Hearing on
H.R. 5607, State Secrets Protection Act of 2008

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties

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Chairman Nadler, Ranking Member Franks, and distinguished members of the Subcommittee, thank you for this opportunity to appear before you to comment on the "State Secrets Protection Act of 2008" (H.R. 5607). The bill includes procedures and standards that will ensure the protection of information that could pose significant harm to national security or diplomatic relations while at the same time rebalancing the adversarial process to protect the rights of individuals to seek relief in the courts when they believe their rights have been violated by the federal government. My testimony will focus on the importance of judges conducting meaningful, independent judicial review into government secrecy claims.

I represent the National Security Archive (the "Archive"), a non-profit research institute located at George Washington University. The Archive's analysts frequently seek access to records concerning national security, intelligence, military and foreign relations matters. Our experience seeking security classified records has shown that when independent, higher-level inquiry is made into the government's secrecy claims, the almost invariable result is that more information can be released than the government was prepared to release. When, on the other hand, there is no countervailing pressure, agencies have no incentive to seriously consider whether information could cause harm to national security if released and unnecessary secrecy grows.[1] This dynamic both demonstrates the excessive secrecy that pervades the national security arena and suggests the role that courts can play in reducing unnecessary secrecy that interferes with the proper resolution of cases.

There is no debate among commentators that the executive has the authority to keep certain secrets. As commander in chief, the president plays a central operational role in protecting the nation's security. Protection of sources is necessary to facilitate intelligence gathering. The ability to negotiate in confidence is critical to effective diplomatic relations. The assertion that secrecy is necessary in the intelligence, military and diplomatic arenas is a compelling one.

Secrecy and Accountability

The controversy about the executive branch's invocation of the state secrets privilege, particularly as it has evolved from a common law evidentiary rule to a shield against civil lawsuits, arises in the context of a surge of official secrecy throughout the executive branch of our government over the last seven years.[2] Military and intelligence officials have admitted that

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[1] The reclassification effort at the National Archives and Records Administration that my organization and historian Matthew Aid uncovered in 2006 illustrates this point. *See* Scott Shane, *U.S. Reclassifies Many Documents in Secret Review*, New York Times, Feb. 21, 2006. When the agencies were able to operate without any limits, they reclassified more than 25,000 25 to 50 year old records over a 6 year period. The Information Security Oversight Office (ISOO) concluded that 1 out of 3 of those classification decisions was improper, and two-thirds of the remaining decisions were made without sufficient judgment. In the more than 2 years since the program was exposed and the ISOO established controls, only 7 documents have been reclassified.

[2] *See, e.g.*, Information Security Oversight Office, *2007 Report to the President* (May 2008) (cataloguing growth in classification decisionmaking), http://www.archives.gov/isoo/reports/2007-annual-report.pdf; OpenTheGovernment.org, *Secrecy Report Card 2007* (Sept. 2007) (statistics on growth of secrecy according to numerous measures), http://www.openthegovernment.org/otg/SRC2007.pdf.

much of the security classification activity is unnecessary.[3] The reasons for the increase in secrecy range from the legitimate to the illegitimate, but there are few internal checks to limit the expansion of government secrets.[4]

As a consequence, in almost any case involving an intelligence, law enforcement or military agency, there is likely to be some secret information. In these circumstances, the state secrets privilege has become a potent weapon for zealous defense of cases involving the activities of those agencies. When secrecy can be wielded as a weapon to dismiss lawsuits, without an independent determination of the necessity for the secret to be considered in the suit and the potential harm to national security, there is a risk that the government will overreach to protect as "secret" policies that otherwise would have been considered unthinkable, unlawful, or unconstitutional.[5]

I know this committee has heard views on both sides about whether there were any state secrets at issue in *United States v. Reynolds,*[6] the Supreme Court case that established the evidentiary privilege, so I will not revisit that debate. But, *Reynolds* is far from the only case in which later-disclosed facts suggest that secrecy may have protected the government from much-needed scrutiny. That is certainly what happened in *Korematsu v. United States*.[7] *Korematsu* concerned an order that directed the exclusion from the West Coast of all persons of Japanese ancestry. That order was held constitutional.

In that case, the Court's finding of "military necessity" was based on the representation of government lawyers that Japanese Americans were committing espionage and sabotage by

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[3] *See, e.g.,* Secretary of Defense Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12 ("I have long believed that too much material is classified across the federal government as a general rule …."); *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats and Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. 82 (testimony of Carol A. Haave, Deputy Under Secretary of Defense) (acknowledging that more than 50 percent of classification decisions are overclassification) (2004), http://www.fas.org/sgp/congress/2004/082404transcript.pdf; *id.*, (statement of J. William Leonard, Director of the Information Oversight Office) ("It is my view that the government classifies too much information."); 9/11 Commission Hearing, Testimony of Chair of the House Permanent Select Committee on Intelligence Porter Goss (2003) ("[W]e overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them."), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

[4] *See generally* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 13, 147-156 (2006) and the references cited therein.

[5] Secrecy is a central tool used by government to insulate its activities from scrutiny. There is a long list of abuses and improprieties conducted in secret by the government under the mantle of national security that were only terminated after exposure and scandal. For example, my organization requested a document under the Freedom of Information Act (FOIA) from the Central Intelligence Agency (CIA) that is referred to as the "Family Jewels." When finally released 15 years after we first requested it, the document revealed that the CIA violated its charter for 25 years until revelations of illegal wiretapping, domestic surveillance, assassination plots and human experimentation led to official investigations and reform in the 1970s.

[6] 345 U.S. 1 (1953).

[7] 323 U.S. 214 (1944).

signaling enemy ships from shore. Documents later released under the Freedom of Information Act revealed that government attorneys had suppressed key evidence and authoritative reports from the Office of Naval Intelligence, the Federal Bureau of Investigation, the Federal Communications Commission, and Army intelligence that flatly contradicted the government claim that Japanese Americans were a threat to security.[8] Had the court required an explanation of the evidence to support the central rationale for interning thousands of Japanese Americans, it would have learned that there was no evidence.

The same seems true of the National Security Agency's program to conduct warrantless surveillance of United States citizens without regard to the strictures of the Foreign Intelligence Surveillance Act which – according to publicly available information – apparently was operated illegally. According to testimony provided by James Comey, former Deputy Attorney General of the United States, the Attorney General determined in 2004 that the Department of Justice could not certify the surveillance program and informed the White House of that decision. Thereafter, the President reauthorized the program anyway, without regard to the Department of Justice's refusal to certify the program.[9] Yet, resolution of the constitutional issues associated with the program has been impossible because the government asserts near blanket secrecy over the legal justifications and details of the program.

There is a long line of cases involving invocation of state secrets privilege to shut down prosecution of claims against the United States,[10] including claims of illegal rendition and torture of foreign citizens,[11] alleged racial and sexual discrimination claims by government employees working in law enforcement or intelligence agencies,[12] and allegations of mismanagement or misdeeds within federal agencies.[13] Each of these cases involved troubling allegations but was dismissed because the government claimed the dispute could not be resolved without exposing a secret.

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8 *Korematsu v. United States*, 584 F. Supp. 1406, 1416-19 (N.D. CA 1984).

9 *See Hearing before the Sen. Judiciary Comm. On Preserving Prosecutorial Independence: Is the Dep't of Justice Politicizing the Hiring and Firing of U.S. Attorneys?* 110th Cong. 21-22, 28 (2007) (testimony of James B. Comey, Former Deputy Attorney General).

10 *See generally* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 90-92 (2005); Amanda Frost, *The State Secrets Privilege and Separation of Powers,* 75 Fordham L. Rev. 1931 (2007).

11 *See, e.g., El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va. 2006), aff'd 479 F.3d 296 (4th Cir. 2007), *cert. denied* 128 S. Ct. 373 (2007).

12 *See, e.g., Sterling v. Tenet*, Civil Action No. 01-CIV-8073 (S.D.N.Y. 2002); *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000).

13 *See, e.g., Edmonds v. Dep't. of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6, 2005 U.S. App. LEXIS 8116, 04-39 (D.C. Cir. May 6, 2005) (allegations of improper influences and criminal acts in FBI translation unit); *Barlow v. United States,* No. 98-887X, 2000 U.S. Claims LEXIS 156 (Fed. Cl. July 18, 2000) (allegations of intelligence agency deception of Congress).

Litigation in Secrecy Cases

Currently, when a private party brings a civil action against the government that may touch on a claimed secret, the adversarial system is tilted overwhelmingly toward the government. Not only does the government have access to the relevant information, but the government has the powerful argument that the information cannot be shared in discovery or during the litigation process. The information that is claimed to be secret is strictly controlled by a system in which there is a strong incentive to keep it from the public, especially if the government is overreaching or has engaged in some misconduct. The courts are reluctant to question executive branch assertions because of concerns that only the agency has sufficient knowledge and expertise to understand the significance of the secret information. Moreover, because a security clearance granted by the executive branch is needed to review the records, the court typically has no access to alternate views to aid in consideration of the matter.

Congress has attempted to address these challenges in at least two categories of cases that demonstrate that courts are competent to address national security secrecy.

Under the FOIA, members of the public may exercise a right to records without any showing of need. In that area, to counter excessive government secrecy that could interfere with public accountability, Congress directed courts to conduct *de novo* review of national security claims and empowered courts to conduct *in camera* review of classified materials. By directing *de novo* review, Congress signaled that it wanted a new review of the facts and law that did not rely on the agency's administrative decision to deny requested records. Thus, Congress plainly intended that the courts would review procedural and substantive issues and would permit a full airing of the factual and legal issues. Indeed courts in FOIA cases have used many of the tools that are included in the State Secrets Protection Act of 2008, including indices of allegedly secret records,[14] special masters,[15] and *in camera* review.[16] There even have been instances of courts

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[14] A central tool that courts have employed in FOIA litigation is the "Vaughn Index." In *Vaughn v. Rosen*, 484 F.2d 820 (1973), the court noted the classic problem faced by a FOIA requester: "In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . ." *Id.* at 823-24. The *Vaughn* court recognized that "existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity." *Id*. at 826. In order to better satisfy its responsibility to conduct a *de novo* review and to push the government to justify its denial, the court fashioned procedures to ensure "adequate adversary testing" by providing opposing counsel access to the information included in the agency's detailed and indexed justification and by *in camera* inspection, guided by the detailed affidavit and using special masters appointed by the court whenever the burden proved to be especially onerous. *Id.* at 828. The legislative history of the 1974 amendments indicates that Congress "supports this approach. . . ." S. Rep. No. 93-854, 93d Cong., 2d Sess. 15 (1974).

[15] In *Washington Post v. Dep't of Defense*, 766 F. Supp. 1 (1991), a case involving a request under the FOIA for documents from the Department of Defense ("DOD") regarding American efforts to rescue hostages in Iran, DOD claimed partial or entire exemption for 2000 documents totaling approximately 14,000 pages. Over the government's objection (and after already reviewing detailed government affidavits), the District Court appointed a special master skilled in the classification of national security documents to compile a meaningful sample of these documents for the court to review. The parties submitted comments, including 4 volumes of evidence by the plaintiff concerning information in the withheld records already in the public domain. After a number of conferences and hearings, the Department of Defense requested that it be permitted to re-review the records in light of the special master's comments and the materials submitted by the plaintiff to determine whether it could release

directing agencies to orally describe the characteristics of withheld records in a proceeding involving opposing counsel, a so-called "oral Vaughn index."

At the other end of the spectrum, in instances when the government is using the full force of its power to criminally prosecute someone with the intent of depriving that person of their liberty, Congress has empowered courts under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, to craft special procedures to determine whether and to what extent classified information may be used in a defense. Section 4 of CIPA explicitly provides for courts to deny government requests to delete classified information or to substitute summaries or stipulations of fact for the classified materials.

In the case of civil actions where the government asserts the state secrets privilege as a basis for dismissal, however, courts rarely use any of these methods to scrutinize the government's claims. The American Bar Association has found that courts have utilized "inconsistent standards and procedures in determinations regarding the applicability of the privilege."[17] Courts' unwillingness to consistently probe government secrecy claims in these cases is striking when the plaintiffs are alleging specific government wrongdoing, which in many instances is a far more compelling interest than in the typical FOIA case. Although the plaintiff's interest may not be as compelling as that of a criminal defendant, there are instances, such as in the rendition and torture cases, where it comes quite close. Further, when the plaintiffs allege widespread government illegality and violation of fundamental constitutional rights, such as in the warrantless surveillance cases, the interest is also quite high. Courts' superficial review in these cases is even more remarkable given that the assertion of the state secrets privilege is not constrained by an executive order and can shift and adjust along with the executive's desire for secrecy; in FOIA cases, a withholding of records on the grounds of

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additional materials. In the end approximately 85 percent of the records that had been denied as secret were released to the FOIA requester. Among these was an after action report asking the military not to include milk in the box lunches for the helicopters because it spoiled. Thus, a critical impact of the procedure was to press the government into conducting a better review of the records to determine what could be released. Appointment of the special master was upheld by the D.C. Circuit on mandamus. *In re United states Dep't of Defense*, 848 F.2d 232 (D.C. Cir. 1988) (denying writ of mandamus and finding district judge acted within his discretion in appointing a special master).

[16] FOIA explicitly provides for *in camera* inspection and the Conference Report for the 1974 amendments to the law states clearly that "[w]hile in camera examination need not be automatic, *in many situations* it will plainly be necessary and appropriate." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 9 (1974) (emphasis added). As the D.C. Circuit recognized upon extensive review of the legislative history to the 1974 Amendments to FOIA, "[*i*]*n camera* inspection does not depend on a finding or even a tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination." *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (per curiam). The cases show that *in camera* review often can result in greater disclosure of information. *See, e.g., Public Citizen v. Department of State*, 276 F.3d 634 (D.C. Cir. 2002) (District Court reviewed records *in camera* to determine applicability of Exemption 1; found some information meaningful and segregable).

[17] *Oversight Hearing on Reform of the State Secrets Privilege: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (Jan. 29, 2008) (statement of H. Thomas Wells, J., President-Elect, American Bar Association), http://judiciary.house.gov/hearings/pdf/Wells080129.pdf.

national security must at least be grounded in the provisions of Executive Order 12958, as amended

One common argument against greater judicial scrutiny is its impact on separation of powers concerns. In fact, the framers of the Constitution designed a system of government intended to bring power and accountability into balance. The Executive's power to keep information secret is derived from the Article II powers vested in the President as commander-in-chief and as maker of treaties (with the advice and consent of the Senate). U.S. Const. art. II, § 2. These significant presidential powers are balanced by congressional authority to "provide for the common Defence," *id.* art. I, § 8, cl. 1; "declare War . . . and make Rules concerning Captures on Land and Water," *id.* cl. 11; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; advise in and consent to the making of treaties, *id.* art. II, § 2, cl. 2; "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by th[e] Constitution in the Government of the United States," *id*. art. I, § 8, cl. 18; and insist that "[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." *Id*. § 9, cl. 7. Thus, significant powers with regard to the protection of national security are vested in Congress as well.

Congress, in turn, may provide the judiciary a role in policing executive claims of secrecy; the constitutional system of checks and balances does not permit the executive branch to act beyond the accountability of the judiciary.[18] The judiciary is empowered by Article III of the Constitution to resolve disputes.[19] Congress already has legislatively instructed courts to assess government secrecy claims in the FOIA and the CIPA contexts. It has the authority to do so with respect to civil cases involving claimed secrets as well. Indeed, the Supreme Court recognized in *Reynolds*, that courts are not prohibited from considering the legitimacy of state secrets claims.[20]

Although the executive branch is not vested with constitutional exclusivity over national security information, there always has been a judicial reluctance to probe in cases arising in the military and foreign affairs arenas out of concern that the judiciary does not have the expertise to reach appropriate decisions in these areas.

The concern about lack of expertise is particularly odd given that courts are experienced at examining facts for the sorts of warning signs of overreaching that are sometimes present in secrecy cases and that should trigger additional inquiry into the government's conduct. Judges have had no problem in other contexts recognizing when a matter may involve improper

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[18] Indeed, the Supreme Court has recognized that Congress has the power to control the breadth of judicial deference in the realm of national security. *See Dep't of Navy v. Egan,* 484 U.S. 518, 530 (1988) ("[*U]nless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") (emphasis added).

[19] As the Supreme Court reminded the executive branch when it mandated due process for enemy combatants, even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 603 (2004) (O'Connor, J., plurality opinion).

[20] *Reynolds*, 345 U.S. at 9-10 ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive of executive officers."); s*ee also In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.").

targeting of groups or infringement on constitutional rights. The federal courts hear a wide range of cases involving alleged violation of law by government personnel and private individuals. Judges are familiar with the motivations behind such conduct. Moreover, judges often are asked to rule in cases that involve technical or scientific information with which they may have no familiarity. In all instances outside the national security area, judges use well established tools to help them reach decisions. The State Secrets Protection Act of 2008 would ensure judges use these tools in cases in which the executive branch asserts the state secrets privilege as well.

Existing cases suggest that concerns about judges substituting their own judgment for that of the executive also are overstated. Indeed, even with the direction to conduct *de novo* review in FOIA cases, courts typically grant agencies substantial deference. For example, if the government was an ordinary litigant, its past practices or admissions might cause a court to consider secrecy claims with some level of skepticism, but the government's assertions are always received with a presumption of good faith.[21] As Congress recognized when it amended FOIA in 1974, judges are not likely to order release of records against executive demands for secrecy.[22] Yet, by taking the time to review the claims, courts pose at least some threat to agencies; for even the necessity of having to explain oneself to a federal judge has some salutary effect and may stem the expansion of unnecessary secrecy.

The State Secrets Protection Act of 2008

The State Secrets Protection Act of 2008 would lead to more careful assertions of secrecy by the government and protect against government overreaching. The provision of the bill that requires an affidavit signed by the head of the executive branch agency with responsibility over the evidence asserted to be subject to the privilege (Sec. 4) will ensure that some judgment was exercised in the decision to assert the privilege and not merely because it is an available defense to a lawsuit. We find in FOIA cases involving national security information, that higher level testing of secrecy claims invariably results in more information being released, such as when we file administrative appeals of agency decisions to an independent appeal panel such as at the Department of State or appeals of mandatory declassification review requests to the Interagency Security Classification Appeals Panel (ISCAP).

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[21] For example, in a case brought by my organization involving a FOIA request for the biographies of nine former Communist leaders of Eastern European countries, William McNair, a CIA information officer swore under oath that only one line in one of the requested histories could be declassified and that the CIA could never confirm nor deny the existence of biographical sketches of Soviet bloc leaders. We argued that McNair's testimony was "facially incredible," not least because the CIA had already released biographical information on some of the same Eastern European Communists that were the subject of the request. *See* http://www.gwu.edu/~nsarchiv/NSAEBB/ciacase/index.html. When the falsity of the CIA declaration was made known to the court, it was struck, but the agency was permitted to file a new declaration from another official. There was no consequence for the filing of an inaccurate declaration. Ultimately the court held the CIA could withhold the biographies.

[22] The legislative history, S. Rep. No. 93-1200, at 9 (1974), recognizes that in granting *de novo* review powers to judges, it was anticipated that judges would "naturally be impressed by any special knowledge, experience and reasoning demonstrated by agencies with expertise and experience in matters of defense and foreign policy." *Ray*, 587 F.2d at 1213 (D.C. Cir. 1978 (Wright, J., concurring).

Section 3 of the bill provides substantial protection to the government's interest in maintaining secrecy. It provides for *ex parte* and *in camera* proceedings, protective orders, security clearance requirements, sealing of materials, and other proven security procedures to ensure that sensitive information is not released. These methods are used regularly and successfully to protect information in many other types of cases. Moreover, the provision for an interlocutory appeal in Section 8 will ensure appellate oversight and testing of trial court decisions.

The index requirement (Sec. 5(c)) will force agencies to review each withheld piece of evidence and specifically justify why it must be kept secret. The format will make it possible for judges to review agency claims in an organized way, without being overwhelmed by generalities. It also will make it possible for the plaintiff to make specific arguments against the state secrets invocation based on the requester's knowledge of surrounding facts and circumstances, which may be a distinct advantage over *in camera* review.

The provisions that permit the appointment of a special master or expert witness (Sec. 5(b)) will enable courts to overcome their reluctance to question agencies about secrecy claims. Current law already would permit the use of masters and experts, but courts have not generally employed this tool.[23]

Importantly, the provisions of Section 6 of the bill, which would require courts to consider all of the relevant evidence, will guard against the inclination of judges to grant utmost deference regardless of logical and factual inconsistencies in the government's position.

Section 7 of the bill generally follows the example of the CIPA, by providing methods that will permit cases to proceed in instances when the state secrets privilege is validly asserted. These procedures have worked well in the criminal CIPA context to ensure that the government's interest is protected.

The combined impact of these procedures will lead to the executive branch doing a better job articulating the need for secrets and thereby protecting them from any possible disclosure. Judges, who have been cautious and deferential in secrecy cases, will be equipped to exert the needed countervailing pressure against unnecessary secrecy. Individuals with important claims against the government will no longer be shut out of the judicial system.

I thank you for seeking my input and I am happy to respond to any questions.

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[23] *See* Meredith Fuchs and Greg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, 28 Nat'l Sec. L. Rep. 1 (2006).

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