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Defending Liberty
Pursuing Justice

Confirmation hearings to begin Sept. 6

John G. Roberts Jr. is Bush nominee for Supreme Court

Confirmation hearings are scheduled to begin Sept. 6 on the nomination of John G. Roberts Jr., President Bush's choice to replace Sandra Day O'Connor on the U.S. Supreme Court, and the ABA Standing Committee on Federal Judiciary is evaluating the nominee's professional qualifications.

White House Photograph by Eric Draper

Supreme Court Nominee John G. Roberts Jr. and President Bush in the Rose Garden.

Roberts, who has been a judge on the Court of Appeals for the Federal Circuit for the past two years, was nominated July 29 by the president and, if confirmed, would become the first new justice since 1994.

A graduate of Harvard Law School, Roberts clerked for Judge Henry J. Friendly of the Court of Appeals for the Second Circuit and for Chief Justice William H. Rehnquist when Rehnquist was an associate justice. Roberts served as an associate White House counsel and principal deputy solicitor general in the 1980s and early 1990s. From 1993 until his confirmation to the appeals court in 2003, he was a partner at the law firm of Hogan and Hartson.

The ABA committee, which rated Roberts "well qualified" for his appointment to the appeals court, will be considering the same factors of integrity, professional competence and judicial temperament, but this time the committee's investigation will be more extensive, based on the premise that the Supreme Court requires a person with exceptional professional qualifications. The significance, range and complexity of the issues considered by the Supreme Court, as well as the finality and nationwide impact of its decisions, are among the factors that require the appointment of a nominee of exceptional ability.

All members of the ABA committee take part in the investigation, with

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LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
Independence of the Bar. A district court issued a ruling 4/30/04 that the Federal Trade Commission (FTC) went beyond its statutory authority by including lawyers under Title V privacy provisions of the Gramm-Leach-Bliley Act of 1999 (GLBA). The FTC appealed the decision, and the ABA filed a response to the appeal on 1/19/05.				**Opposes any federal laws or regulations that would preempt or interfere with state rules protecting the confidential attorney-client relationship, including the Federal Trade Commission rules applying the privacy protection provisions of Title V of the GLBA.**
Federal Tort Laws. S. 5 and H.R. 516 would expand jurisdiction of federal courts over certain class action cases. S. 354, H.R. 5 and H.R. 534 would cap pain and suffering and punitive damage awards in medical liability cases. S. 397 and H.R. 800 would protect gun manufacturers, sellers and traders from almost all ordinary civil liability.	H.R. 516 and H.R. 534 were referred to the Judiciary Committee on 2/3/05. House passed S. 5 on 2/17/05. Judiciary Committee approved H.R. 800 on 5/25/05. House passed H.R. 5 on 7/28/05.	Judiciary Committee approved S. 5 on 2/3/05. Senate passed S. 5 on 2/10/05. S. 354 was referred to the Judiciary Committee on 2/10/05.	President signed P.L. 109-2 (S. 5) on 2/18/05.	**Supports amending ERISA to allow causes of action to be brought in state and territorial courts against employer-sponsored health plans under state and territorial laws; legislation establishing the use of ADR procedures for resolving disputes between patients and group health plans; federal legislation addressing asbestos litigation issues and class actions. Opposes creating a special tort standard for the gun industry**. **See page 4.**
Immigration. S. 119 and H.R. 1172 would ensure that unaccompanied alien children have counsel to represent them in immigration proceedings. H.R. 418 and portions of H.R. 1268, a fiscal year 2005 supplemental appropriations bill as passed by the House, would have imposed significant barriers on asylum-seekers, but the provisions were not in the final version bill.	H.R. 1172 was referred to the Judiciary Committee on 3/8/05. House passed H.R. 418 on 2/10/05, H.R. 1268 on 3/16/05, and the H.R. 1268 conference report on 5/5/05.	Judiciary committee approved S. 119 on 4/14/05. Senate passed H.R. 1268 on 4/27/05. Senate passed H.R. 1268 conference report on 5/10/05.	President signed P.L. 109-13 (H.R. 1268) on 5/11/05.	**Supports the appointment of counsel at government expense to assist unaccompanied children in immigration proceedings. Supports the humane treatment and legalization of unlawful aliens living in the United States.**
Judicial Independence. P.L. 108-447 (H.R. 4818), omnibus fiscal year 2005 appropriations legislation, waived Section 140 of P.L. 97-92 to allow federal judges to receive a 2.5 percent cost-of-living adjustment (COLA).			The president signed P.L. 108-447 (H.R. 4818) on 12/8/04.	**Opposes initiatives that infringe upon the separation of powers between Congress and the courts. Supports increased judicial pay. Opposes enactment of any legislation to change constitutional law by limiting federal court jurisdiction in specific areas.**
Legal Services Corporation. H.R. 2862, fiscal year 2006 appropriations legislation as passed by the House, includes $330.8 million for the LSC. The Senate Appropriations Committee version includes $324.8 million.	House passed H.R. 2862 on 6/16/05.	Appropriations Committee approved H.R. 2862 on 6/23/05.		**Supports an independent, well-funded LSC. See page 8.**

ABA opposes bill to speed up habeas cases

Sees focus on providing competent counsel

The ABA urged the Senate Judiciary Committee last month to focus on helping states provide competent counsel instead of enacting S. 1088, a bill the association maintained would, in an effort to speed up the habeas corpus process, make it harder for defendants to assert their rights and claim innocence.

The legislation, sponsored by Sen. Jon Kyl (R-Ariz.), among other things would impose firm time limits on court of appeals review of federal habeas petitions, prevent federal courts from considering claims which the state courts have refused to consider on procedural grounds, prevent federal courts in virtually all cases from considering claims regarding a sentence if the state has asserted that any constitutional error was "harmless" or "not prejudicial," and shift oversight of whether a state's system for providing competent assistance of counsel is adequate from the federal courts to the attorney general.

The "bedrock definition of justice" is that the legal system functions reliably to punish the guilty and acquit the innocent, according to Eric M. Freedman, the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra Law School and a member of the Steering Committee for the ABA Death Penalty Representation Project. He explained in a statement for the record of a July 13 Senate Judiciary Committee hearing that S. 1088 attacks the two core principles recognized by the ABA as necessary to achieve justice.

The first principle is that the government must provide competent counsel to indigent defendants at every phase of the criminal process. The second is that federal habeas corpus proceedings should be structured to ensure that meritorious claims − whether claims of innocence or of violations of the procedures mandated by the Constitution to ensure fairness and accuracy − are heard on the merits and not lost in a thicket of legalisms.

S. 1088, he said, would dilute states' obligations to provide competent counsel by shifting the review responsibility from the courts to the attorney general, who would be subject to very little judicial review.

"To allow states with inadequate systems for the provision of counsel to erect yet more barriers to reviewing the results of trials that are simply unreliable in ascertaining the truth is misguided as a matter of public policy," Freedman said. He said that instead, Congress should provide more resources to states to implement the "ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases."

Other witnesses appearing at the July 13 hearing concurred.

Barry C. Scheck, co-director of the Innocence Project and a law professor at Cardozo Law School, said that in the last 16 years, primarily due to the impact of DNA testing, it has become clear that "wrongful convictions plague the justice system in far greater numbers than ever imagined." He emphasized that "the barriers that now exist to proving and getting a conviction overturned based on actual innocence make it clear that we need to bring more − not less − judicial scrutiny to such cases."

Also opposing the bill was Bryan A. Stephenson, director of the Equal Justice Initiative of Alabama, who emphasized that underfunded indigent defense has caused flawed representation in many cases with corresponding doubts about the reliability and fairness of the verdict and sentence. In many states, incarcerated individuals do not have access to legal assistance and, if they do, the low levels of compensation deter lawyers from accepting appointments, he explained.

The Senate Judiciary Committee began marking up S. 1088 last month, but further consideration has been postponed until after the August recess. In the House, identical legislation is pending in the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, which held a hearing June 30. In a letter for the record of that hearing, ABA President Robert J. Grey Jr. said the numerous changes proposed in the bill "raise serious constitutional questions and would invite protracted litigation." ■

ABA Annual Meeting
Chicago, Illinois
August 4-9, 2005

Medical liability measure passes House

The House passed legislation July 28 that would preempt substantial portions of the state medical liability laws, an action opposed by the ABA.

The bill, H.R. 5, would cap noneconomic damages, such as those for pain and suffering, at $250,000 in medical malpractice cases, and would limit punitive damages to two times the economic damages or $250,000, whichever is greater. Rep. Paul Gingrey (R-Ga.), sponsored the legislation, which is similar to bills passed nine times by the House over the past several Congresses only to die in the Senate.

The ABA opposes the provisions in H.R. 5 because they would "interfere with the traditional state regulation of medical liability laws and restrict the rights of injured patients to be compensated for their injuries," Miles Zaremski, chair of the ABA Standing Committee on Medical Professional Liability, wrote in a letter to the House that was reprinted in the July 28 *Congressional Record.*

He explained that states currently have the opportunity to enact and amend their tort laws, and the system functions well. Congress should not substitute its judgment for the systems that have thoughtfully evolved in each state over time, he said.

Zaremski said that the ABA is especially concerned about the provisions that would place a cap on pain and suffering awards in states that do not have such caps, maintaining that the courts instead should make greater use of their powers to set aside verdicts involving pain and suffering awards that are disproportionate to community expectations.

Citing several studies − including a Weiss Ratings Inc. report, a study from Texas conducted by three major universities and a General Accounting Office report − he said there is no evidence that caps will be effective in reducing medical malpractice premiums. In addition, the Wisconsin Supreme Court ruled in its July 14 opinion in *Ferdon v. Wisconsin Patients Compensation Fund, et al.*, that caps in malpractice cases are unconstitutional. The court found that the state's cap of $350,000 is "unreasonable and unnecessary because it is not rationally related to the legislative objective of lowering medical malpractice insurance premiums and creates an undue hardship on those whose non-economic damages exceed the cap and is thus arbitrary."

"It is obvious that those affected by caps on damages are the patients

see "Medical," page 8

Detainee issues stall defense bill

Senate debate over the treatment of "enemy combatants" stalled the fiscal year 2006 defense authorization bill last month.

An amendment offered by Sen. John McCain (R-Ariz.) would have added provisions to the legislation, S. 1042, to establish the Army *Field Manual* as the uniform standard for interrogating those detained by the Department of Defense in the war on terror.

Faced with a threat from the White House that the president would veto any bill that includes provisions regulating the treatment of detainees, the Senate failed to garner the 60 votes necessary to close debate on S. 1042 and proceed to a final vote. The bill then was pulled from the Senate calendar and is expected to be brought back to the floor in September.

"The advantage of setting a standard for interrogation based on the *Field Manual* is to cut down on the significant level of confusion that still exists with respect to which interrogation techniques are allowed," McCain said. He added that the "confusion results in the kinds of messes that will once again give America a black eye around the world and will make the war on terror that much harder to fight." He maintained that abuses at Abu Ghraib, Guantanamo Bay and other locations occurred in part because soldiers received ambiguous instructions that resulted in treatment that went beyond what the *Field Manual* allows.

Meanwhile, Senate hearings continued on treatment of military detainees last month. During a July 14 hearing before the Senate Armed Services Subcommittee on Personnel, Stephen A. Saltzburg, who served as a member the ABA Task Force on Terrorism and the Law and is currently on the ABA Task Force on Enemy Combatants, testified on his own behalf but drew upon ABA policy for much of his testimony.

The permanent detention of U.S. citizens classified as "enemy combatants" is a major concern for the association, and Saltzburg said ABA policy recommends that these citizens receive "meaningful judicial review and access to counsel in conjunction with the opportunity for such review."

Another area of concern for the ABA, Saltzburg pointed out, is how

see "Detention," page 5

Violence Against Women Act being considered

ABA says act has made profound difference

The ABA urged Congress last month to reauthorize the Violence Against Women Act of 1994, which the association said has made a profound difference in the lives of millions of victims of domestic violence and their children as well as their communities and workplaces across the country.

In a statement submitted for the record of a July 19 Senate Judiciary Committee hearing, ABA Governmental Affairs Director Robert D. Evans pointed out that the act, which is scheduled to expire in September, also has made a difference in the last decade in how our courts and legal system respond to domestic violence and its victims.

"Some of the most effective tools available to victims of domestic violence to ensure their safety and to reduce violence are remedies obtainable through the legal system, particularly the civil protection order," Evans said.

He explained that VAWA-funded programs, including the Civil Legal Assistance and STOP Grant Programs, have improved and aided in the prosecution of domestic violence, sexual assault, and child abuse cases; provided necessary training and support for law enforcement personnel; and increased civil legal services for victims of domestic violence.

VAWA also has increased public awareness of domestic violence as well as an understanding that it takes the coordinated efforts of all members of a community to prevent domestic violence and to stop it once it has begun.

"We must not let this success fade away, as there is much more that can and must be done to end domestic violence," Evans wrote.

Sen. Joseph R. Biden Jr.

Echoing a letter sent in June by ABA President Robert J. Grey Jr., Evans expressed gratitude to those who introduced S. 1197, VAWA reauthorization legislation that he said "strikes an appropriate balance between renewing core programs, closing loopholes, expanding successful programs and developing critically needed initiatives for children and prevention efforts."

Sen. Joseph R. Biden Jr. (D-Del.), who sponsored the legislation with Sens. Arlen Specter (R-Pa.) and Orrin G. Hatch (R-Utah) and more than 40 cosponsors, also sponsored the original 1994 act and said he considers VAWA the "single most significant legislation" he has crafted during his 32 years in the Senate.

In introducing S. 1197, Biden pointed out that the legislation includes new provisions to help abused women maintain secure employment by permitting battered women to take limited employment leave to address the violence, such as attending court proceedings or moving to a shelter. Another new provision is the creation of a tribal deputy director in the Office on Violence Against Women in the Department of Justice to coordinate federal tribal policy focusing on violence against Indian women.

The bill also would authorize tribal governments to access and upload domestic violence and protection order data on criminal databases, as well as create tribal sex offender registries.

The Senate Judiciary is expected to mark up S. 1197 after the August recess.

In the House, VAWA reauthorization bills have been introduced as H.R. 2876 by Rep. Mark Green (R-Wis.) and H.R. 3171 by Rep. Zoe Lofgren (D-Calif.). There has been no action scheduled on the bills. ■

Detention

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the need for security in military tribunals has limited the use of civilian defense counsel in such cases – a situation that has led to questions regarding fairness. In 2003, the ABA House of Delegates passed a resolution encouraging the use of civilian defense counsel and opposing restrictions on the full participation of this counsel.

In August 2004, the association also adopted resolutions urging the United States to condemn the use of torture against detainees to abide by the rights granted in the Constitution and under the Geneva Conventions. The resolutions also urge the United States to treat prisoners as this country would expect American prisoners to be treated in another country and to ensure that no prisoner is sent to another country that may condone the use of torture. The ABA also urges that accusations of torture are quickly and appropriately investigated and that the Constitution and other human rights treaties are adhered to throughout the process. ■

ABA committee evaluates Roberts

continued from front page

confidential interviews conducted nationwide. Those interviewed include federal and state judges, practicing lawyers in both private practice and government service, law school professors and deans, legal services and public interest lawyers, representatives of professional legal organizations, community and national leaders, and others who are in a position to evaluate the nominee's integrity, professional competence and judicial temperament.

The nominee's legal writings will be examined by a team of law school professors, and a separate team of practicing lawyers will review the writings under the direction of a former solicitor general. The ideology of the nominee is not assessed.

There are three possible ratings: "well qualified," "qualified" and "not qualified." "Well qualified" nominees are at the top of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the highest standards of integrity, professional competence and judicial temperament. A "well qualified" evaluation is reserved for those found to merit the committee's strongest affirmative endorsement.

The committee will report its rating to the White House, the Department of Justice and each member of the Senate Judiciary Committee, which will be holding confirmation hearings.

The ABA committee consists of 15 members who serve no more than two three-year terms: two members from the Ninth Circuit, one member from each of the other 12 federal judicial circuits and one member-at-large. Stephen L. Tober of Portsmouth, New Hampshire, is the committee's chair. ■

Bill would protect firearms industry

The Senate passed legislation July 29 that would insulate the firearms industry from accountability through the enactment of special tort laws.

S. 397, passed by a 65-31 vote, was sponsored by Sen. Larry Craig (R-Idaho) to address what proponents consider "frivolous" lawsuits against the industry that include suits filed by cities and state governmental units. The bill would preempt state substantive law standards for most negligence and product liability actions in which the defendant is a gun manufacturer, gun seller or gun trade association, and would insulate this new class of protected defendants from almost all ordinary civil liability actions.

The ABA opposes the legislation and maintains that the industry has been and will continue to be protected by the competent action of state courts. The association is concerned about the unparalleled protection the legislation would provide to the gun industry while neglecting consumer safety.

Similar legislation, H.R. 800, is ready for full floor action in the House after being approved May 22 by the House Judiciary Committee. ■

Judicial Vacancies/Confirmations -- 109th Congress
(as of 7/31/05)

Court	Current Vacancies	Pending Nominations	Confirmations
US Supreme Court (9 judgeships)	1	1	0
US Courts of Appeals (179 judgeships)	12	6	6
US District Courts (678 judgeships)	32	9	4
Court of International Trade (9 judgeships)	1	0	0
Totals	46	16	10

Washington News Briefs

DO NOT FAX

President Bush signed ABA-supported legislation into law July 9 that allows businesses and associations to continue to send unsolicited faxes to members and customers with whom they have an established business relationship (EBR). P.L. 109-21 (S. 714), the Junk Fax Prevention Act of 2005, overrides Federal Communications Commission (FCC) rules issued in 2003 that required written consent from fax recipients before business and associations could send facsimile advertisements. The FCC previously had delayed implementation of the rules until Congress could act on the legislation. In an April 13 letter to the Senate Commerce, Science and Transportation Committee, ABA Governmental Affairs Director Robert D. Evans urged the panel to support S. 714, noting that the FCC rules would have interfered with the ability of associations to communicate with their members and created "unreasonable financial and administrative burdens for the associations without any tangible benefit to their members." He maintained that a majority of association members want to receive faxed communications from their associations, and many organizations, including the ABA, have opt-out systems in place that can dramatically reduce the number of unwanted faxes to their members.

INDIAN HEALTH

The ABA expressed support July 15 for reauthorization of the Indian Health Care Improvement Act (IHCIA), maintaining that congressional action is critical as an important first step to improving the quality of health care for Native Americans and Alaska Natives. "Notwithstanding the progress that has been made since the founding of the Indian Health Service in 1921, American Indians and Alaska Natives continue to experience dramatic health disparities and high mortality rates compared to the rest of the American population," ABA Governmental Affairs Director Robert D. Evans wrote in a letter to Sens. John McCain (R-Ariz.), chairman of the Senate Select Committee on Indian Affairs, and Michael Enzi (R-Wyo.), chairman of the Senate Health, Education, Labor and Pensions Committee. For example, Evans said, the mortality rate for American Indians and Alaska Natives is 420 percent higher from diabetes than that for the general population; 280 percent, from accidents; 190 percent, from suicide, and 770 percent, from alcoholism. McCain has introduced S. 1057 to reauthorize the IHCIA, which was originally enacted in 1976 but has not been reauthorized since 1992. Since 2001, Congress has been relying on the 1921 Snyder Act to continue federal funding for Indian health care programs. During a July 14 joint hearing of the two Senate committees, Charles W. Grim, director of the Indian Health Service at the Department of Health and Human Services, noted the progress that has been made in the health status of American Indians and Alaska Natives, particularly in the areas of infant and maternal mortality. While the administration supports reauthorization of the IHCIA, Grim said he would like to work with the committee to address several concerns in the bill. In the 108th Congress, similar legislation passed the Senate but stalled in the House awaiting comments from the administration. Even though the comments were received before the Congress adjourned, there was not enough time to pass the bill. The sponsors are hoping for passage by both houses during the 109th Congress.

WELFARE

President Bush signed legislation July 1 extending through Sept. 30 the provisions of the Temporary Assistance to Needy Families program (TANF). The legislation, H.R. 3021 (P.L. 109-19), marks the tenth time Congress has extended TANF as members try to reach a final agreement on how best to reauthorize the program. First established by an overhaul of the welfare system in 1996, TANF imposes work requirements on welfare recipients and was originally scheduled to expire in September 2003. Bills to reauthorize the program have been moving in both House and Senate. The House Ways and Means Subcommittee on Human Resources approved its bill, H.R. 240, on March 15. Two days later, S. 667 was introduced in the Senate after approval of a draft version by the Senate Finance Committee. H.R. 240 would provide a $1 billion increase per year for child care and would increase recipients' work requirements from 30 hours a week to 40 hours. The Senate bill would increase funding for child care by $6 billion over five years and require recipients to work 34 hours per week. The ABA is urging Congress to reinstate protections that were in the welfare law before 1996 that offered a conciliation process before sanctions could be imposed for failure to meet work-related requirements. The association also is recommending removal of the law's five-year ban on access to TANF by legal immigrants, equitable access to foster care and adoption services for Indian children under tribal court jurisdiction, and an increase of the pass-through of child support from payments made to states to families receiving assistance.

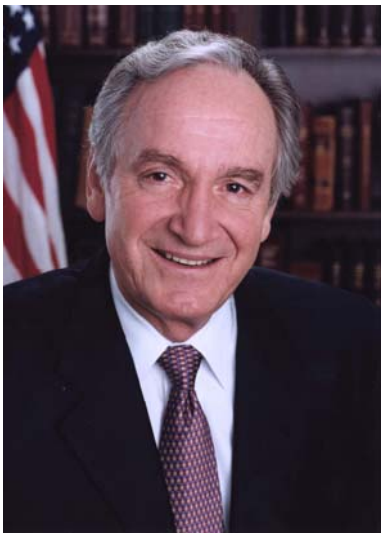
Senate to vote on LSC funding after August break

Harkin amendment would provide $33 million increase

A bipartisan group of senators, led by Sen. Tom Harkin (D-Iowa), is planning to offer an amendment to fiscal year 2006 appropriations legislation on the Senate floor that would restore and increase funding for the Legal Services Corporation (LSC) by as much as $33 million from the fiscal year 2005 appropriation of $330.8 million.

The Senate is expected to consider the funding bill soon after returning from its August recess.

Despite a June 15 letter from 47 Senators requesting the $33 million increase and support from many other Senate leaders, the Senate Appropriations Subcommittee on Commerce, Justice and Science (CJS) reduced LSC's funding by $6 million to $324.6 million. The Senate Appropriations Committee approved that amount June 23. The administration had requested a $12 million cut.



Sen. Tom Harkin

The Harkin amendment would restore the $6 million cut by the Senate Appropriations Committee and provide $363.9 million, determined by the LSC Board of Directors to be the "minimum amount necessary for LSC to effectively undertake its mission of delivering quality civil legal assistance to eligible low-income Americans."

In letters to both the subcommittee and the committee, ABA President Robert J. Grey Jr. also had urged the panels to approve the LSC Board's request.

"A recent LSC survey reports that at least half of all eligible persons who seek legal services from LSC-funded programs are turned away for lack of resources." He noted that the survey also reports that women, most of whom have dependent children, represent up to 74 percent of the client base of LSC-funded programs. Many of these women, he added, are victims of domestic violence.

The LSC would receive level funding as part of H.R. 2862, the fiscal year 2006 appropriations bill passed by the House June 16. During House debate, members rejected by a 112-316 vote an amendment that would have shifted $10 million from the LSC to increase funding for law enforcement programs under the justice assistance grant program. Strong bipartisan support for the LSC led to the defeat of the proposed amendment.

In related action July 28, the Senate confirmed the nominations of Thomas A. Fuentes, of California, and Bernice Phillips, of New York, to serve on the LSC Board of Directors. ■

Medical liability

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who have been most severely injured by the negligence of others," Zaremski concluded.

Those supporting the legislation, however, argue that large damage awards lead to increased malpractice insurance premiums that are driving doctors out of the practice of medicine, particularly in specialties such as obstetrics. The bill is strongly supported by the Bush administration. ■

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