

THE BRICKER AMENDMENT

by

Senator Hubert H. Humphrey

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I speak today in the role of a Conservative. By definition, a Conservative is one who hesitates to accept change. But its verb form, "to conserve," means to "preserve from injury or destruction."

Today, the object of destruction is the Constitution of the United States. The destructive force is the so-called Bricker Amendment.

Where does the Bricker amendment strike at our Constitution?

Threatened is one of the fundamental characteristic of our fabric of government, if not the most fundamental -- the Doctrine of the Separation of Powers. So ingrained in the thinking of the Founding Fathers was this doctrine that the actual arrangement of the Constitution devoted Article I to the legislative branch, Article II to the executive branch, and Article III to the judiciary. Not only was the separation of powers the existing practice and the prevailing political theory, but it represented sound psychological observations -- for the Founding Fathers, and their descendents after them, well

knew that "Power tends to corrupt and absolute power corrupts absolutely."

The Articles of Confederation failed in the early days of our Republic largely because of its inability to deal with foreign affairs. Treaties and their enforcement was one of the most urgent problems that faced the Constitutional Convention in 1787. When the written document emerged from the secrecy that shrouded Philadelphia, Article II, Section 2 read: "(The President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Clearly, the treaty-making power had been vested in the executive.

In vesting the treaty power in the Executive, our Founding Fathers accepted the universal custom of sovereignties to vest the treaty power in the Executive Branch of government. There was another powerful and compelling reason to do so -- the President, elected by all the people, alone has the power to speak or listen as a representative of the nation. As John Marshall told the House of Representatives in his great argument of March 7, 1800: ("Annals of the Congress of the United States, Sixth Congress," p. 613.)

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"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

"He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him."

But the vital principle of checks and balances does not allow the President free reign. His treaties must meet with the approval of two thirds of the Senators present. We all know that the Senate has been called the graveyard of treaties. John Hay even went so far as to say,

"A treaty entering the Senate is like a bull going into an arena. No one can say just how or when the final blow will fall. But one thing is certain: it will never leave the arena alive."

In spite of these facts, however, supporters of the Bricker amendment are today asking us to change our traditional executive-legislative balance in treaty-making. Ironically, under the pressure

of an atomic age cold war, the Senate is not only being asked for
a vote of no confidence in the Executive, but in itself as well.

No longer, they say, can we put our trust in the President (who negotiates treaties) or in the Senate (who confirms them).

The effects of the Bricker amendment would be to require treaties that affect "internal law" after going through the usual Senatorial "arena," to be either passed by both Houses of Congress, or approved by the 48 State Legislatures.

And what are these treaties that affect "internal law"?

The Association of the Bar of the City of New York believes that we would not be able to make treaties concerning the allocation of international radio frequencies or adopt uniform quarantine regulations because they effect "internal law". The State Department believes that we could not make treaties for the international control of atomic energy and mass destruction weapons because they affect "internal law". Professor Zechariah Chaffee of the Harvard Law School believes that we could not make certain types of

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treaties of commerce, ownership and inheritance of land abroad,
and for the carrying out of business and professions abroad

because they affect "internal law". The distinguished Chairman
of our Foreign Relations Committee has even said that treaties for
the international control of narcotics and international extradition
of criminals might not be made because they affect "internal law".

It is indeed possible that all these types of treaties will
be prevented or impeded under the proposed amendment. But the fact
remains that no one knows the exact extent that the "internal law"
clause of the Bricker amendment would affect treaties. Isn't it
remarkable that we are now discussing the passage of an amendment to
the Constitution of the United States and we cannot say definitely
what will be affected by it?

But it is not just the existing legislative-executive balance
that would be upset by the Bricker amendment. Equally important is
its devastating effect on the Federal-state balance. Not only did

our Founding Fathers vest the treaty-making power entirely in the hands of the Federal government, but they made sure that treaties would be "the supreme law of the land." This was done, in the words of James Madison, to prevent "the States in their individual character, from defeating the Constitutional authority of the States in their united character..."

The Constitution gave Congress a number of specified powers. Powers not specified, or delegated, and not constitutionally necessary and proper for the carrying out of delegated powers were reserved to the States under the 10th Amendment. But the treaty power was not reserved to the States. Not only was it delegated to the Federal Government, but Article I, Section 10 of the Constitution strictly forbids a State from entering "into any treaty, alliance of Confederation."

That the treaty power, vested solely in the Federal Government, is 'the supreme law' taking precedent over any conflicting State statute is not a new and radical principle as the proponents of the Bricker Amendment would have us believe. Only seven years after the Constitution became effective, in 1796, the Supreme Court held (in the case of Ware v. Hylton, 3 Dallas 199) that a Virginia law was unconstitutional because it conflicted with a later treaty. Had there not been a treaty, the State statute would have been perfectly legal. But if the Federal Government had not had this supremacy power in treaty-making, and had the State law remained in effect, we could have had no guarantee that other nations would respect our agreements, or even make treaties with us at all.

Certainly with the distinct possibility that any agreement our representatives negotiated with foreign nations would have no effect as law within the 48 States, our international bargaining power would be drastically weakened. And that would be the situation under the Bricker Amendment. In other words, as Secretary of State Dulles has said, the Bricker Amendment "would set the clock back to an approximation of the conditions which existed under the Article of Confederation". Any treaty negotiated on any subject that in domestic law is reserved to the States would have to be ratified by the States -- by 48 separate bodies, usually meeting for only 60 or 90 days at irregular intervals, some spaced two years apart.

The Bricker Amendment would repudiate the principles of internationalism which unite the mainstream

of both of our major parties. It is the long step backward to the dismal and disastrous "go it alone" way of thinking. It is the psychological roadblock in the path of American participation in world affairs.

I have attempted to show the havoc this amendment would wreak on the basic fabric of our government -- The Constitution, and on our hopes for a free world. I have done this as a student and teacher of government, and not from a legalistic point of view. I am not a lawyer. Great outcries in behalf of this proposal have come from certain small, but vocal, groups of the Bar. To analyze their polemics more fully, I call your attention to three blistering legal reports in opposition to the Bricker Amendment by the Federal Bar Association, the Association of the Bar of the City of New York, and the

Section of International and Comparative Law of the American Bar Association. I call the attention of the Senate, as well, to the opinions of 26 out of 27 Deans of American Law Schools who vigorously oppose this threat to the Constitution, and to the numerous forthright statements of opposition by one of our nation's greatest Constitutional lawyers, Mr. John W. Davis.

But even without a law degree one can observe a vital flaw in the arguments of the proponents — for all their reasoning is either hypothetical or based on mere dicta. As one of the most influential proponents said in presenting his case to the American Bar Association, "We are thinking about what is going to happen eight years from now". Why do the proponents resort to such strategy? Certainly they would not attempt to build such a case in a court of law. They do so because they cannot point

to one single unconstitutional treaty in the 165 years
of American history. What could be a greater commentary
on our treaty-making system and the wisdom and vigilance
of our Executive and Senate! What could be a more powerful
answer to those who criticize our Constitution!

Has this minority of the legal profession stopped
to look carefully and responsibly at the Bricker
Amendment in the light of our role in world affairs?

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Armed with precedents and horn books, have they not failed
to see this measure in the far-sighted, long-term light
of our foreign policy -- and our quest for survival in
this atomic age?

I single out these men of the legal profession
who support this resolution ^{first} because they are honorable
individuals in the main whose primary mistake appears
to be that they have failed to see the forest of world

affairs for the trees of legal dicta. But what about that other group of willful men -- those Bricker Amendment supporters who are deliberately using the proposal as a weapon in their self-appointed crusade to bring our nation back into the fold of isolationism, and who rally to the cry of Gerald L. K. Smith to "Kick the UN out of the U. S. and get the U. S. out of the U. N." (See "Abolish the United Nations" Citizens Congressional Committee to Abolish the United Nations). On this issue, the extremist fringe is all the more dangerous because they are carefully hiding behind the coattails of legalistic arguments. Gratis, they have finally been given a shield of respectability.

Let us examine some of the arguments these extremist groups have been spreading across the United States in behalf of the Bricker Amendment. Let us see

how they have distorted the truth to forward their cause.

First, there is the irrevocability of treaties distortion. I quote from Samuel Pettengill, sometime Chairman of the old Committee to Uphold the Constitution. He has written something called "Subverting the Constitution by Treaty," which is being widely distributed by Merwin K. Hart's National Economic Council. (You will recall this group as the one that the House Select Committee on Lobbying Activities of the 81st Congress said tries "to disparage those who oppose its objectives by appeals to religious prejudice..." (General Interim Report, Union Calendar No. 1085, p. 22) Pettengill writes:

"No matter how foolish or 'dishonorable' a treaty or executive agreement may be, you must bleed and die if you get hooked in one of them.

"And once in, you can't get out
Nor could the Senate repeal a treaty.
Only our cleverlads (he tells us earlier
that this means 'The Hisses, Achesons, and
Dulleses') and their foreign friends could
agree to change a treaty."

Unfortunately for this argument, the Supreme Court
held nearly 70 years ago (in the Head Money Cases, 112 U.S.
580) and has since repeatedly declared that any act of
Congress can repeal an earlier treaty. This rule, by
the way, also applies to Executive agreements. If we
confirm a treaty and later want to repeal it, all that
has to be done is to get a simple majority of Congress.

There is absolutely nothing irrevocable about the treaty-
making power of the Constitution.

Second, there is the completely fallacious argument
that the Bricker Amendment would place the United States
on a "parity", or on a plane of "equality" with other

nations. The proponents of this line of reasoning appear to have a scanty knowledge of comparative government.

Professor Lawrence Preuss of the University of Michigan has shown that their understanding of this issue is based upon "a superficial examination of foreign practice", "an exclusive reliance upon formal texts," and "a misunderstanding of the process by which treaties are given effect under foreign legal systems...". (Michigan Law Review, June 1953) Yet, a group of ladies calling themselves the "Vigilant Women for the Bricker Amendment" have spread the inaccuracy in more than 100,000 copies of their pamphlet, "Our Consitution has a Dangerous Loophole."

They write:

"The United States is the only major participant in the entire UN which permits ratified treaties to become 'the supreme law of the land.'

"Let's give ourselves the same protection
other nations provide for themselves."

Now ~~what~~ what is the true situation? Let us take
the United Kingdom, for example, since it is most
frequently cited as the country we are not in a position
of "equality" with in so far as treaties becoming domestic
law is concerned. Professor Preuss finds that "From the
moment the treaty becomes binding internationally, the
British Government is in a position to give effect to
it internally. No further legislative action is require d
subsequent to ratification." In other words, it becomes
the "supreme law of the land." The Professor then goes
on to find the same true of France, the Netherlands,
Belgium, Italy, Switzerland, Western Germany, and
Australia. I might add that when the State Department
asked our diplomatic corps to make a survey of foreign
treaty procedures, their findings were similar.

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So what about this statement of the so-called

Vigilant Women or similar statements by Mr. Frank Holman, who, by the way, would go so far in isolating our country as to oppose the Baruch Plan for atomic control, and who has done extensive propagandizing for this amendment in more than 40 States? The true situation is that the Bricker Amendment, instead of giving us "the same protection other nations provide for themselves", would give us the most cumbersome method of treaty-making in the world, and put us, not on an "equal plane", but at a distinct disadvantage in international relations.

Third, there is the misleading appeal to doctors. I quote from a letter to American doctors in December by Edward A. Rumely, Executive Secretary of the Committee for Constitutional Government, a group that has opposed most every piece of humane legislation for the last 18 years. Rumely writes: "Passage of the Bricker amendment is indispensable to safeguard the medical profession and free enterprise for physicians." The fact is that the Bricker amendment has nothing to do with the free enterprise of the American medical profession.

The case Rumely and others are trying to build is that a so-called "Socialized Medicine" program will be slipped over on the American people through an International Labor Organization Convention. What they fail to tell the doctors is that this ILO Convention under discussion would give the Federal Government no legislative powers it does not already possess; that the two-thirds vote of the Senate needed to pass such a Convention is more difficult to get than a simple majority of Congress; that such a treaty is non-self-executing and would therefore have to receive enabling legislation from both

Houses of Congress, and that as the Wagner-Murray-Dingell bill was not even able to get out of committee in 1948 there is no possibility for such a Convention to withstand the much more arduous formalities necessary for it to become law.

In still another misleading appeal to doctors, it is said that without the Bricker amendment reciprocal treaties for the practice of medicine would lower our medical standards. This is not so for the following reason: if the President negotiates such a treaty, if the Senate by a two-thirds vote confirms such a treaty, if the President then ratifies such a treaty the only thing it could possibly do would provide that a foreign doctor shall not be denied the right to practice solely because of his nationality. He would still have to fulfill the rigid requirements that the States set out to protect the public health. In my own state, Minnesota, we have a State Board of Medical Examiners. This consists of seven physicians appointed for long terms by the Governor. An agreement for the reciprocal rights to practice medicine would not affect this State Board. They would still have the authority to set standards

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and grant licenses. The Bricker amendment has nothing to do with the protection of our high medical standards.

Personally, I am perturbed by the outright insinuation that the duly elected Senate of the United States is engaged together with the President in a world plot to sneak something over on the American people. Furthermore, I consider this attempt to appeal to the so-called "vested interests" of the American medical profession one of the most unfair tricks of the campaign waged by the supporters of this amendment.

There is another appeal being made in behalf of the Bricker amendment. It is the appeal to fear. True, this propaganda technique is only being employed by a small minority. But this minority, from the "literature" I receive daily, appears to be by far the most vocal. Take, for example, the booklet written by one Bryson Reinhardt called, "You?...In a Foreign Prison?" We could laugh this off if it wasn't for the fact that in the last four months it has been reproduced more than 500,000 times; that it has been widely distributed by the Committee for Constitutional Government, and that " promotional plans for substantially increasing

this circulation" have been undertaken. Allow me to quote from
Reinhardt's discussion of Article IV, paragraph 2 of the
Constitution (the "supremacy clause"):

"Just how does it endanger you?...What does this hole in
the Constitution mean to you personally?...to your children?
...your neighbors?...your job?

"In one sentence: It means that--with a little manipulation
--foreign governments (including Russia) can reach through
this hole and control YOU as they now control the faceless
serfs in their own lands.

"Control the most intimate details of your personal life...
what is taught to your children in school...what you can buy
at your grocery store...what your minister may say in church...
what union you may join or not join...where and how you work
and live." (This is unabridged passage. Nothing has been
deleted.)

This statement should really be sent to the "How's That Again"
Department of the New Yorker magazine. Yet such threats, such
unfounded fears are being poured into the bloodstream of our nation.
I appeal to my distinguished colleagues who sincerely and honestly
support the amendment, to repudiate this extremist fringe so that the

nation -- unhampered -- can debate the Constitutional issues involved calmly, dispassionately, with reason and intelligence.

The last argument of the Bricker amendment supporters to which I wish to address a few remarks could be most formidable -- if true. I am referring to the political argument. I am referring to the claims of widespread political support for the amendment. Let us examine some of this alleged support:

(1) In many of the more than 20 pamphlets that Mr. Frank Holman has published he lists a number of State Legislatures that have gone on record favoring the amendment. Yet I have in my possession copies of letters from the Secretaries of the Senates of two of these States, Idaho and Wyoming, saying that their States have not passed any such resolutions. What is the explanation?

(2) Last September, at the Chicago Republican Women's Conference, the so-called Vigilant Women for the Bricker Amendment set up desks for the signing of petitions at every entrance to the grand ballroom of the Hilton Hotel. When the smoke had cleared

they had amassed 700 signatures. These, of course, have been presented to the Senate as an indication of grass roots strength.

But what really happened? I talked to a University scholar who had personally interviewed many of the women who signed the petition.

They told him that in the bustling of convention activities they were handed innumerable official papers to sign. Pushed in among these were the Bricker amendment petitions. Many thought it was an "official position" and signed. Many didn't even have time to examine what they were signing. The treaty-making issue was not even on the conference agenda. Now what was the real extent of support? All that can be concluded is that these vigilantes have well learned the tactics of high pressure politics.

(3) Proponents of the amendment receive great comfort from the favorable resolution of the House of Delegates of the American Bar Association. But they also know that behind this facade is a split between two of the A.B.A.'s committees -- the Committee on Peace and Law Through United Nations is for the amendment and the

Section of International and Comparative Law is against it. What are these two groups? To answer that question I would like to quote from the 1952 Hearings on the amendment. (page 251) This is from the testimony of the late Mr. Charles W. Tillet. Mr. Tillet was chairman of both groups of the American Bar Association for two years and was, therefore, in an unequalled position to evaluate them.

"Mr. Tillet: The section of international and comparative law of the American Bar Association is made up not only of lawyers who practice international law professionally but also it is made up of general practitioners who feel that they can help in solving the problems of an effective and free world order by participating in the committee work of the section and its democratically conducted forums where they have an opportunity to present ideas of enduring peace.

"Senator Hendrickson: How many members do you have in that section?

"Mr. Tillet: From 800 to 1,000.

"Senator Hendrickson: That is Nation-wide?

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"Mr. Tillat: And I want to impress the fact that it is a democratically conducted section. It is the only phase where the rank-and-file lawyers shall participate. The peace and law committee is not a democratically elected group, but it is appointed by the president. So the difference between the section on international and comparative law and the peace and law is that the one is a representative group of those lawyers who have an interest in that sort of thing, whereas the peace and law committee is appointed by the president, and there is no veto."

I might add that while the group opposing the amendment has 1,000 members, the group for it has seven.

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The House of Delegates, however, chose to ignore the recommendations of the Section of International and Comparative Law. They accepted the argument of Mr. Holman and others that if the A.B.A. reversed its stand (and I now quote from Mr. Holman) "you will never send another Committee down to Congress to speak for this Association without the Senators or Representatives saying, 'How do we know if we follow your Committee that two years later your House of Delegates won't turn turtle on us and repudiate us'"

Does this mean that for mere prestige the delegates felt it would be better to compound a mistake rather than honestly admit one? They voted in favor of the Amendment 117 to 33. But 77 members of the House of Delegates did not vote. Furthermore, when an effort was made to poll the entire A.B.A. membership it was sidetracked.

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Now does this suggest wide-spread support of the Bricker Amendment among American lawyers?

(4) The proponents of the Bricker Amendment point to public opinion polls to substantiate their claims to wide-spread popular support. One such poll, the results of which were distributed to 1800 newspapers, 500 radio stations and every member of Congress as a sample of public opinion, was taken by an organization called Facts Forum. It showed 77% in favor of the amendment. It is not my purpose to evaluate the credibility of this poll. Suffice it to say it is in question. I do believe it necessary, however, to refer the Senate to the conclusions of the reputable American Institute of Public Opinion which found five months after Facts Forum poll, that a mere 9% of the people favor the Bricker Amendment.

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Where then is the wide-spread support? It

appears that Samuel Insull himself could not have done a better job of pyramiding manufactured support into paper profits. No votes will be lost by opposing the Bricker Amendment. At stake are not Senate seats, but the Constitution of the United States.

It is a matter of great comfort and pride to me that associated in this fight to preserve our cherished Constitution are two national Administrations: The Democratic Administration of Harry S. Truman and the Republican Administration of Dwight D. Eisenhower.

We are joined by: A great number of our leading newspapers:

New York Times

Washington Post

New York Herald Tribune

St. Louis Post-Dispatch

St. LouisGlobe-Democrat

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Chicago Sun-Times

Denver Post

Baltimore Sun

Boston Herald

Minneapolis Star-Tribune

A great number of our outstanding organizations:

American Association of University Women

League of Women Voters

Young Womens Christian Association

Section of International and Comparative
Law of the American Bar Association

Association of the Bar of the City of New York

New York State Bar Association's Committee on
Amendments to the Federal Constitution

St. Louis Bar Association

Federal Bar Association

National Study Conference on the Churches and
World Order

Board of World Peace of the Methodists Church

Church Peace Union

Catholic Association for International Peace's
Subcommittee on Juridicial Institutions

Central Conference of American Rabbis

Friends Committee on National Legislation

Dept. of Social Education and Action, Presbyterian
Church in the U.S.A.

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National Foreign Trade Council

American Civil Liberties Union

Air Transport Association of America

American Association for the United Nations

Citizens Conference on International Economic
Union

United World Federalists

Cooperative League of the USA

Americans for Democratic Action

National Association for the Advancement
of Colored People

Amvets (American Veterans of World War II and
Korea)

Young Republican Club of New York

Committee for Collective Security

American Federation of Labor

Congress of Industrial Organizations

A great number of outstanding private citizens:

JOHN W. DAVIS -- Democratic Candidate for
President of the U.S. 1924. Former member
of Congress, Solicitor General of the U.S.,
Ambassador Extraordinary and Plenipotentiary
to Great Britain, President American Bar
Association, Association of the Bar of the
City of New York.

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GENERAL LUCIUS D. CLAY (Retired) -- Chairman of Board and Chief Executive Officer Continental Can Co.; Deputy Director of War Program; Commander in Chief U.S. Forces, Military Governor, U.S. Zone, Germany.

FRANK ALTSCHUL -- Chairman of the Board, General American Investors Co., Inc. Member Advisory Council Yale Institute of International Studies.

HON. JAMES T. BRAND -- Former Chief Justice of the Supreme Court, Oregon.

HARRY AMOS BULLIS -- Chairman General Mills, Minneapolis, Minnesota

WILL L. CLAYTON -- Houston, Texas. Former Asst. Secretary of Commerce. Former Under Secretary of State for Economic Affairs.

DR. EDWARD SAMUEL CORWIN -- Professor Emeritus Princeton University. Author and Lecturer.

PROFESSOR EDWIN D. DICKINSON -- University of Pa. Law School. Former President American Society of Intl. Law. Former Dean University of California Law School.

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PALMER HOYT -- Publisher and Editor, The
Denver Post.

JOHN LORD O'BRIAN -- Attorney, Washington, D.C.
Former General Counsel, Office of Production
Management, also Supply Priorities and
Allocation Board, and War Production Board.

PHILIP D. REED -- Chairman of the Board,
General Electric Company

JUSTICE OWEN J. ROBERTS -- Dean of Law School,
University of Pa. Former Associate Justice
Supreme Court of U.S.

HARRISON TWEED -- Milbank, Tweed, Hope and
Hadley, Attorneys, N.Y.C. President American
Law Institute. Overseer Harvard College.

SARAH TILGHMAN HUGHES -- Dallas Texas. Judge
and Educator. President National Federation
of Business and Professional Women's Clubs.

ANNA LORD STRAUSS -- N.Y.C. Vice Chairman
President's Commission on Internal Security
and Individual Rights, Former President League
of Women Voters of the U.S.

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ELIZABETH E. HEFFELINGER -- Republican
National Committeewoman for Minnesota.
Alternate Representative to the Second
Extraordinary Session of UNESCO

ELIHU ROOT, JR. -- Root, Ballantine, Harlan,
Bushby & Palmer, Attorneys, N.Y.C. Trustee
Hamilton College; Carnegie Corp. of New York.
Director American T. & T. Co., Mutual Life
Ins. Co. of N.Y.

And the overwhelming number of the deans and professors
of our law schools.



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