in a number of states, and lawyers increasingly have sought relief in the courts, often unsuccessfully,” former ABA President Dennis W. Archer told the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.

Archer – who is a former Detroit mayor, justice of the Supreme Court of Michigan and president of the State Bar of Michigan – emphasized that the Supreme Court has held that the right to counsel is the “seminal right that makes meaningful all the other rights guaranteed to us by our Constitution.” Ruling in *Gideon v. Wainwright*, 372 U.S. 355 (1963), the court determined that lawyers in criminal cases are necessities, not luxuries, and that states must provide counsel to indigent defendants in felony cases – a mandate that has been extended consistently to any case that may result in a potential loss of liberty.

Rules of professional responsibility require defenders and their supervisors to provide competent services and not to accept excessive caseloads that undermine the quality of their representation, Archer explained. The relentless assignment of new cases, however, routinely prevents adherence to this, and the situation has gotten much worse due to the economic downturn.

Archer noted that the ABA has played an instrumental role during the past five decades in developing standards and guidelines setting forth what competent counsel must do to adequately represent his or her clients. He said that the associa-



Former ABA President Dennis W. Archer discusses indigent defense issues with Rep. Bobby Scott (D-Va.), who chaired a March 26 hearing before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.

tion has published white papers describing the state of public defense in America and provided technical assistance to every state attempting to improve its public defense delivery system. The *ABA Ten Principles of a Public Defense System* are now used across the country to measure a system’s health, find what is broken and then tell how to fix it.

“Those efforts have not been enough,” Archer said, pointing out that too many states still fall far below an adequate standard. His own state of Michigan, which was the focus of the hearing, is one of the worst, he said.

Hearings held by the ABA across the country in 2003 and 2004 to honor the fortieth anniversary of the *Gideon* decision revealed a state of crisis, and an ABA report recommended that the federal government provide substantial financial support for the provision of indigent services in state criminal and juvenile delinquency proceedings. Such support should be a priority, according to the ABA, under the Byrne Grant and Justice Assistance Grant programs, which

have treated indigent defense services as a “poor stepchild” compared to resources provided to state prosecutors.

Also testifying at the hearing was David J. Carroll, director of research for the National Legal Aid and Defender Association (NLADA), which released a study in June 2008 assessing the right to counsel in Michigan against the ABA’s Ten Principles. The NLADA found that “Michigan has abdicated its constitutional obligation to provide for adequate representation of poor people facing loss of liberty in its criminal courts by passing on its financial responsibility to its counties as an unfunded mandate and then failing to provide any administrative oversight of services rendered.”

Carroll emphasized that the problems in Michigan are just an example of the failure of many states to ensure *Gideon* rights. “Though we understand that policymakers must balance other important demands on their resources, the Constitution does not allow for justice to be rationed due to insufficient funds,” he concluded. ■

ABA emphasizes importance of foreign assistance

Former ABA President Michael S. Greco, testifying March 25 before the House Appropriations Subcommittee on State, Foreign Operations and Related Agencies, emphasized the importance of funding for programs that promote the rule of law throughout the world.

Greco, testifying at the request of ABA President H. Thomas Wells Jr., highlighted the work of the ABA Rule of Law Initiative (ABA ROLI), a non-profit public service program grounded in the belief that advancing the rule of law is the most effective way to deal with the pressing problems facing the world, including poverty, conflict, corruption and disregard for human rights.

He said that ABA ROLI's work is guided by several core principles, including providing neutral and apolitical technical assistance and advice, and building sustainable local capacity.

The following is a list of the seven focal areas that comprise ABA ROLI's work and some of the countries where programs are being conducted:

- Access to Justice and Human Rights (Armenia, Burundi, Lebanon, Panama, Philippines);
- Anti-Corruption and Public Integrity (Asia, Kyrgyzstan, Morocco, Serbia, Ukraine);
- Criminal Law Reform and Anti-Human Trafficking (Bahrain, Cameroon, China, Ecuador, Georgia, Tajikistan);
- Judicial Reform (Algeria, Armenia, Liberia, Philippines);
- Legal Education Reform and Civic Education (Cambodia, Jordan, Kyrgyzstan, Liberia, Qatar);
- Legal Profession Reform (Persian Gulf Region, Russia, Thailand); and
- Women's Rights (Azerbaijan, Bangladesh, Georgia, Turkmenistan, Democratic Republic of Congo).

"Terms and principles are important in defining our work, but I

think it is helpful to look beyond them to see the actual impact of these programs on our fellow human beings in such need around the world," Greco said. He highlighted ABA ROLI's work in the Democratic Republic of Congo, where women are among the most frequent targets of the ongoing armed conflict with rape used as a weapon to destroy them, their families and their villages.

In early 2008, ABA ROLI opened an office in the city of Goma in North Kivu that provides pro bono assistance to rape survivors, and trains police, lawyers, prosecutors, magistrates and judges to investigate, prosecute and adjudicate these cases. The office also

operates a legal aid clinic. Since the office opened, Greco said, there has been an unprecedented increase in the number of rape convictions in the region.

In a written statement submitted to the panel March 18, Wells emphasized that "targeted foreign assistance that enhances legal systems and institutions grounded in the rule of law, and that does so by building sustainable local capacity, is a critical component of U.S. foreign assistance effort to foster democracy and sustainable development."

He explained that to advance the rule of law worldwide, the ABA implements its programs through

see "Foreign assistance," page 8

United States plans to join Human Rights Council

ABA President H. Thomas Wells Jr. applauded the decision of the United States to reverse course and seek a seat on the United Nations Human Rights Council, saying that active participation and engagement by countries strongly committed to the promotion and protection of human rights are essential to the council's ultimate success.

The decision by the Obama administration to take part in the May 17 elections to the 47-member council marks a reversal from the stand taken by the Bush administration, which voted against creation of the council in 2006 to replace the Human Rights Commission. The rationale for the Bush administration's opposition was that the council would not differ substantially from the commission, which had allowed countries to use their participation to cover up their own human rights abuses.

The Obama administration, however, sees membership on the council as a way to have a positive influence toward advancing human rights.

"As a member, the United States will be better able to work to improve the operations and effectiveness of the council, and reassert our nation's traditional position as a leader in promoting international human rights and the rule of law," Wells said in a statement issued April 1.

The ABA emphasized in a letter sent to President Obama March 20 that despite its shortcomings the council is an important international institute for monitoring and addressing human rights abuses throughout the world. In the same letter, Wells welcomed the Obama administration's current review of the United States' posture toward the International Criminal Court (ICC), urging the president to reinstate the U.S. signature on the Rome Statute establishing the ICC and initiate the appropriate executive branch process to lead to the treaty's submission to the Senate for ratification.

He also asked that the president direct that the United States fully participate as an observer in the Assembly of States Parties (including activities related to the 2010 review conference) and ensure that the U.S. government cooperates and assists in all ongoing ICC investigations and prosecutions. ■

ABA supports repeal of *Feres* Doctrine

The ABA expressed support last month for H.R. 1478, legislation that would allow servicemembers to sue the United States for damages under the Federal Tort Claims Act (FTCA) for non-combat related injuries caused by negligent medical or dental treatment.

The legislation, introduced by Rep. Maurice D. Hinchey (D-N.Y.), would repeal the *Feres* Doctrine, which was established by the Supreme Court decision in *Feres v. United States*, 340 U.S. 135 (1950). In that case, the court ruled that members of the armed forces and their families have no right or ability to sue the military for negligent medical care during their service.

Hinchey's bill would amend the FTCA to allow claims for damages to be brought against the United States for personal injury or death of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of medical, dental or related health care functions, with an exemption for military medical personnel working in combat. The legislation also would require the payment of claims to be reduced by the value of other federal benefits received as a result of the injury, but would not allow claims to be reduced by the amount of any benefits received under the Servicemembers Group Life Insurance.

During a March 24 hearing before the House Judiciary Subcommittee on Commercial and Administrative Law, Hinchey highlighted the story of Marine Sgt. Carmelo Rodriguez, who died in 2007 of skin cancer after military doctors failed to inform him of a diagnosis of melanoma when he enrolled in the military 10 years earlier. Misdiagnosis by several other military doctors during his career prevented him from getting treatment until it was too late to save his life. The *Feres* Doctrine, according to Hin-

chey, left the Rodriguez family with no recourse for addressing the medical malpractice by military doctors and other medical personnel.



Stephen A. Saltzburg

George Washington University Law Professor Stephen A. Saltzburg, testifying on behalf of the ABA, noted that the association first adopted policy in 1987 supporting a partial overturning of the *Feres* Doctrine and broadened its policy at the August 2008 Annual Meeting to reach beyond medical malpractice.

Saltzburg testified that when the ABA House of Delegates approved the 2008 policy, the delegates were fully aware of the argument that repeal of *Feres* would endanger the chain of command by allowing servicemembers to, in effect, sue their commanders. They determined, however, that the exceptions in the FTCA "provide ample protection to any actions which challenge discretionary command decisions or any tortious acts resulting therefrom, or acts that arise out of combatant activities."

"It is time for the current separate and unequal status and treatment of military personnel to be acknowledged as unnecessary, unwarranted, and patently unfair and

unjust," Saltzburg said, quoting the report accompanying the ABA's 2008 policy.

Saltzburg, a member of the ABA House of Delegates, co-chairs the Criminal Justice Section's Military Justice Committee with Eugene R. Fidell, a Washington lawyer and lecturer at Yale Law School who is president of the National Institute of Military Justice. Fidell, who also testified at the hearing, emphasized that the time for study of the *Feres* Doctrine is past and it is time for Congress to act. ■

Federal judiciary

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officially submits the nomination to the Senate, the Standing Committee's rating is transmitted to the nominee and the Senate Judiciary Committee and is posted on the Standing Committee's website.

A potential nominee's rating is never publicly released or discussed if the president declines to nominate the candidate.

"The Standing Committee itself never proposes or endorses a particular candidate for the federal judiciary; its sole function is to assist the administration and the Senate in evaluating the professional qualifications of potential nominees for a lifetime appointment to the federal bench," Wells said.

The 15 members of the Standing Committee – currently chaired by Kim Askew of Dallas, Texas – are appointed for three-year staggered terms by the ABA president based on their reputations for professional competence, integrity and the utmost confidence and respect of their community. Each member contributes approximately 1,000 hours per year on a voluntary basis to the Standing Committee's work.

LSC reauthorization bill would lift some restrictions

Sen. Tom Harkin (D-Iowa) unveiled legislation March 26 to reauthorize the Legal Services Corporation (LSC) at higher funding levels and lift many of the restrictions on LSC-funded programs.

Harkin emphasized that as the economy continues to wane, the number of individuals needing legal assistance increases. He introduced the bill with Sens. Edward Kennedy (D-Mass.), John Kerry (D-Mass.), Patrick J. Leahy (D-Vt.), Ben Cardin (D-Md.), Barbara Mikulski (D-Md.), Richard Durbin (D-Ill.), Frank Lautenberg (D-N.J.), Claire McCaskill (D-Mo.) and Jeff Merkley (D-Ore.).

Harkin noted that the LSC, first established in 1974 with bipartisan support as a private nonprofit corporation funded by Congress, has not been authorized since 1981, and Congress has slashed the program's funding from \$415 million in 1995 to as low as \$278 million. The LSC regained some funding to \$350 million by 2008 and last month received a \$40 million increase as part of the omnibus fiscal year 2009 funding bill signed by the president March 11, bringing the LSC appro-

priation to \$390 million.

Harkin's bill, S. 718, would authorize annual funding for LSC at \$750 million, an amount that would provide the minimum level of access to legal aid in every county. The bill also would lift restrictions imposed in 1996 that prohibit LSC-funded attorneys from seeking court-ordered attorneys' fees and from lobbying with non-federal funds, and would allow LSC-funded attorneys to bring class action lawsuits grounded in existing law. The bill would retain restrictions prohibiting abortion-related litigation and prohibiting representation of undocumented immigrants not specified in current law, prisoners challenging prison conditions but not those seeking representation on reentry matters, and those charged in public housing eviction proceedings with illegal drug possession.

"Proper reauthorization of LSC is decades overdue, and antiquated rules severely limit LSC's efforts to help people in need," said ABA President H. Thomas Wells Jr., who applauded introduction of the bill.

He noted that approximately 51

million Americans qualify for LSC-funded assistance, including 18 million children. The mission of the LSC is more pressing than ever in today's environment, he said, adding that from Alabama to Arizona, from Hawaii to New Jersey, the legal needs of the vast majority of people facing civil legal problems ranging from eviction to domestic violence remain unmet. He cautioned that "many personal financial problems are becoming legal crises and threaten to further undermine our economy."

In a March 6 letter to Office of Management and Budget Director Peter Orszag, Wells supported increased LSC funding and urged the Obama administration to direct Congress to eliminate restrictions on use of non-LSC funds and on the ability of LSC-funded attorneys to obtain statutorily permitted attorneys' fees.

In other recent action, the LSC requested \$485.1 million in fiscal year 2010 funding during an April 1 hearing before the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies. ■

Judicial Vacancies/Confirmations — 111th Congress (as of 4/13/08)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	0
US Courts of Appeals (179 judgeships)	15	3	0
US District Courts (678 judgeships)	54	0	0
Court of International Trade (9 judgeships)	0	0	0
Totals	69	3	0

Washington News Briefs

ADMINISTRATIVE CONFERENCE: P.L. 111-8 (H.R. 1105), omnibus fiscal year 2009 appropriations legislation signed March 11, includes \$1.5 million in startup funding for the Administrative Conference of the United States (ACUS) so that the agency can once again advise the federal government on reforms to administrative procedural law, which is the backbone of federal regulation. Congress terminated ACUS in 1995 because of budget concerns even though the conference had enjoyed bipartisan support and assisted all three branches of government for more than 25 years. Although Congress reauthorized ACUS in 2004, no funding was appropriated before that three-year authorization expired. The current reauthorization in the annual amount of \$3.2 million through fiscal year 2011 was signed into law in July 2008. The ABA strongly supported resurrection of ACUS, emphasizing its proven track record of success and its key role in implementing numerous important laws, including the Equal Access to Justice Act, the Congressional Accountability Act, the Government in the Sunshine Act and the Administrative Dispute Resolution Act. "ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars to work together to improve how our government functions," the ABA said in a statement submitted during hearings on ACUS reauthorization during the 110th Congress. Once ACUS begins operations again and receives its full funding for fiscal year 2010, it can resume its mission of providing expert, nonpartisan advice to the federal government, including offering recommendations for improved implementation of the new financial rescue laws, according to the association.

JUDICIAL COMPENSATION: Federal judges received a 2.8 percent cost-of-living adjustment (COLA) for 2009 under P.L. 111-8 (H.R. 1105), omnibus appropriations legislation signed March 11 by the president. The COLA is retroactive to Jan. 1, and is one of two modest steps that the ABA has called on Congress to take to halt the erosion of judicial pay. In addition to ensuring that federal judges receive the same COLA that congressional members received for 2009, the association urged Congress to repeal Section 140 of P.L. 97-92, which requires Congress to provide explicit approval for each judicial COLA. The failure of the 110th Congress to provide the approval resulted in judges having to

wait until March to receive their 2009 COLA, while congressional members started to receive theirs after the new year commenced. "Fair pay for judges is key to sustaining fair and impartial courts that uphold the American ideas of justice and equal treatment under the law," ABA President H. Thomas Wells Jr. said in a statement issued late last year. He pointed out that judges have not had a real raise since 1992 and did not even get a COLA in six of those years. As a result, during the past 15 years, U.S. federal judges have lost 12 percent of their salaries' purchasing power.

ABA Day in Washington



April 21-23, 2009
Hyatt Regency
Washington
Capitol Hill

Join ABA President H. Thomas Wells Jr. and fellow ABA, state, local and specialty bar leaders for this annual "lobby day" organized by the ABA Governmental Affairs Office.

Patent reform bill clears Senate Judiciary Committee

The Senate Judiciary Committee approved patent reform legislation April 2 that includes provisions supported by the ABA that will improve the U.S. patent system by awarding a patent to the first inventor who files applications.

S. 515, sponsored by Committee Chairman Patrick J. Leahy (D-Vt.), would institute the “first inventor to file” rule to replace the current and more complex “first to invent” standards that relies on “proof of invention dates.” The United States stands alone in the world in using the “first to invent” standard, and the ABA maintains that the change to the better “first inventor to file” system would also advance the objective of greater international patent law harmonization.

During markup of the bill, the committee adopted a manager’s amendment that reflects compromise on several controversial provisions in the bill. As approved by the committee, the bill would require courts to identify the methods and factors to be considered by juries in determining damages in patent infringement cases, but would not require that any particular method or factor be applied. Another major change would be to replace numerous proposed new provisions regarding venue in patent cases with a single provision that would require transfer of a case to a more convenient venue when called for by the interests of justice.

The committee tabled an ABA-supported amendment offered by Sen. Tom Coburn (R-Okla.) to ensure that all fee revenue collected by the U.S. Patent and Trademark Office (PTO) would be made available to the office for its use in providing services for which the fees were paid. Since 1990, when PTO fees were substantially raised so that the office could function entirely on user fee collection, the PTO has received no public funds. In the past, however, short-term financial pressure frequently resulted in appropriations legislation that did not provide the PTO with authority to spend all of the fees it has collected.

Although no diversion of PTO funds has occurred in the past four years, the ABA supports a statutory provision to prohibit such diversion. Under the Coburn amendment, the PTO would place all patent and trade-

mark fees into a revolving fund from which it would be able to withdraw money for its operations without any additional annual appropriations.

“The ABA determined that fee diversion drained away essential resources from the PTO and threatened the capacity of the agency to effectively operate the patent and trademark system that are critical to the U.S. economy,” ABA Governmental Affairs Director Thomas M. Susman wrote to the committee March 26.

S. 515 is expected to reach the Senate floor after Congress returns April 20 from its spring recess. Similar House legislation, H.R. 1260, is pending in the House Judiciary Committee. ■

Foreign assistance

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ABA ROLI to increase public understanding of and respect for the rule of law; hold governments accountable under law; work for just laws, including human rights, and a fair legal process; assure meaningful access to justice for all; and preserve the independence of the legal profession and judiciary. Programs are funded primarily through the U.S. Agency for International Development and the State Department.

ABA ROLI technical assistance efforts are carried out by members of the American legal profession, some serving one or two years or more on a pro bono basis. In addition to partnering with host country institutions, the association also works collaboratively with a variety of foreign and multilateral institutions.

In a related development, the Senate adopted an amendment to S. Con Res. 13, the fiscal year 2010 budget resolution passed by the Senate April 2, to restore \$4 billion to the International Affairs budget that the Obama administration had requested be cut. “This is a small investment that results in significant returns for the interest of the United States,” ABA Governmental Affairs Director Thomas M. Susman wrote to all senators in a letter supporting the amendment, which was offered by Sens. John Kerry (D-Mass.) and Sen. Richard Lugar (R-Ind.). ■

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association’s legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at <http://www.abanet.org/poladv/publications.shtml>. © 2009 American Bar Association. All rights reserved. Please address correspondence to:

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