Activist judge – it means different things to different people

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Abstract

This paper explores the application or misapplication, as it were, of the term "activist judge". Much has been written about the concept. However, there is currently little agreement as to the real definition of the term or its overall use as to members of the judiciary, It is hoped, that this discussion will shed dome light on the continuing dichotomy of the terminology and its application.

Keywords: activist judge, restrained judge, liberal, conservative, judges

INTRODUCTION

One of Alexander Hamilton's arguments for the new Constitution in the 1700's, was that the judiciary would be the "weakest" branch of government. By 1996, however, presidential candidate Bob Dole said in a speech that federal judges are a president's "most profound legacy." It has been argued that in two centuries, the weakest branch has become a most profound legacy because judges have taken from the people control of the most significant issues that affect our culture, communities and families. [Thomas L. Jipping Oct. 1929 Disorder in the Court, Law Enforcement Alliance of America]

The people themselves should have the power to decide the laws enacted by their elected representatives without judicial interference or imposition.

Most Americans, however, are not alarmed by this loss of liberty because they do not understand the Constitution or the American system of government. The National Constitution Center recently found that 41% of American's do not know the number of branches of government, and one-quarter cannot identify a single right guaranteed by the First Amendment. While only 35% of teenagers know the first three words of the Constitution, 59% can name the Three Stooges.

Columnist Thomas Sowell cut through all the distractions and misleading rhetoric when he wrote: "The real issue is not the number of judges but what kind of judges." There exist two basic choices, a restrained judge who is a servant of the law, or an activist judge who is the master of the law."

A judge's most important task is interpreting the law. Since the law (whether a statute, a regulation, or the Constitution) already exists, interpreting it is simply determining what it means. The meaning of individual words determines the outcome of cases and, therefore, determines how the government conducts itself.

A restrained judge believes that the meaning of these words already exists, that the meaning came from the legislatures or the people who enacted those words into law in the first place, and the judge's job is to find it. Activist judges, in contrast, pursue their own agendas and believe they can give those words any meaning they choose. A restrained judge takes the law as he finds it, while the activist judge believes he can make it up as he goes along. America's founders described a restrained judge as one who uses "judgment" and an activist judge as one who uses "will."

In explaining why the judiciary should be the weakest branch of government, Alexander Hamilton explained that "if judges should be disposed to exercise will instead of judgment, the consequences would equally be the substitution of their pleasure to that of the legislative body." That is another way of saying that restrained judges allow the people to run the country while activist judges take over that job themselves.

Restrained judges allow people to make the law and the people's values to define the culture. The people are meant to decide issues such as public safety, educational standards, or whether or not religion plays a significant role in public life. Activist judges take that freedom

away from the people and dictate these and other issues, typically with liberal and secular values. As a result, judicial selection is the most important issue in national politics today. [Thomas L. Jipping, Oct. 1998, "Disorder in the Court" Law Enforcement Alliance of America]

The common term today is "activist judges." Activist federal judges have declared themselves the power over state legislatures, school boards and city councils. As a result, the federal government grows ever more invasive, as the states become ever more subservient.

Congressman Ron Paul explains that "Federal judges are undermining republican government by imposing their preferred politics on states and local governments, instead of respecting the policies adopted by those elected by, and thus accountable to, the people."

"Some may claim that an activist judiciary that strikes down State laws at will expands individual liberty" said Paul. "Proponents of this claim overlook the
fact that the best guarantor of true liberty is decentralized political institutions, while the greatest threat to liberty is concentrated power. This is why the Constitution carefully limits the power of the Federal government over States."

Courts that are free to overturn State laws at the whim of a judge or from the pressure of an activist group's lawsuit literally nullify the 10th Amendment's
Limitations on Federal power. [Tom DeWeese, 6/8/06 "Protecting the Republic from Federal Judges", American Policy Center]

Judicial activism has also been described as legislating from the bench. According to judicial analyst and former superior court Judge Andrew Napolitano, "There is no such thing as an activist judge. An activist judge is one who's ruling you disagree with. And if you agree with what the judge has done, you call them heroic and honest."

The job of the judicial branch is to interpret the law whether it is unclear or in question. When laws or rulings of lower courts are challenged, Supreme Court justices must examine the law and determine if the intention of the law has been upheld. Often, justices must determine whether federal or state laws are constitutional, or if Congress has passed a law without any constitutional authority to do so, judicial rulings then become the basis for future legal arguments- this is known as legal precedent, or "case law."

"To conservatives, activist judges are those who permit or compel activity in which the opinion of conservatives can only be done in the legislative branch,"
Judge Napolitano said. "To liberals, activist judges are judges who prevent the government from doing the things the Legislature wants to do."

So the core of the argument is the rule of the judiciary. Supreme Court justices are appointed for life. The reasoning behind lifetime tenure is that sometimes justices must make decisions that are unpopular or counter to the will of the majority. Because they are not elected, they are free to uphold the law in spite of potential political fallout. Chief Justice William

Rehnquist said, judges should uphold the laws, regardless of whether that makes them popular or not.

Fairleigh Dickinson University in their PublicMind poll asked the question,"Are the federal and state courts legislating from the bench?" The surprising results of the poll were that Americans, regardless of whether they classify themselves as independent, Democrat, Republication, liberal, moderate, or conservative, believe that the courts are overstepping their role as interpreters of the law. 75 percent believe that legislating from the bench is a serious problem in federal courts, and 67 percent believe it is a problem in state courts. These results coincide with a separate CBS poll in which 77 percent believe that a judge's personal ideology should not affect judicial decision – making.

The American Bar Association President Robert J. Gray Jr. denounced as "politically motivated" attacks against judges stemming from high profile cases, saying that they highlight the lack of civility in contemporary public discourse regarding the role of judges in American justice. "The draconian stance against the judiciary by some of this country's lawmakers is troubling," said Gray. "The role of the judiciary is clear. Federal and state judges are charged with weighing the facts of a case and following the law, responsibilities they carry out with great dignity and sensitivity." Bitter partisanship over nominations to the federal bench and the vitriolic attacks on allegedly "Activist" judges may change", according to Gray. [Robert J. Gray Jr., April 29,2005,ABA President Urges Political leaders to refrain from intimidating judges, American Bar Association Network]

Justin Daar wrote in the "American Chronicle" that "we have lost faith and confidence in our judiciary system to do what is right.Judicial activist judges have turned our legal system into a sick mockery of justice to the point where many people would rather keep quiet and accept whatever injustices are meted out on them rather than take their chances in a perverse game of 'judicial' roulette."[Justin Daar, March 24, 2005, "Ignore Activist Judges and They Will Go Away." American Chronicle]

Alexander Hamilton addressed the issue of judicial activism and how it would be prevented under the new American Constitution in "Federalist Paper 81." Hamilton wrote, "Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be as extensive as to …..affect the order of the political system. This may be inferred with certainty…from [the judiciary's] total incapacity to support its usurpations by force."

Our government has a series of institutional checks and balances that keep any one of the three branches from superseding the others. The checks and balances between the Legislative and Executive Branches are well known. But what Hamilton is writing about is the lesser known check of the President over the Supreme Court. As outlined in Articles II and III of the Constitution. The Supreme Court is dependent upon the Executive Branch, as is the Congress, to "execute" their wishes. Nothing gets done unless the President agrees.

The Supreme Court can decide whatever they want about anything and nothing is going to happen unless the President agrees to execute that decision. Political convention states that the

rulings of the Supreme Court are executed by the President as a matter of course, however, there is no Constitutional requirement that this must be done. It has been done before, in 1832 President Jackson refused to execute the Supreme Court ruling in the case of Worchester v. Georgia, and the Court responded by not issuing a similar ruling for the rest of Jackson's term.

Tom DeWeese, Publisher and Editor of the DeWeese Report and President of the American Policy Center had this to say, "Activist judges have been a plague on American liberty for decades. Many of their rulings, based more on political ideology and political agendas then on the rule of law and the actual provisions of the United States Constitution, are undermining and destroying the reserved powers of the states under the Tenth Amendment to the Constitution and the guarantee of a republican form of government to each and every state under Article IV of the Constitution. Activist judges are destroying state autonomy and local self-government and are a threat to individual liberty."

"Now, there is a looming danger that federal judges with political agendas will use their bench powers to overturn voter-approved ballot measures and state legislative efforts regarding such public policy issues as the legal definition of marriage. All of this is in pursuit of a radical agenda of political centralization, statist public policy and social engineering profoundly hostile to Constitutional democracy and individual liberty." [Tom DeWeese, August 11, 2006, "Legislation against Judicial Activism," An Online Journal of Political Commentary & Analysis.]

The current climate of hostility to the judiciary cannot be written off as a product of the lunatic fringe. Attacks on "activist judges"--- a phrase that, like "the elites", has become a code word for liberals. The truth is that the real issue is not the activism of judges but the principles upon which they are acting. Justices Roberts and Alito now form a voting bloc with Anthony Scalia and Clarence Thomas. All are infact, activist judges on behalf of right-wing ideology. [Susan Jacoby, August 14, 2006, "The Activist Judge Myth", Tom Paine. com]

The most activist court? The Rehnquist Court, which in terms of the annual average number of federal statutes overturned by the Court ranks first. When it comes to rejecting state and local statutes, the late Warren Court was second most activists in American history. Here we see liberal activism, strongest in fact during the Great Society period and into the Burger period before fading. As the reconstituted Court slowly grew more formable to the state of the law. But the Rehnquist Court wasn't far behind. Modern conservatives have tried to curtail the liberal activism they inherited from the Warren Court, while simultaneously seeking to develop a new conservative activism of their own. [Thomas M. Keck, "The Most Activist Supreme Court in History", October, 2004]

Whether a court decision is activist has nothing to do with which direction it leans politically. Before 1937, the Supreme Court was activist in the conservative direction. That was just as wrong as the later liberal activism. Judges who are committed to judicial restraint are simply committed to letting the democratic process work. Under the Constitution, a few basic traditional rights are protected from change by the legislative branch. All other questions of

policy are subject to the democratic process. [Carl P. Meyer, Oct. 9, 2008, "Carefully consider candidates' take on Justices", USA Today]

Even though the term "judicial activist" has dominated public debate over courts for a generation. There is no consensus on its meaning. Political scientists opt for objective criteria, saying that anytime judges strike down statutes or policy decisions by elected branches --- no matter how uncontroversial their reasons --- is an instance of "activism". [Charlie Savage, June 20, 2009 "Uncertain Evidence for "Activist" Label on Sotomayor, The New York Times Section A, page 10]

Senator John McCain lashed out at liberal judges for making law rather than interpreting the Constitution and ripped the current Supreme Court for injudicious decisions. He said "America's courts have strayed far from the edict of the Founding Fathers, who laid out, "not just guidelines," not "helpful suggestions," but a clear set of limits."

"The moral authority of our judiciary depends on judicial self-restraint, but this authority quickly vanishes when a court presumes to make law instead of apply it. A court is hardly competent to check the abuses of other branches of government when it cannot even control itself", Mr. McCain stated.

However, Barack Obama's criteria for a good justice is someone who shares "Ones deepest values, one's core concerns, one's broader perspectives on how the world works." [Joseph Curl, May 7, 2008, "McCain indicts judges who 'Make' Law", The Washington Times, Section: Nation; A03]

All judges hold their offices "on good behavior." They freely take an oath to uphold the constitution of their various states and the U.S. Constitution. In taking their oaths, such jurists understand that they have no authority to rewrite the foundational laws of this republic by judicial frat. Yet, from the U.S. Supreme Court down to a variety of state courts, that is exactly what they have been doing…. and they have been doing it with impunity. They have come to behave like judicial brigands crawling over the gunwales of the ship of state with daggers in their teeth, intent on storming the wheelhouse of our democracy. The only way to bring chronic judicial outlawry to an end is to hold the perpetrators of this historic societal crime to account by removing them from office. [Thomas E. Wilson, June 24, 2008, "Impeach Activist Judges", the Washington Times, Section: Letters; A24]

Elected legislators, not unelected judges should determine policy and law. The conservative majorities under Chief Justices William Rehnquist and John Roberts have overturned or gutted more legislation than any Supreme Court in more than 70 years; the Constitution should be strictly constrained, without straying beyond its original intent and explicit wording.

The greatest damage in the past generation to the concept of returning power to the states has been the reinvigorated doctrine of federal pre-emption, whose champion is icon Roberts. Under this doctrine, even long-standing state control has been subordinated to the dictates of the federal government.

Another conservative icon, Justice Antonin Scalia voted that federal power invalidated the California medical marijuana law and the Oregon assisted – suicide law, even though both represented the direct expression of the will of the people by initiative and referendum.

Judges make decisions by following the law, not their personal agenda or views shaped by their life experience.

Most judges, conservative or liberal; try to be impartial, but legal issues are complex, and judges are human. The default position in a close case is invariably influenced by one's life history and present beliefs. It is not believable, for example, that consciously or unconsciously, Justice Scalia's strong conservative and religious beliefs played no role in his violating his federalism principles to vote to invalidate state medical marijuana and assisted-suicide laws.

Probably two of the most activist decisions in our judicial history were the Brown v. Board of Education and Loring decisions of the Supreme Court. Brown prohibited government – enforced segregation in our schools, and Loring invalidated statutes in 16 states that prohibited consenting black and white adults from marrying each other.

On the other hand, the 1857 Dred Scott case by the Supreme Court was the quintessential strict constructionist decision, both by its method and its explicit wording. Justice Roger Taney wrote that his generation might not approve of slavery, but the people who wrote the Constitution did, and therefore, absent a constitutional amendment, slavery would be forever enshrined in our laws. Even Justice Scalia has admitted that the Dred Scott decision was an utter disaster for the judiciary and the country. Yet it was, by every definition, a strict conservative decision. [Sol Wachtler and David Gould, July 12, 2009, "The Myth of Judicial Activism; Life experience, and beliefs will influence a judge', Newsday, Opinion Section; pg A36.]

Complaints about judicial activism have plagued Supreme Court confirmation hearings for decades. Justice Sandra Day O'Connor fielded dozens of questions on judicial activism in 1981. Justice Stephen Breyer was urged to "resist the siren calls of judicial activism" in 1994. The term appears 56 times in the record of Justice Ruth Bader Ginsburg's confirmation hearings, and it seemed omnipresent at the Roberts and Alito hearings.

But what does "judicial activism" mean? To borrow from Justice Antonin Scalia, it often "doesn't mean anything. It doesn't say whether you're going to adopt the incorporation doctrine, whether you believe in substantive due process. It's totally imprecise. It's just nothing but fluff."

Without context or a clear definition, a charge of judicial activism is an empty epithet, the legal equivalent of calling someone a jerk. It hampers the exchange of ideas and lowers the level of public debate, wasting time (and pages) that could be devoted to serious discussion of the issues. With appropriate context and clarity, however, the term can be a valuable tool for a meaningful discussion about the judicial role. [Keenan Kmiec, May 12, 2009, "Ever Judicial Activist"? Politico]

Criticism of the U.S. Supreme Court often centers on allegations that the Court decisions reflect inappropriate "judicial activism". Hundreds of law review articles every year address the

issue, [Keenan D. Kniac, 2004. "The Origin and Current Meanings of "Judicial Activism", 92 Cal. L. Rev. 1441, 1442 (noting that the term had been discussed in over five thousand articles since 1990.)] While the popular press also commonly critiques so-called activist decisions. [See id.@1443 n.8. "In the past decade (from 1994 to August 2004), "judicial activism' and its cognates have appeared 163 times in the Washington Post and another 135 times in the New York Times."]

Even hundreds of judicial decisions have decried judicial activism. While there is no intrinsic reason why an activist judiciary is inevitably or inherently problematic, the phrase typically carries a very negative connotation—at least in modern discourse. [Cass R. Sunstein, (2005) "Radicals in Robes". 42 (observing that for some the "word" activist isn't merely a description" but is "always an insult".]

Not all forms of judicial activism are universally condemned. Some of the decisions for which the Supreme Court is generally applauded, such as Brown v. Board of Education [347 U.S. 483 (1954)], were in some respect activist decisions. [Kermit Roosevert III, (2006) "The Myth of Judicial Activism"]

Ronal Dworkin has extolled the virtues of an activist judiciary in the protection of constitutional rights. [Stanley C. Brubaker, (1984). Reconsidering Dworkin's Case for Judicial Activism, 46 J. Pol.503.] Judicial activism is arguately "a way for a Court to line up for its obligation to serve as citadel of the public justice." [Rebecca L. Brown, (2002) "Activism Is not a four- letter word;" 73 U. Colo L. Rev. 1257] While this defense of activism certainly resonates, it presumes that Justices embrace a certain honest sincerity regarding constitutional interpretation, as opposed to a more result-oriented ideological approach.

Critics of judicial activism challenge this sincerity and claim that activist judges simply impose their policy preferences on society, without electoral accountability or fidelity to the Constitution. [William P. Marshall, (2002) "Conservatives and the Sever Sins of Judicial Activism", 73 U. Colo. L. Rev. 1217.] As calls to rein in the activist judiciary have entered popular discourse, however, the term "activism" has become devoid of meaningful content as it often reflects nothing more than an ideological harangue.

Nevertheless, the underlying concern – that activist judges may act improperly – is legitimate in light of our commitment to democratic values. Yet to evaluate this concern, we need both a precise definition of judicial activism and more rigors in its testing.

At the core of the criticisms of judicial activism lies a concern that the judiciary is acting outside its proper judicial role. Some complain that the activist judiciary is acting "like a legislature" instead of a court. [Kmiec, id @ 1471, "Judges are labeled judicial activists when they "legislate from the bench"] Exactly what it means for a court to "act like a legislature" is less clear. Sometimes, the criticism suggests the Court is creating law rather than applying it. Indeed, the key objection is that an activist Court somehow acts non-judicially. As Justice Black noted in objection to a right to counsel ruling, "we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the

Framers to put in it." [U. S. v. Wade, (1967) 388 U S 218, 250] Such "non-judicial" behavior is the form of action that must be reflected in a social scientific measure of judicial activism.

The term "judicial activism" apparently is an effective rhetorical tool in ideological argument, but no consensus exists regarding its specific meaning. Instead, the phrase is used as an epithet "to bludgeon legal and political opponents." [Jeffrey A. Segal and Harold J. Spaeth, (2002), "The Supreme Court and the Altitudinal Model Revisited 408]. As Judge Diarmuid F. O'scannlain observes, "judicial activism is not always early detected. Because the critical elements of judicial activism either are subjective or defy clear and concrete definition." [Diarmuid F. O'scannlain, (March, 2000), "On Judicial Activism: Judges and the Constitution Today", Open Spaces Q.]

Judge Frank H. Esterbrook suggests that the term is "empty" and simply a "mask" for the critic's own substantive position on the court. While Justice Scalia has characterized criticisms of judicial activism as "nothing but fluff". [Charles Law, (April 1, 2002) "No Unanimity on Holding on the High Esteem," Washington Post, @A13]

The most common standard for evaluating judicial activism is the extent to which judges invalidate legislative enactments. Judge Richard A. Posner suggests that a basic element of judicial activism is a court's willingness to act "contrary to the will of the other branches of government," as in striking down a statute. [Richard A. Posner, (1996) "The Federal Courts: Challenge and Reform, 320]. Sunstein contends that "it is best to measure judicial activism by seeing how often a court strikes down the activity of other parts of government, especially those of Congress." [Cass R. Sunstein, (2005) "Radicals in Robes", p. 42.43] Judicial activism is in fact "most often associated with judicial invalidation of decision by elected representatives." [William P. Marshall, (2002) "Conservatives and the Seven Sins of Judicial Activism", p1223].

Political scientists generally contend that "the most dramatic instances of a lack of judicial restraint – or conversely, the manifestation of judicial activism – are decisions that declare acts of Congress and, to a lesser extent, those of state and local governments unconstitutional." [Segal and Spaeth (2002) "The Supreme Court and the Altitudinal Model Revisited", p. 413] This standard is commonly invoked and probably the most common measure of judicial activism. [Christopher J. Peters, (1997) "Adjudication as Representation", 97 Colum. L. Rev. 312, p434]

Overturning or ignoring applicable precedent may also constitute a form of judicial activism. [Keenan D. Kmiec, (2004) "The Origin and Currrent Meanings of "Judicial Activism", 92 Col. L. Rev P 1446]. When Justices overturn precedent they more clearly trammel the actions of their predecessors than the privileges of the coordinate branches, but these decisions are often challenged as activist, given the general standard of judicial fealty to precedent. The framers of the Constitution considered precedent to "derive from the nature of judicial power, and intended that it would limit the judicial power delegated to the courts by Article III of the Constitution." [Anastasoff v. United States, (2000), 223 F. 3rd. 898 @ 900, Vacated as moot en banc, 235 F. 3rd 1054]. Regularly overruling or distinguishing away precedent might therefore be considered inappropriate judicial activism. The Justices have themselves occasionally criticized their

brethren for judicial activism in ignoring the Court's precedents. [Kimel v.Fla. Bd of Regents, (2000) 528 US 62, pg 98,99) (Stevens, J. dissenting.); Engle v. Isaac, 456 US. 107 @ 137 (1982) (Brennan, J. dissenting).

Another form of judicial activism involves not the decision but the opinion or remedy. Writing an unnecessarily broad opinion with applicability beyond the unique circumstances of the case before the Court might be considered activist. Alternatively, the nature of relief ordered might appear to have an "activism" dimension. In some cases, courts have involved themselves in the "day - to – day running of public institutions" or demanded public expenditures amounting to millions of dollars." [Ernest A. Young, (2002) "Judicial Activism and Conservative Politics", 73 U. Colo. L. Rev. p.1154] These seemingly activist judicial measures, regardless of whether the underlying decision invalidated a statute or overturned a precedent. They certainly assume power generally reserved for other governmental institutions.

Judges fail to act within their proper role when they engage in "result – oriented judging", whereby their decisions are driven by their ideological preferences concerning substantive case outcomes (e.g., liberal Justices preferring liberal policy outcomes and conservative Justices preferring conservative outcomes.) [See, Kmiec, id @ 1475. 1476] As a result, based on ideological predispositions, a liberal Justice would rule in favor of criminal defendants' rights, whereas a conservative Justice would oppose such rights. Such ideological judging has been called "the essence of judicial activism." [O'scannlain, supra @23] ("When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he fails by definition to apply the law faithfully.")

Jeffrey Segal and Harold Spaeth also reviewed Supreme Court declarations of unconstitutionality, examining votes in 170 cases between 1986 and 1998 in which the Court found a law unconstitutional. The vast majority of the Justices displayed a significant ideological effect—liberal Justices voted to strike conservative laws and uphold liberal ones, while conservatives on the Court ruled the opposite. [Segal and Spaeth (2002) "The Supreme Court and the Attitudinal Model Revisited 408 p. 415-416].

In a more recent publication in the Journal of Empirical Legal Studies, Rorie Spill Solberg and Stefanie Lindquist analyzed Justices' votes to invalidate state and federal legislation for the period from 1986 to 2000. [Solberg & Lindquist, "Activism, Ideology and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986-2000 (2006) 3 J. Empirical Legal Stud. P. 239.]

This study focused on whether the conservative Justices' expressed desire to protect states' rights 'via an enhanced federalism doctrine actually structured their exercise of judicial review, or whether their votes to invalidate state and federal legislation were better explained in terms of the ideological direction of the statute at issue. [id. @ 237] The authors found that the Justices' preference for certain substantive policies trumped their professed concern for deference to state law and legislative policy. [Id]

In another recent study, Lori Ringhand conducted an analysis of the data summarized in Gewintz and Golder's New York Times editorial. [Lori A. Ringhand, (2007) "Judicial Activism:

An Empirical Examination of Voting Behavior on the Rehnquist Natural Court, 24 Const. Comment p. 2] She confirmed their finding that the conservative Justices of the Rehnquist Court were distinctly more likely to invalidate federal legislation and overturn precedent than the liberal Justices. [See Ringhand, pg 7-8, 27] In addition, Ringhand expanded on the limited editorial to find that the Court's liberal Justices were more likely to invalidate state legislation. [id. P 17- 19]. However, she concluded that the conservatives would overturn state legislation to advance conservative ends [id pg 23] and even did so in the most legally contestable cases. [Id. P. 22.23]

To date, the empirical research exploring judicial activism has only scratched the surface. This research is limited in part because it focuses primarily on one dimension of judicial activism involving the invalidation of legislative enactments. [Frank B. Cross and Stefanie A. Lindquist, (June, 2007) Minnesota Law Review, 1752, pg. 9.]

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