



THE LONGEST-SERVING JUSTICE RETIRES

OR, HOW STEPHEN PREEMPTED THE FIELD

Ira Brad Matetsky

IN 1863, CONGRESS ENLARGED the size of the U.S. Supreme Court from nine to ten Justices.¹ Although the change was primarily motivated by a desire to shape the Court's ideological leanings during the Civil War,² it involved the creation of a new (though short-lived) Tenth Circuit to handle the federal judicial needs of the Far Western states of California and Oregon.³ The creation of a new circuit implied the appointment of a new Circuit Justice, justifying the Court's enlargement.⁴ It

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¹ Act of March 3, 1863, 12 Stat. 794.

² On the expansion of the Court to ten Justices and the appointment to the new seat, see generally, e.g., BRIAN MCGINTY, LINCOLN AND THE COURT 176-82 (2008); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 93-97 (1997); CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 111-18 (1930).

³ California, admitted to the Union in 1850, was initially not placed within any federal judicial circuit. In 1855, a "California Circuit" was created, but no Justice was allotted to it. Oregon, admitted in 1859, was not placed within any circuit at that time. See www.fjc.gov/history/administration/federal-judicial-circuits (all webpages cited were last accessed December 2, 2020).

⁴ Congress may not have expected the tenth Justice to participate in all of the Supreme Court's work, "for it authorized payment of an additional sum for traveling 'for each year in which he may actually attend a session of the Supreme Court of the United States.'" EDWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 53 (2002) (quoting Act of

was understood that a Californian would fill the new position, and President Abraham Lincoln selected the most prominent lawyer in that state: the Chief Justice of California, Stephen Johnson Field. The Senate confirmed Field's nomination just four days after Lincoln made it. Field received his commission on March 10, 1863, although he was not sworn into office until May 20, 1863.⁵ He was then 46 years old.

Field's service as a Justice is remembered for many things: the length of his tenure, as discussed below; his advocacy of a "substantive due process" jurisprudence under the Fourteenth Amendment; his mixed record on cases involving racial discrimination; his authorship of that bane of many first-year law students, *Pennoyer v. Neff*⁶; and his role in one of the most bizarre cases ever to come before the Court, *In re Neagle*.⁷ But this article focuses not on Field's service on the Supreme Court,⁸ but his de-

March 3, 1863, 12 Stat. 794). But the appointee, Stephen Field, was unlikely to play anything less than a full role on the Court, and within three years the tenth justiceship was eliminated in any event. *See id.*

⁵ *See* www.fjc.gov/history/judges/field-stephen-johnson (Federal Judicial Center website confirming date of commission); www.supremecourt.gov/about/members_text.aspx (official Supreme Court website confirming date of oath). The two-month delay allowed Field to finish work on cases he had heard on the California Supreme Court. SWISHER, *supra* note 2, at 118-19.

⁶ 95 U.S. 714 (1878) (defining standards under which courts may exercise personal jurisdiction consistent with the Fourteenth Amendment). *See, e.g.*, Elizabeth Chamblee Burch, *There's a Pennoyer in My Foyer: Civil Procedure According to Dr. Seuss*, 13 GREEN BAG 2D 105, 109-10 (2009).

⁷ 135 U.S. 1 (1890) (affirming grant of *habeas corpus* to a Deputy United States Marshal who shot and killed one of Field's former colleagues on the California Supreme Court, who appeared to be threatening Field's life). "MR. JUSTICE FIELD did not sit at the hearing of this case, and took no part in its decision." *Id.* at 99. *See also* Paul Kens, *Introduction: The Incident at Lathrop Station*, 30 J. SUP. CT. HIST. 85 (July 2005); George C. Gorham, *The Story of the Attempted Assassination of Justice Field by a Former Associate on the Supreme Bench of California*, 30 J. SUP. CT. HIST. 105 (July 2005) (originally published in 1893); A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* 269 (2d ed. 1969) (quoted in A. James Casner, *In Memoriam: W. Barton Leach*, 85 HARVARD L. REV. 717, 721-22 (1972)).

⁸ Two book-length works on Field are the biographies by Carl Swisher (1930) and Paul Kens (1997), both cited *supra* note 2. The ultimate evaluation of Justice Field's tenure, in the form of his *Green Bag* bobblehead doll and the accompanying commentary, has not yet been released.

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parture from it. Unfortunately, Field's resignation came only after a period of decline that led to tensions within the Court. Because Field's retirement was overdue, we cannot say that "[n]othing in his life [tenure] became him like the leaving it,"⁹ as we might of Justice Gabriel Duval ("the first Justice to voluntarily leave the Court after making a career of it"),¹⁰ or to a lesser extent of Justice Samuel Nelson ("the first Justice in generations to leave the Court because it was, in his own sound judgment, time to hang it up").¹¹

Field first mused about retirement during the late 1880s, when he was in his late 60s and had served two decades on the Court. But although Field was aging, and must have wearied of cross-country trips between California and Washington, DC, he was reluctant to retire. Court historians who have studied Field's reluctance to leave the Court and his eventual decision to do so¹² have offered several explanations for why Field did not leave the Court earlier than he did. These include that Field quarreled with Presidents Grover Cleveland and Benjamin Harrison, who between them served from March 1885 to March 1897, and did not want either man to appoint his successor.¹³ In addition, Field's wife enjoyed the social status accompanying Field's high-ranking position and wished to retain it.¹⁴ In any event, during the 1880s there were no overt signs that Field *needed* to retire. By the mid-1890s, that would change.

⁹ MACBETH, I.iv.7-8.

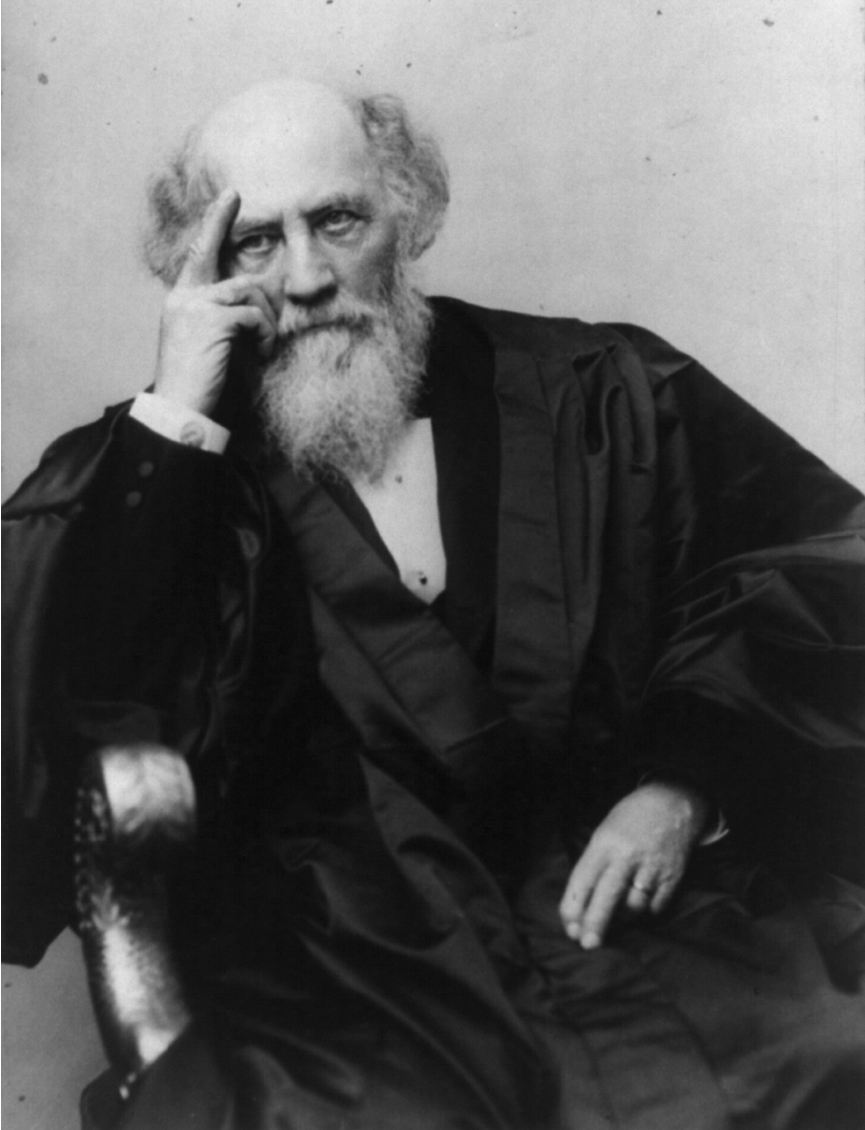
¹⁰ Ross E. Davies, *Recognition and Volition: Remembering the Retirement of Justice Gabriel Duval*, 4 J.L. 1, 1 (2014). See also David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983) (describing Duval as "the most insignificant justice" in Supreme Court history, a conclusion undercut by Davies' observation); Frank Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 492-93 (1983) (disagreeing with Currie, but not by much).

¹¹ Ross E. Davies, *Pioneer of Retirement: Justice Samuel Nelson*, 17 GREEN BAG 2D 209, 210 (2014).

¹² See generally DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 68-71 (1999); ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 95-101 (2003); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1008-11 (2000); see also Ross Davies, Craig D. Rust & Adam Aft, *Supreme Court Sluggers: John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 463, 469 (2010).

¹³ ATKINSON at 69; WARD at 96-97; KENS, *supra* note 2, at 263.

¹⁴ ATKINSON at 69; WARD at 96.



Justice Stephen J. Field (circa 1890).

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Field had never been an easy colleague for his fellow Justices to work with, and the passage of time did not improve matters. “Predictably, this colorful and determined personality grew more difficult and temperamental throughout his long tenure.”¹⁵ Worse, “[b]y the 1890s Field’s mental condition was in noticeable decline.”¹⁶ His colleagues noticed; as time passed, Chief Justice Melville Fuller assigned Field fewer opinions to write for the Court, and ultimately none at all, much to Field’s displeasure.¹⁷ Justice Horace Gray described Field as “behaving more like a wild bull than before” in 1892,¹⁸ while Justice John Marshall Harlan wrote that Field acted “like a mad man” during deliberations in a high-profile case in 1895.¹⁹ Field became embroiled in unnecessary, petty controversies within the Court, such as one about the wording of the headnote of a case.²⁰ Sometimes he even forgot how he had voted and contradicted himself regarding a case’s outcome.²¹ Yet although Field had moments of dysfunction on the bench and in conference, he had periods of high functioning as well, even near the end.²²

An often-told account holds that Field’s colleagues eventually decided that it was time for him to retire and deputized Harlan to call upon him with the message. Harlan introduced the topic of judicial retirement by reminding Field that Field himself had once suggested to the elderly Justice Robert Cooper Grier in 1870 that it was time for Grier to leave the bench. “Yes,” Field supposedly exclaimed, “and a dirtier day’s work I never did in my life!”²³ This account has a venerable source — Harlan told it to

¹⁵ ATKINSON at 68.

¹⁶ *Id.* at 69; *see also* WARD at 96-97; Garrow, *supra* note 12, at 1008-11.

¹⁷ WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910, at 222-23, 339 (1950); ATKINSON at 69; WARD at 97.

¹⁸ KING at 222.

¹⁹ Garrow at 1008; OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE 1888-1910, at 29 (1993) (quoting an 1895 letter from Harlan to two of his sons).

²⁰ Garrow at 1008; KING at 170-73; Alan F. Weston, *Stephen J. Field and the Headnote to O’Neil v. Vermont: A Snapshot of the Fuller Court at Work*, 67 YALE L. J. 363 (1958).

²¹ SWISHER, *supra* note 2, at 442-43; KENS, *supra* note 2, at 262; Garrow at 1008.

²² SWISHER, at 442-43; ATKINSON at 69-71.

²³ ATKINSON at 71; WARD at 97-98; KING at 224.

his future colleague Charles Evans Hughes²⁴ — as well a certain poignancy in bringing Field’s views on judicial retirement full circle. Nonetheless, it may well be apocryphal.²⁵

It is easy to understand why Field, or any aging Justice, would resist retiring even if he recognized that he was lagging mentally or physically. After all, as a Supreme Court Justice, Field was one of the nine most important lawyers and judges in the country, which would no longer be the case after he left the Court. As Jeffrey Toobin wrote about a more recent aging Justice who considered retiring during his final illness, “the benefits of the job still outweighed the appeal of retirement. The choice came down to being [a Supreme Court] Justice or sitting at home by himself. It wasn’t a difficult call.”²⁶

Field also knew that once he resigned from the Supreme Court, he would no longer be a member of the judiciary for *any* purpose. Nineteenth-century retired Justices, unlike modern ones, could not maintain some level of judicial activity by serving by designation on lower courts; the Judicial Code did not create that option for retired Justices until 1937.²⁷ As the length of Field’s service on the Court approached the record-setting tenure of Chief Justice John Marshall, Field also wished to stay on until he would become the longest-serving Justice.²⁸ Whatever the reasons Field stayed on, “little doubt exists that Justice Field remained on the Court for at least two years beyond when his mental incapacity should have prompted his retirement.”²⁹

²⁴ See CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 75-76 (1928), quoted in WARD at 97-98 and ATKINSON at 187.

²⁵ See Charles Allan Wright, *Authenticity of “A Dirtier Day’s Work” Quote in Question*, 13 SUP. CT. HIST. Q. 6 (Winter 1990); ATKINSON at 183-87.

²⁶ JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 238 (2007) (discussing Chief Justice William Rehnquist).

²⁷ See Ira Brad Matetsky, *Chief Justice Hughes and Martin Manton’s Appeal*, 2020 GREEN BAG ALM. 279, 284-87, and authorities cited therein.

²⁸ ATKINSON at 71; see also WARD at 99; KENS at 263.

²⁹ Garrow, *supra* note 12, at 1011.

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Despite all the incentives to remain on the bench, in April 1897 Field finally agreed to leave the Court, submitting the letter to the President reproduced and transcribed at (fittingly) the end of this article. Several factors may have helped lead Field into relinquishing his hold on his seat. First, on March 4, 1897, William McKinley was sworn into office as the 26th President. If Field now left the Court, neither Grover Cleveland nor Benjamin Harrison would appoint his successor. Second, during 1897, Field would surpass John Marshall's length of service on the Court. Third, McKinley had appointed Joseph McKenna, of Field's home state of California, to be his Attorney-General. Field reportedly favored McKenna to replace him on the Court; one account holds that Justice David Brewer, who was not only Field's colleague on the Court but also his nephew, brokered an agreement for Field to resign with the knowledge that McKenna would be appointed.³⁰ Field's brother, Henry Martyn Field,³¹ traveled to Washington to secure Field's written resignation and arranged for it to be delivered to the President.³² Although the resignation letter was written and delivered in April, it was not made public until October, and did not take effect until December 1, 1897.

Even after he finally agreed to retire, Field was indecisive about how best to do so, and at times had second thoughts about whether to leave at all. On May 3, 1897, Field wrote to Chief Justice Fuller, confirming that Henry Field had delivered Field's resignation letter to Fuller and adding that "whatever you [Fuller] and Judge Brewer agreed upon as to form, terms and manner of the resignation would be entirely satisfactory to me."³³ Fuller responded the following day, advising Field that "your letter

³⁰ SWISHER, *supra* note 2, at 444-45; *see also* WARD at 98; KENS at 263.

³¹ Henry Martyn Field (1822-1907) was a prominent clergyman and author. There were nine Field siblings altogether, including David Dudley Field Jr. (1805-94), a New York attorney and drafter of the Field Code of 1850; Cyrus West Field (1819-92), an industrialist involved in the laying of the first transatlantic cable; and Emilia Ann Field (1807-1861), the mother of Stephen Field's colleague on the Supreme Court, Justice David Brewer.

³² WARD at 98.

³³ Papers of Melville Fuller, Manuscript Division, Library of Congress, Box 4. This letter is quoted in full in KING, *supra* note 17, at 225, who also refers to a "draft with many interlineations" in the Papers of Mrs. Rivers Ginet (Fuller's granddaughter). King's copies of many of Fuller's letters now form the bulk of the Fuller Papers at the Chicago Historical

of resignation in which you fixed December 1 as the date of its taking effect was much to be preferred to the other. . . . Accordingly we have just delivered it to the President. . . . Neither the President nor ourselves will give publicity to the fact.”³⁴

On May 6, Field wrote again to Fuller, stating that “[s]ometime during the week I would like to call upon you and ask for directions as to my future labors in court. Although my resignation has been delivered to the President, I shall hope to be able to do something that may be of service to the court, in reference to which I shall feel grateful for any suggestions you may make to me.”³⁵ Fuller, probably relieved that Field had finally agreed to step down, did not ask him to do anything.

By August, Field was feeling better and again having some second thoughts about whether to leave the Court at all.³⁶ Probably fortunately, nothing came of this, and Field decided to send a formal letter of resignation to all of his fellow Justices at the start of the upcoming Term in October. Even the preparation of this final resignation letter proved troublesome; Harlan told Fuller that he was concerned about Field’s draft of the letter, and Fuller’s “papers contain several sheets, with many interlineations, of a

Society Library. ALEXANDRA VIGDOR, *STUDY OF THE RECORDS OF SUPREME COURT JUSTICES* 108 (1977). Professor Ward asserts that “[o]nly the signature [of this letter] is in Field’s handwriting.” WARD, *supra* note 12, at 276 n.7. The text of the letter quoted at the end of this article appears to be in the same handwriting.

³⁴ Quoted in KING, *supra* note 17, at 225-26. An earlier May 1, 1897 draft of the resignation letter which was not used, also found in the Fuller Papers, would have made Field’s resignation effective as of November 20, 1897 instead of December 1, 1897. Why the December 1 date was chosen and why it might have been “much to be preferred to the other” are not known.

³⁵ Letter from Field to Fuller, May 6, 1897, Fuller Papers, Library of Congress, Box 4.

³⁶ Letter from Brewer to Fuller, August 21, 1897, quoted in KING at 226:

I have . . . received a letter from Uncle Henry [Field] in which he says he has just returned from a visit to Uncle Stephen & that the latter is so much better physically that he talks of another year’s work on the bench, intimated that you wish it, & expects me to insist upon it as a personal matter.

Brewer told Fuller that although he had considered alerting the President to Field’s thoughts, he had concluded that it would be better to speak privately with Field. *See id.*

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draft in Fuller's handwriting of Field's published letter of farewell."³⁷ An acceptable letter, much lengthier than usual for this type of correspondence, was eventually crafted and delivered. It is published, with the Court's collective reply, in the Appendix to volume 168 of the *United States Reports*.³⁸

As noted above, "Justice Field attached importance to his record tenure, and it was only after he had eclipsed Chief Justice John Marshall's record . . . that he was willing to seriously entertain the thought of leaving the Court."³⁹ When Field formally wrote to his Court colleagues to tell them he would be leaving, he proudly observed that "[w]hen my resignation takes effect, my period of service on this bench will have exceeded that of any of my predecessors, while my entire judicial life will have embraced more than forty years."⁴⁰ To ensure this, Field timed his resignation to take effect on December 1, 1897, by which time he had served for 34 years 6 months, or 12,614 days, surpassing Marshall's tenure of 34 years 5 months, or 12,570 days.⁴¹ In his last years of service, the Justice did not

³⁷ KING at 227.

³⁸ Letter from Justice Stephen J. Field to the Chief Justice and Associate Justices, Oct. 9, 1897, 168 U.S. 713 (Appendix); Letter from the Chief Justice and Associate Justices to Field, Oct. 9, 1897, 168 U.S. 717.

³⁹ ATKINSON at 71; *see also* WARD at 99; KENS at 263; KING at 224-25.

⁴⁰ Letter from Field to the Chief Justice and Associate Justices, 168 U.S. at 714, quoted in SWISHER, *supra* note 2, at 441.

⁴¹ Field's calculation in his resignation letter, *infra* note 43, that he had served for "thirty-four years, eight months and twenty days," begins the calculation on March 10, 1863, when he received his commission, rather than May 20, 1863, when he was sworn in. As noted above (*see supra* note 34), an earlier draft of Field's resignation letter provided for the resignation to be effective on November 20 rather than December 1. The exact date turned out not to make any difference, because Field last sat with the Court on October 11, 1897, the first day of the 1897 Term. His name does not appear among the Justices who attended on subsequent dates in October or in November. *See* Journal of the Supreme Court of the United States, October Term 1897, available at www.supremecourt.gov/pdfs/journals/scannedjournals/1897_journal.pdf. It is unclear from the published Journal and the *United States Reports* whether Field voted on the cases decided in October and November 1897; evidently he was not participating in the full work of the Court, but there is no notation of Field's absence or non-participation in the reports. The list of Justices in the relevant volume of the *United States Reports* states that "Mr. Justice Field, having resigned, ceased to be a member of the court on the first day of December, 1897," but does not discuss his work in October or November. 168 U.S. iii.

do his best work. But at least in the realm of judicial longevity, he had truly preempted the Field.⁴²



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Supreme Court of the United States
Washington, D.C.

April 24, 1897

To the President
of the United States,
Sir:

I hereby resign my office as a Justice of the Supreme Court of the United States, to take effect on the first day of December, 1897, at which date I shall have attained the age of eighty-one years and shall have held the office for a period of thirty-four years, eight months and twenty days, reserving; however, for the rest of my life the right to the salary attached to such position at the time of my resignation, as prescribed by section 714 of the Revised Statutes of the United States.

I am,

with great respect,
Your obedient servant
Stephen J. Field⁴³

⁴² See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 432 (6th ed. 2015); en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_justices_by_time_in_office. Of subsequent justices, only William O. Douglas has served longer than Field, while John Paul Stevens served for just three fewer days. See *id.*

⁴³ Letter from Justice Stephen J. Field to the President of the United States (William McKinley), Apr. 24, 1897, copy in Fuller Papers, Library of Congress, Box 4. The letter is signed by Field but the text may not be in Field's handwriting. See *supra* note 33.

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(Copy)

Supreme Court of the United States,
Washington, D.C.

April 24, 1897.

To the President
of the United States;
Sir:

I hereby resign my
office as a Justice of the
Supreme Court of the United
States, to take effect on the
first day of December,
1897, at which date I
shall have attained the
age of eighty-one years and
shall have held the
office for a period of

thirty-four years, eight
months and twenty days;
reserving, however, for the
rest of my life the right
to the salary attached to
such position at the time
of my resignation, as
prescribed by section 714
of the Revised Statutes of
the United States.

I am

with great respect,

your obedient servant
Stephen J. Field.

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