UNITED STATES OF AMERICA, Appellant	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	MOTION FOR RECONSIDERATION ON BEHALF OF APPELLEE
	)	CASE No. 07-001
v.	)	Hearing Held at Guantanamo Bay, Cuba on 4 June 2007 Before a Military Commission Convened by MCCO # 07-02
OMAR AHMED KHADR, Appellee	)	Presiding Military Judge Colonel Peter E. Brownback III

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Relief Sought

Mr. Omar Khadr (Appellee) respectfully requests that this Court reconsider its decision of 24 September 2007. *United States v. Khadr*, CMCR 07-001 (Sept. 24, 2007). In light of new facts not in existence before the decision was rendered, we ask that this Court: (1) reconsider its determination that the military commission is properly empowered to make the initial determination as to Appellee's status as an Unlawful Enemy Combatant (UEC); (2) rule that the military commission is not a competent tribunal to make the initial determination as to whether Appellee is an unlawful enemy combatant in accordance with international and U.S. law; and (3) order that Appellee's status determination must be made by another "competent tribunal established under the authority of the President or the Secretary of Defense." 10 U.S.C. § 948d(c). In the alternative, this Court should: (1) provide specific guidance to the military judge regarding the process for determining Appellee's status; and (2) stay proceedings before the

military commission for a period of 20 days to allow Appellee to meaningfully exercise his right to appellate review of this Court's decision.

Facts

On 4 June 2007 the military judge ruled that the military commission only had jurisdiction to try individuals who had been previously determined to be UECs. As Appellee had never been determined to be a UEC, the military judge dismissed all charges against Appellee without prejudice, refusing to make a determination as to Appellee's status himself. On 29 June 2007 the military judge denied Appellant's motion for reconsideration. On 4 July 2007 Appellant filed its interlocutory appeal of the military judge's decision with this Court.

On 24 September 2007, this Court issued its decision reversing the military judge's order and holding that the commission had jurisdiction to make the determination as to UEC status itself.

The next day, 25 September 2007, the military judge issued a brief email order setting out, in only two paragraphs, the parameters that would govern the initial status determination hearing. Order of 25 Sept 2007 ¶¶ 8-9 (attached as Exhibit A). The order allowed parties one week to submit all materials upon which it intended to rely at the status determination hearing. The order required the prosecution and defense to submit evidence simultaneously, outside the context of an on the record hearing. The order did not require the prosecution to specify the factual basis on which it intended to establish Appellee's status as a UEC. And, lastly, the order restricted Appellee's ability to raise legal claims relating to the UEC determination arising under international law, constitutional law, or criminal law. The order implies that the Military Judge intends to make a "threshold or initial determination of jurisdiction" at the first session of the military commission on this thinnest of factual and legal foundations. Defense counsel

immediately moved for a continuance, which the military judge granted in a second email order. Order of 27 Sept 2007 (attached as Exhibit B). Although the date for the first hearing has been postponed, the Military Judge's order granting the continuance suggests his intention to proceed in the fashion outlined above.

Argument

The two orders issued by the military judge since this Court's decision demonstrate that it is impossible for the military commission to provide the fair status determination hearing to which this Court acknowledges Appellee is entitled. *United States v. Khadr*, CMCR 07-001, at 15, 25 & n.38 (Sept. 24, 2007). The military judge's orders show that the commission, constituted for the purpose of trying criminal charges against unlawful enemy combatants, simply cannot temporarily transform itself into a competent tribunal for making the initial status determination upon which its special criminal jurisdiction depends. To permit the current proceedings to go forward would severely prejudice Appellee's case and violate international law and fundamental notions of due process.

In brief, the military judge's two orders fail to set forth adequate procedures for the conduct of the initial status determination hearing. The military judge simply lacks guidance in this Court's opinion or the Military Commissions Act from which to fashion an adequate status determination procedure. Moreover, the military judge appears mindful of the impropriety of subjecting Appellee to the jurisdiction of this special tribunal absent a proper determination of status rendering Appellee amenable to commission jurisdiction. Yet in the rush to establish a basis for jurisdiction, the military judge has indicated his intention to adopt a summary process, which renders the determination fundamentally unfair. The Catch-22 situation faced by the judge can be summarized as follows: have a fair proceeding that requires the accused to litigate

extensively in a tribunal that may have no lawful jurisdiction over him, or summarily determine jurisdiction and truncate what limited rights the accused has to contest the legal and factual basis for the commission's jurisdiction.

Clearly, the military judge desires to establish a basis for jurisdiction as quickly as possible. The manifest result of this Court's decision is thus an ad hoc and unfair proceeding. Furthermore, the upshot of concentrating the administrative status determination and criminal trial in one tribunal, as required by this Court, combined with the unavailability of interlocutory appeals, is that the Appellee, if determined to be an UEC at the initial hearing, will have no opportunity to contest his designation until *after* the commission tries him and imposes a sentence. This procedure, envisioned by this Court's decision and the military judge's order, would result in the Appellee being subjected to the very sort of extraordinary criminal tribunal that the Geneva Conventions prohibit, unless and until a person has been properly adjudicated as not a prisoner-of-war. This procedure also strips Appellee of the right to contest his status determination by petitioning the D.C. Circuit, one of the protections afforded all detainees under the independent Detainee Treatment Act regime that provides discovery rights absent from the status determination procedures the military judge implemented. Postponing the review made possible by the DTA until after trial would render the protections therein meaningless: the whole point of contesting status is to avoid being wrongly held and, post MCA, tried by military commission.

As a threshold matter, this Court can properly reconsider its decision in light of the new orders issued by the military judge. *Bd. of Trs. of Bay Med. Ctr. v. Humana Military Health Care Srvcs. Inc.*, 447 F.3d 1370, 1377 (D.C. Cir. 2006)) ("Courts have recognized three grounds justifying reconsideration: 1) an intervening change in controlling law; 2) the availability of new

evidence; and 3) the need to correct clear error or manifest injustice.") (internal citation omitted). The military judge's recent orders constitute new evidence directly relevant to the competence of the commission to conduct an initial status determination hearing. Furthermore, the orders indicate that in the absence of reconsideration, Appellee will be subjected to a manifestly unjust proceeding.

I

The military judge's orders do not, and could not, afford Appellee a fair status determination hearing, as guaranteed by international law and this Court's own prior decision.

A. The military judge's orders do not afford any opportunity for pre-trial discovery nor adequate notice and an opportunity to respond.

The military judge's two orders are deficient in several respects. Significantly, the first order does not provide for any opportunity for pre-hearing discovery. Rather, it simply directs the government to "provide the commission and the defense the materials upon which it intends to rely to establish that the accused is an Unlawful Enemy Combatant" within one week. Order of 25 Sept 2007 ¶ 8. The order does not appear to provide any opportunity for the Appellee to demand information in the government's possession that might be relevant to his defense, but which the government does not intend to use at the hearing. The second order does not remedy this flaw. While it does extend the deadline for submitting materials to the commission, it does not allow for any discovery. Rather, it simply directs the government to "insure that all materials previously provided to LtCol Vokey are provided to LCDR Kuebler." Order of 27 Sept 2007 ¶ 9. *See generally* Army Regulation 190-8 1-6(e) (setting forth procedures governing conduct status determination proceedings).

The consequences of this Court's ruling that the military judge may make the initial status determination and the procedures established by the military judge in his 25 September

order are that Appellee has fewer rights and protections than detainees appealing an administrative UEC determination to the D.C. Circuit Court of Appeals pursuant to the DTA. This Court's ruling that the military judge may determine whether Appellee is a UEC, a finding that a separate tribunal has always made in the past, removed the potential for appeal of that determination before trial that exists under the Detainee Treatment Act. *See* DTA § 1005 (e)(2). This is significant because, while detainees have limited rights to discover evidence at a Combatant Status Review Tribunal ("CSRT"), they hold much broader discovery rights on appeal of CSRT decisions before the D.C. Circuit Court of Appeals. *See Bismullah v. Gates*, 2007 U.S. App. LEXIS 17255, at *23-*24 (D.C. Cir. July 20, 2007). On appeal before the D.C. Circuit, a detainee challenging a UEC classification is entitled to all the information that the government has in its possession and could practicably share. *See id.*[1] But, here, if the military judge proceeds as planned, Appellee will be forced to trial on criminal charges based on a status determination made in the absence of discovery *and* without an opportunity to appeal that determination prior to trial.

Despite the absence of discovery, the military judge ordered the defense to "provide the commission and the government any materials upon which it intends to rely to refute a designation as an UEC" on the same day that the government must submit its evidence supporting a UEC designation. Order of 25 Sept 2007 ¶ 8. Requiring Appellee to defend against

[1] As the D.C. Circuit put the point in the context of its review of a CSRT determination, neither the court nor the petitioner's counsel can consider whether "a preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not as the denominator." *Bismullah*, 2007 U.S. App. LEXIS 17255, at *18. Defense counsel is unclear as to whether "all materials previously provided to LtCol Vokey," Order of 27 Sept 2007 ¶ 9, constitute all the information that the government has in its possession and could practicably share.

the government's evidence before seeing it deprives Appellee of the right to adequate notice and an opportunity to be heard – rights that this Court described as among "the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness", the denial of which "violates Common Article 3." *United States v. Khadr*, CMCR 07-001, 15 (Sept 24, 2007).

B. The initial status determination proceedings before the military commission are so ad hoc as to violate fundamental norms of fairness.

Without any statutory or regulatory guidance on how a military commission is to perform status determinations, the military judge has been forced by this Court's decision to improvise an ad hoc procedure for making the initial status determination. For example, the military judge's orders leave it entirely unclear what evidence will be permitted at the initial status determination. The orders fail to indicate what evidentiary objections the court will entertain and what law the judge will apply in ruling on such objections. It is not even clear whether the Appellee will be permitted to call witnesses to contest his alleged status as an Unlawful Enemy Combatant (UEC).

Furthermore, it is not clear from the military judge's order whether evidence received for the initial status determination will be received on the record. Order of 25 Sept 2007 ¶ 8. This would profoundly hinder the ability of the military judge or an appellate court to review the adequacy of the status determination proceeding. Finally, and perhaps most egregiously, the military judge's orders fail even to set forth the standard of proof that will govern the determination of UEC status. Given such uncertainty, it is impossible for the Appellee to adequately or effectively prepare for his status determination hearing.

Such uncertainty, however, is not merely a deficiency that would be remedied if the military judge issued more detailed rules regarding the conduct of the initial determination

hearing. The military judge simply lacks sufficient guidance from this Court from which to fashion an adequate hearing procedure. The MCA is also silent as to how such an initial determination should be carried out and the Detainee Treatment Act, which sets out some guidelines for the Combatant Status Review Tribunals, does not apply to the commission.

The unavoidably ad hoc and arbitrary nature of the procedures for status determinations before the commission violates fundamental understandings of due process. As the Supreme Court has "emphasized time and again, . . . the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal quotations and citations omitted). A principle so profoundly ingrained in the jurisprudence and national psyche of the United States should not be so easily discarded.

The deficiencies relating to pre-hearing discovery and the complete uncertainty regarding evidentiary issues and the conduct of the status determination proceedings demonstrate that the commission is simply not equipped to provide the fair status determination to which the Appellee is entitled under this Court's decision and international law.[2] The ad hoc nature of the proceedings suggests that this Court erred in construing § 948a(1)(A)(i) as granting the commission authority to hear evidence, and ultimately to decide, the Appellee's UEC status. Rather, it militates toward an interpretation of the statute that requires the UEC status to be

[2] Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, 75 U.N.T.S. 135, Oct. 21, 1950 (hereinafter GPW); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 45, 1125 U.N.T.S. 3, June 8, 1977 [hereinafter Protocol I].

determined by "another competent tribunal established under the authority of the President or the Secretary of Defense" under § 948a(1)(A)(ii).

II

The military judge's orders reveal the fundamental unfairness of concentrating the initial determination of status and the criminal trial in a single tribunal.

A. If the military judge does not determine Appellee's status at the outset, the military commission is exercising jurisdiction over Appellee prior to status determination in contravention of international law.

The Third Geneva Convention and First Additional Protocol to the Geneva Conventions require that a person held must be tried "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power," i.e. by courts-martial, until and unless they have been determined by a competent tribunal not to be prisoners-of-war. GPW arts. 102, 5; Protocol I art. 45. As stated in this Court's decision, "Article 45(2) of Protocol I to the Geneva Conventions . . . suggests that a detained individual who is not being held as a POW has the right to assert an entitlement to POW status before a judicial tribunal, and that judicial adjudication of combatant status shall occur before trial for any alleged substantive offense." *Khadr*, CMCR 07-001, at 25 n.38.

If the military judge fails to conduct a status determination at the outset of proceedings, i.e., prior to arraignment, he will be subjecting the Appellee to the jurisdiction of a special criminal tribunal before he has been determined not to be a POW and, therefore, while he still enjoys presumptive POW status. This demonstrates the Catch-22 mentioned above and reflects the impossibility of transforming a commission constructed by statute for the sole purpose of trying criminal charges against UECs into a status determination tribunal. In any case, the

procedures envisioned by the commission would violate the rights of detainees not to be treated inconsistently with their presumptive status as POWs. *See* GPW art. 5; Protocol I art. 45.

B. The military commission cannot make an initial determination focused solely on Appellee's unlawful enemy combatant status without precluding a fair opportunity for Appellee to assert prisoner-of-war status.

This Court ruled that allowing Appellee to assert POW status in a pre-trial motion would be sufficient to bring the military commission process in accord with Article 45(2) of Protocol I. *Khadr*, CMCR 07-001, at 25 n.38. However, the military judge's order regarding the status determination hearing renders that protection essentially void. If the military commission rules on whether Appellee is an unlawful enemy combatant *before* hearing Appellee's motion to assert POW status, the military commission will effectively prejudge Appellee's POW status before receiving, much less ruling on, the motion envisioned by this Court's decision. Such a prejudicial procedure would be a flagrant violation of "our most basic and fundamental notions of due process." *Khadr*, CMCR 07-001, at 15.

Furthermore, even if the military commission were to hear the motion for POW status at the status determination hearing, Appellee would be subject to the restrictions imposed by the military judge's order including the prohibition against raising issues of "international law, constitutional law, criminal law." Order of 25 Sept 2007 ¶ 9. Hearing the motion to assert POW status in such a context would vitiate his "right to assert an entitlement to POW status before a judicial tribunal." *Khadr*, CMCR 07-001, at 25, n.38. Indeed, the very term "POW" employed by this Court references international humanitarian law, making the restrictions the military judge imposes troublingly inconsistent both with international law and this Court's decision.

C. Depriving Appellee of the right to bring claims based on international, constitutional or criminal law in the status determination hearing may result in Appellee being subjected to a proceeding that lacks legal authority, is fundamentally unfair, and is in violation of this Court's own decision.

The Military Judge's first order appears to forbid the Appellee from challenging the sufficiency of the procedures and the legal standards used to make the crucial threshold determination of whether he is an UEC. Order of 25 Sept 2007 ¶ 9. Specifically, it appears that Appellee will not be able to raise any arguments that relate to international law, constitutional law, or criminal law in conjunction with the initial determination. *Id.* These are crucial limitations, as the Appellee has a number of legal claims to bring in connection with the application of the MCA definition of "unlawful enemy combatant." For instance, Appellee disputes that the MCA can be applied, without violating the Constitution or relevant international law, to someone, such as himself, who was a minor at the time of the alleged misconduct.

The military judge's second order confirms that the Appellee is unlikely to be able to raise such threshold legal issues in advance of (or even during) the initial determination proceeding. Order of 27 Sept 2007 ¶ 5(a) ("[T]he Commission is giving no weight to the [legal concerns raised by the Defense counsel in the supplement to its request for a continuance]. The Commission will determine the scope of the proceeding following the arraignment.").

Preventing the resolution of such legal disputes before or during the initial determination means that the Appellee could be determined to be an UEC, and thus subject to the extraordinary criminal jurisdiction of the commission, in an initial determination hearing that itself is unconstitutional or a violation of the relevant laws of war. It is plainly insufficient for the military judge to provide that "[a]ny limitation [imposed on the scope of legal arguments at the initial determination] will not affect the ability of the defense to present matters in conjunction with an ordered motion schedule." Order of 27 Sept 2007 ¶ 5(a). The military judge appears to

envision that motions challenging the legality of the initial determination will be made *after* the commission has already made the determination as to his status. In such a situation it will be impossible to disentangle the legal issues relating to the threshold administrative status determination from those relating to the criminal proceeding. Not only would this make the work of the military judge needlessly difficult, but it would result in the extraordinary circumstance of a criminal tribunal ruling on the legality of its own separate and prior administrative proceeding – a proceeding which, if found to be invalid, would wholly divest the court of any criminal jurisdiction whatsoever over the Appellee.

Furthermore, it does not appear that the Appellee would have the opportunity to appeal any adverse rulings by the military judge relating to the legality of the initial status determination until *after* the commission has rendered a judgment and sentence on the criminal charges.[3] Even if such an appeal were somehow to be allowed, the proceedings could not be stayed pending the outcome of such an appeal. RMC 707(b)(4)(F).

This contrasts starkly with the procedures established under the Detainee Treatment Act, for appeals of Combatant Status Review Tribunal (CSRTs) determinations. The DTA authorizes the D.C. Circuit to "determine the validity of any final decision of a [CSRT]." DTA § 1005 (e)(2)(A). Such review allows the D.C. Circuit to consider whether the detainee's status determination is "consistent with the standards and procedures specified by the Secretary of Defense for [a CSRT]." DTA § 1005 (e)(2)(C)(i). By charging the military commission with making the initial status determination, a determination that has in the past always been made by

[3] *See* Rules for Military Commissions [hereinafter RMC] 1201(c) (providing that this Court can only appeal matters referred to it under RMC 908 or RMC 1111); RMC 908 (providing a right of interlocutory appeal only to the United States and not to the Defendant); RMC 1111 (requiring trial record to be sent to this Court only *after* guilt has been adjudicated, a sentence imposed, and the Commission has been adjourned).

a separate tribunal, this Court eliminated the potential for an independent appeal of that issue. This frustrates the scheme established by Congress under the DTA and eliminates a key procedural protection.

As a result, if the status determination hearing is permitted to go forward in the commission, there is a very real possibility that Appellee will be improperly subjected to the very sort of extraordinary trial that the Geneva Conventions prohibit for persons whose prisoners-of-war status remains in doubt. If, as Appellee contends, the initial status hearing is procedurally inadequate, and without legal authority under the Constitution and relevant international law, he will not have been properly determined to be subject to such an extraordinary criminal tribunal, and he will have suffered the irreparable harm of being subjected to trial in a court with no legal authority over him.

In light of the orders of the military judge and the manifest injustice that would occur if the present course continues, we ask this Court to reconsider its decision to charge the commission with making the initial status determination and to transfer this responsibility to some other competent tribunal established under the authority of the President or the Secretary of Defense.

III

If the Court elects to abide by its 24 September ruling, it should provide guidance to the military judge regarding the process for determining Appellee's status.

If the Court decides to stand by its 24 September decision, notwithstanding the clear deficiencies discussed above, it should exercise its supervisory authority to provide clear guidance to the military judge regarding the process by which Appellee's status is to be adjudicated. The specific defects in the process contemplated by the military judge are noted

above. They include (1) the absence of any requirement for the prosecution to provide notice of the factual basis for the UEC determination; (2) the absence of an opportunity for the defense to conduct meaningful discovery in connection with the UEC determination; (3) the apparent intention to collect evidence off the record in contravention of the MCA's requirement that proceedings be conducted in the presence of the accused and that the accused be afforded the opportunity to examine all evidence against him;[4] and (4) denial of the ability to bring potentially meritorious legal claims bearing on the legality and/or interpretation of the MCA's definition of "unlawful enemy combatant." The Court should order the military judge to conduct the status determination in such a way as to avoid each of these deficiencies. In particular, regarding the absence of an opportunity for meaningful discovery, if defendants are to proceed directly from the military commission's status determination to trial, without the opportunity to appeal the status determination, then the military commission's function must by necessity, and at a minimum, encompass both the CSRT and D.C. Circuit Court of Appeals functions, permitting military commission defendants the same scope of discovery detainees obtain before the D.C. Circuit on DTA petition review.

IV

If the Court elects to abide by its 24 September decision, it should stay proceedings before the military commission for a period of 20 days in order for the accused to meaningfully exercise his right to appellate review.

R.M.C. 908(c)(3) provides that the accused has the right to file a petition of review of any adverse decision by this Court with the U.S. Court of Appeals for the District of Columbia Circuit within 20 days of the date of such decision. As noted above, within 24 hours of this Court's decision on 24 September, the military judge had scheduled an arraignment within the

[4] *See* 10 U.S.C. § 949a(b).

20-day period for filing an appeal, and set suspense dates for preliminary matters relating to the UEC determination approximately one week from the date of his initial order. As Appellee's counsel argued to the military judge, it is simply impossible for counsel to adequately prepare for an initial session (especially as contemplated by the military judge) and meaningfully evaluate and exercise his right to appellate review under R.M.C. 908(c)(3).

The prosecution will likely argue in response that because the time periods for arraignment and trial under R.M.C. 707 begin to run upon issuance of the CMCR decision, the military judge (as he himself indicated in his 25 September order) is under a duty to conduct the arraignment within 30 days, and that, as a result, the military judge must be free to schedule the arraignment immediately upon issuance of the decision. This position is in error for at least two reasons: first, there is no valid reason why the military judge should not be able to wait until the 20-day period under R.M.C. 707 has run and then schedule the arraignment. Allowing the period to run leaves ten days to schedule and conduct an arraignment, which should be a sufficient amount of time. After all, the Secretary of Defense promulgated both rules at issue, i.e., R.M.C. 707 and R.M.C. 908, and consciously chose to allow the defense 20 days in which to evaluate its options and file an appeal, knowing full well that the government's speedy trial clock would "tick" upon remand by the CMCR.

The prosecution may additionally argue that if the military judge is to have all the necessary information for a determination of status at the initial session (as contemplated by the military judge's 25 September order) he must act promptly to establish suspense dates and timelines as he did in this case. For the reasons discussed above, the defense does not believe that the status determination can be conducted in such a manner consistent with fundamental

notions of due process. As a result, the perceived necessity of these procedures cannot serve as justification for material infringement with the appellate rights of the accused.

Accordingly, in the event the Court elects to abide by its 24 September decision, it should stay proceedings in the military commission for a period of 20 days from the date of its decision. If the Appellee files a petition for review within that time period, the military commission is divested of jurisdiction to proceed and the speedy trial clock stops. If not, the military judge has ten days in which to arraign the accused. Stay by the CMCR prevents the parties from having to litigate the issue of continuance in connection with the matter once again.

Conclusion

For the foregoing reasons, Appellee requests the Court to reconsider its decision of 24 September and rule that the military commission is without authority to determine that the accused is a UEC under the MCA and that the determination of status must be made by a CSRT[5] or "other competent tribunal." Alternatively, Appellee requests the Court to direct the military judge not to conduct an initial determination of status in the manner contemplated by his 25 September order, and stay proceedings in the military commission for a period of 20 days while the defense evaluates and possibly exercises its options for appeal.

Respectfully submitted,

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[5] Appellee does not concede the lawfulness of the CSRT as presently constituted. Congress has created a separate process under the DTA to determine whether or not those procedures are lawful.

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PANEL No. _____
GRANTED (signature) _____
DENIED (signature) _____
DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 1 October 2007.

/s/
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