Federal Seizure of Power

I wish to speak to you today on the subject of a clear and present danger to American freedom.

I am not speaking of the threat posed by any foreign nation.

I am speaking of a grave domestic problem: Federal seizure of power, the arch threat to individual liberty in America. I am speaking of a two-pronged attack on the Constitution of the United States, an attack which has already achieved an alarming degree of success, and which, if not checked NOW, will result in the complete extinction of individual freedom in this country.

This is, I assure you, no exaggeration. We are faced with an issue the gravity of which cannot be overemphasized. Our free institutions are in critical danger. Yet the American people are tragically unaware of just how great, and how imminent, is the danger. This is in part because so many of our people are also tragically unfamiliar with the Constitution, not versed in its meaning, its aims and its purposes.

In order to show how vital is the maintenance of our constitutional structure to the preservation of our individual freedom, it will be helpful for us to go back for a moment to the time of the framing of that basic document. By examining the fears and the purposes of the Framers, we can more clearly see the enormous threat to our liberties which is posed by this dual assault on the Constitution today -- this seizure by the Federal government of the rights and powers of the States; and, within the Federal government itself, the seizure by one branch, of powers rightfully belonging to the other two branches.
The men who framed the Constitution knew full well that the greatest potential threat to the liberty of the individual lay in government. That is why they were insistent that the government they were setting up be **limited** and **decentralized**. They were determined not to create a power-apparatus which, however well it might work and however beneficent it might prove while in their hands, would someday become an instrument of tyranny over the people should it fall into the hands of evil or power-hungry men.

And, being realists, they knew that the power of government would -- on many occasions, at least -- fall into the hands of evil men of boundless ambition. They knew that the idea of benevolent government, without checks, is a delusion. They knew the utter folly of setting up a government without limitations, in the reliance that good men would control it. Listen to the words of Patrick Henry:

"Would not all the world," he asked, "from the eastern to the western hemisphere, blame our distracted folly in resting our rights upon the contingency of our rulers being good or bad? Show me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty? I say that the loss of that dearest privilege has ever followed, with absolute certainty, every such mad attempt."

Or as Thomas Jefferson later expressed it, in his famed "Kentucky Resolutions":

"...It would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism -- free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go; ... In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."
What were the chains which the Framers fashioned, to bind man
down from mischief, in defense of liberty? Principally, they were
two simple and workable devices, which together form the main
components of our well-known checks-and-balances system.

First, the newly-established central government was to be kept
small and limited. It was a government of enumerated powers only,
all powers not delegated to it by the Constitution (nor prohibited to
the States) being reserved to the States or to the people. In other
words, the central government would exercise power over only a
limited number of fields of general concern to all the States. Among
these would be foreign affairs, military defense, commerce of a
genuinely interstate nature, and so on; while the great bulk of
domestic matters would continue to be under the jurisdiction of the
several States. The States were by no means supposed to be mere
provinces or administrative subdivisions of the general government,
but were separate and distinct sovereignties, co-existent with the
general government. Thus was a balance set up between the new
central government on the one hand and the States on the other.

Second, within the framework of the new general government
itself, the Founders provided for a distinct separation of powers.
That is, in order to prevent all the powers of the new government
from being exercised by one man or a single small group of men, it
was provided that the legislative, the executive and the judicial
powers should be in the hands of separate branches. By a series of
devices, these branches were to be kept independent of one another,
insofar as possible.

It was by these two governmental principles, these two
constitutional devices, that our forefathers sought to prevent that
concentration of centralized power which they knew would be the death-knell of individual liberty in America. Liberty would be safe so long, and only so long, as these two principles remained intact and were scrupulously upheld.

We may express the Framers' thinking graphically in this way: The structure of our liberty rests upon these two supports, the twin pillars of States' Rights and the Separation of Legislative, Executive and Judicial Powers. So long as both these pillars stand, unimpaired, our liberties stand also. But if either one of these pillars be destroyed, or slowly eroded away, then, surely and inevitably, the temple of liberty will come crashing down.

Ladies and Gentlemen, we are nearer to that eventuality than is generally realized. We are very near, dangerously near, to it. By processes which at first were gradual, but which in recent years have assumed a progressively increasing rate, the structure of States' Rights has been almost completely eroded away, until what was once a sturdy and massive support of American freedom has been whittled down to a very tenuous column indeed.

Actually, the process of infringing on the rights of the States is not new. It began early in our history. Thomas Jefferson saw the beginning of this process of seizure by the Federal judiciary; he feared its ultimate result, and he expressed his fears as follows:

"...There is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court."

With prophetic vision, the great Virginian warned further that the germ of dissolution of our Federal system lies in the Federal judiciary.
"...working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one."

Jefferson's description of the process and methods of judicial usurpation is truly remarkable. It could well have been written today. These are his words:

"The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated republic. They are construing our Constitution from a coordination of a general and special government to a general and supreme one alone. This will lay all things at their feet... They skulk from responsibility to public opinion... An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge who sophist- cates the law to his mind, by the turn of his own reasoning..."

This process which Jefferson depicted was beginning even in his own day. Nevertheless, despite this early beginning of judicial usurpation; despite the War Between the States and the force-imposed post-War amendments, which radically altered the original concept of the Union; despite the nationalizing influence of the commercial expansion of the post-War period -- despite all of these things, the basic principle of States' Rights remained fundamentally intact. The North, the nation as a whole, might have rejected the Southern contention that States' Rights included the right to secede and dissolve the Union; but within the framework of Union, the country was still dedicated to the principle of local self-government.

In 1868 Chief Justice Salmon P. Chase echoed the prevailing view when he characterized the United States as "an indestructible
Thus, until the 1930's, our governmental system was still fundamentally based on States' Rights, both in principle and in practice. Not to the extent that some of us had desired, to be sure; not to the extent that the Framers had recommended; but still to the extent that the great majority of those vital economic, political and social activities most closely affecting the people were the subjects of State control only and were outside the province of the Federal government. And the country and the people seemed aware of the vital importance of keeping them that way. In an address delivered in 1930, Franklin Delano Roosevelt, then Governor of New York, emphasized the necessity of preserving States' Rights, when he declared:

"...To bring about government by oligarchy masquerading as democracy, it is fundamentally essential that practically all authority and control be centralized in our National Government. The individual sovereignty of our States must first be destroyed, except in mere minor matters of legislation. We are safe from the danger of any such departure from the principles on which this country was founded just so long as the individual home rule of the States is scrupulously preserved and fought for whenever it seems in danger."

As a distinguished commentator has pointed out, the significance of this address by Governor Roosevelt lies in the fact that it was not merely a statement of the views he himself then held, but rather was a re-phrasing, a re-stateMENT, of "the long-established American principles which had been well understood and firmly accepted by generation after generation of the American people, and voiced in varying forms innumerable times throughout the country for almost a century and a half."
In the last quarter-century, however, we have seen assaults on States' Rights at every point. We have seen the national government in Washington expanded to its present swollen size, accompanied by a steady diminution of the reserved powers of the States. It is not my purpose to attempt to fix the blame for this development. Suffice it to say that all three branches of the Federal government participated in it, and that an acquiescent and desperate people permitted it. The Supreme Court resisted the trend until 1937, but, in that year, as the Honorable Hamilton A. Long of the New York Bar explains in his brilliant study, USURPERS -- FOES OF FREE MAN, the Court underwent a major policy-revolution. From that time forward, the Supreme Court's role has been one of willing, and then eager, collaboration in the process of aggrandizing the central government at the expense of the States. In 1954, with the school segregation decision, the Supreme Court really moved into high gear against the States and the Constitution. It sustained the assault with the subsequent Steve Nelson and Girard College cases. In 1957 the Congress and the Executive Branch joined in the attack. The passage -- in an atmosphere of bogus sanctity and mock legality -- of the mis-called Civil Rights bill was followed shortly by the subjection of a once-sovereign State to bayonet rule, which still continues.

Before leaving the subject of States' Rights and going into this second aspect of usurpation, within the Federal government itself, I should like to pause for a moment to reflect upon a circumstance which frankly puzzles me.

I can easily understand why those who are at heart enemies of America and enemies of liberty would seek to destroy States' Rights. I can easily see why our secret enemies, those who would weaken our
civilization and bring our nation to its knees, would seek to destroy local self-government.

What I cannot understand is how it is that many loyal and sincere Americans, conscientious and zealous advocates of civil liberty, have in recent years been in the very forefront of the effort to break down the integrity of the States.

These men honestly picture themselves as champions of individual freedom; yet they are its worst enemies. They see some real or imagined violation of civil liberty on the State level -- generally a situation in which a member of some racial minority group is allegedly deprived of an alleged right -- and, egged on by shrewd and conscienceless politicians bent on corralling the vital minority-group vote, these liberals become inflamed with righteous wrath and filled with deep and honest concern over the fact that an individual's rights are being violated.

So what is their remedy? Do they seek corrective action on the State level? No. They do all in their power to break down the rights of the States and to build up a super-government which is supposed to be for the protection of the individual, a super-government strong enough to rule the recalcitrant States with an iron hand and thus to prevent them from continuing their alleged denials of the rights of individuals of certain classes.

But does it never occur to these self-styled liberals that this super-government they are building up, this "big brother" to police the States, someday may, inevitably will, become itself the greatest possible threat to the rights of the individual? That, by tearing down the rights of the States and centralizing power in Washington, they are building up a power-apparatus before which the States first, and later the individual, will be completely powerless? Can they not
admit the inexorable truth of Calhoun's solemn warning that:

"The powers which it is necessary for government to possess, in order to repress violence and preserve order, cannot execute themselves. They must be administered by men in whom, like others, the individual are stronger than the social feelings. And hence the powers vested in them to prevent injustice and oppression on the part of others, will, if left unguarded, be by them converted into instruments to oppress the rest of the community."

Surely they know that the reins of government will fall into the hands of such men, "in whom the individual are stronger than the social feelings." Or do they naively trust that completely good and altruistic men -- themselves, perhaps? -- will always be in control? Is not this the very delusion against which the Founders warned, the same mad folly so eloquently referred to by Patrick Henry and by Jefferson in their insistence upon a system of checks-and-balances?

Blinded by short-sightedness and by a failure to read history, these zealous liberals, these self-styled champions of the individual's civil rights, are busily engaged in breaking down the principle of States' Rights and thus destroying what is, in the long view, the greatest single bulwark of our individual freedom.

Perhaps they rely on the idea that it is safe to destroy the rights of the States and create a centralized government so long as, within this centralized government, the principle of Separation of Powers is strictly enforced; that the latter principle is all that is really necessary to guarantee individual liberty.

Nothing could be more wrong. The two pillars, States' Rights and Separation of Powers, are complementary to each other. Destroy or remove one, and the other will soon collapse. Jefferson warned that:
"...when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated."

And even the arch-Federalist Alexander Hamilton saw clearly that the fate of individual liberty was inextricably tied up with the fate of the States. Said Hamilton:

"The States can never lose their powers till the whole people of America are robbed of their liberties. They must go together; they must support each other, or meet one common fate."

Let us now examine the other face of the coin; let us turn to the second pillar of our checks-and-balances system, the principle of Separation of Powers, and see how it has fared over the years.

Generally speaking, Separation of Powers has not been subjected to anything like the degree of attack that has so largely eroded away States' Rights. This constitutional support is still in a comparatively healthy condition. But in the past four years, especially, the Supreme Court has stepped up the assault in this direction too.

You are probably generally familiar with a series of decisions handed down by the Warren Court, in cases involving various aspects of internal security -- commonly referred to as the Subversion Cases. Some of the decisions in these cases constituted further restrictions on the rights of the States, denying them the right to prosecute for or even to investigate sedition and treason or to exclude suspected Communists from the practice of law. Others restricted the executive branch of the Federal Government in its anti-subversion efforts and limited the power of congressional investigating committees in
questioning witnesses.

The net effect of these decisions, of course, was to hamper seriously the activities of our government in the anti-subversion field.

But what principally concerns us here is not so much the serious impairment of our government's anti-subversion efforts, deplorable as that is. Nor is it simply the fact that the decisions placed certain restrictions on the Executive and on the Congress.

The more fundamental cause for concern is that, in some of these cases, the Supreme Court has usurped powers rightfully belonging only to the legislative branch of the government. In other words, the Court has been guilty of judicial legislation. In the Steve Nelson case, for example, the Court violated the intent of Congress by construing the Smith Act as giving the Federal government complete pre-emption of the anti-subversion field, to the exclusion of the States. When the Court thus violates, or goes beyond, the intent of Congress, it is, in effect, making new law, or legislating -- a function which the Constitution bestows exclusively upon Congress.

That the Court has in fact exercised legislative powers is clear to lawyers, and they have reacted with considerable concern. Only a few weeks ago Judge Learned Hand, one of the most eminent jurists in this country, and considered of liberal views, observed that the Court was apparently becoming a third house of the legislature.

Laymen, however, may have some difficulty in grasping the significant difference between interpretation and judicial legislation and I should therefore like to take a few moments to discuss this point. The Honorable Hamilton A. Long, of New York, of whom we have already spoken, dealt with this vital subject in an editorial which
appeared last year in the Saturday Evening Post. Mr. Long wrote:

"Few subjects are surrounded by more confusion than the function of the United States Supreme Court in interpreting the Constitution. There can be no doubt, however, that the Court has no right to change this basic law or to violate the intent of those who initially adopted it or of those who later amended it. Only the people can change the Constitution, by amendment.

"For the Supreme Court to try to bypass this process, by interpreting the Constitution contrary to that original intent, is to usurp power never given it."

In other words, the Supreme Court, in interpreting a provision of the Constitution, must stay strictly within the limits set by the intent of the Framers and Adopters. Likewise, in the case of construing a statute, the Court cannot violate the intent of Congress.

In handing down a decision contrary to the intent of the lawmakers, the Court is itself making new law, and is thus usurping a function which the Constitution vests exclusively in the legislative branch.

And where the Court is interpreting a constitutional provision (or amendment), violation by the Court of the Framers' and Adopters' intent constitutes an illegal amending of the Constitution. In such a case the Court would be seizing a power rightfully belonging to the people alone; for only the people, through their States, have the right to change the Constitution, and they can do so only by amendment. The decision in the school segregation case of May 17, 1954, is a flagrant example of this type of usurpation.

What are we to do to remedy this critical situation? What steps
can we take to save these beleaguered constitutional principles, so vital to our liberty as free men?

1. The Congress can protect itself against further judicial usurpation by exercising its constitutional right to limit the appellate jurisdiction of the Court.

I disagree with those who feel that this is too drastic a remedy. It is an effective way to curb the excesses of the Court and to discipline that body, and it is a curb which the Congress could easily remove later as it would now impose.

Let me cite just two examples of this kind of remedial legislation.

One such bill was introduced by me in 1957. It would have limited the jurisdiction of the Supreme Court in two fields—the activities of local school boards in regulating school attendance, and the efforts of State governments to combat subversive activities through legislation.

The other bill of this sort, one that was given widespread attention, was the Jenner-Butler Bill to remove the Supreme Court's appellate jurisdiction in certain cases involving subversion. This bill would have deprived the Supreme Court of jurisdiction with respect to questions on admission of applicants to the bar of State Courts, thereby setting aside the Schware & Konigsberg decisions; provided that in contempt of Congress prosecutions, Congress shall be sole authority to decide questions of pertinency of Committee questions, thereby setting aside the Watkins decision; prevented preemption of State sedition laws by past or future Federal Acts, thereby setting aside the Steve Nelson decision; and provided that "theoretical advocacy" of overthrow of the government, as well as "incitement to
action" would constitute sedition under the Smith Act, thereby setting aside the Yates decision. I actively supported this bill because I felt that the Supreme Court had overstepped its bounds and encroached on the prerogatives of Congress, the Executive Branch of the government, and several agencies of local government in the cases to which the Jenner-Butler Bill was applicable.

Unfortunately, this bill was defeated in the Senate by a vote of 49 to 41.

If Congress will enact laws restricting the jurisdiction of the Supreme Court, I believe that the Court will see the handwriting on the wall and curb its impulses. Unless the Court is restricted by legislation to judicial matters, we can expect to see new and more far-reaching forms of judicial legislation in the future.

The problem of States' Rights is more difficult, because here the process of usurpation has been going on so much longer. It has proceeded so far that it will be difficult to stop. That is the great danger in permitting "just a little bit" of usurpation, of acquiescing in just a little deprivation of one's rights: Before one realizes it, the point of no return has been reached.

The States, however, have not quite been destroyed. If they will stand firm from here on out, they can preserve a good measure of their independence and can keep the pillar of States' Rights standing as a sturdy support of our individual freedom.

2. Congress can play a part in preserving the power of the States.
In the first place, it should examine each piece of legislation that comes before it to determine whether it will expand Federal power at the expense of the States. Some bills with admirable aims must be rejected because of the means they would employ to reach their ends.

3. Congress can take an active role in upholding the rights of the States by enacting legislation that will help in restoring power to the States.

A most outstanding example of such legislation was a bill limiting federal pre-emption, popularly known as the Smith Bill, or H. R. 3, which was considered during this past session of Congress.

This bill passed the House by a substantial majority but was bottled up in committee in the Senate. In the closing days of the session it was presented to the Senate in the form of an amendment. The opposition, after extended debate, moved to table the amendment, but the motion to table was defeated by a vote of 46 to 39. This preliminary vote, to me, was the most encouraging show of strength made by the conservative thinking Senators during the 85th Congress.

This sound and worthwhile legislation provided that no congressional act should be construed to pre-empt the field and thereby nullify State laws on the subject unless either: First, the acts specifically so provided; or second, there was an irreconcilable conflict between the Federal act and State law. It also provided that no Federal anti-sedition act should prevent enforcement in State courts of State statutes providing a criminal penalty for sedition against the United States or such State.

This provision was aimed specifically at the Supreme Court's decision in the case of Commonwealth of Pennsylvania v. Nelson, in
which the Court held that by virtue of the passage of the Smith Act, Congress showed an intent to nullify all State anti-sedition laws, even though the Smith Act itself specifically states a contrary intent.

I am sure you are aware of the determined and successful fight which the opponents of this measure waged in the Senate in the closing days of the session. Their opposition included the very real threat of a filibuster against the bill, despite the avowed intention of the same people to abolish forever extended debate by a change in the Senate rules. It is interesting to note where our Northern Democrat colleagues stood on this vote. Voting for the Smith Bill Amendment in our 41 - 40 loss were 17 Democrats, all Southerners, but not all the Senators from Southern States, and 23 Republicans. Voting in favor of the court were 27 Democrats and 14 Republicans.

There was also S. 1538, a bill I co-sponsored, which would have returned to the individual states a large measure of legislative jurisdiction over lands in the several States, owned by the Federal Government or used for Federal purposes.

In January, 1958, I introduced S. J. Res. 145 to set up a Commission on Federal and State Jurisdiction. The purpose was to study the seizure of State powers by the Federal government, and the seizure of powers by each branch of government from the others. The Commission would report to Congress, recommending legislation that would redraw the boundary lines in places where they had become completely obliterated or obscured.

I co-sponsored another important piece of States’ Rights legislation, S. 1723. This bill would have eliminated the no-man’s land
existing between State and Federal jurisdiction in the field of labor relations. This gap was caused by the Supreme Court's decision last year in the Guss case. S. 1723 empowered the States to act for the protection of both labor and management rights, where the National Labor Relations Board declined to assert its jurisdiction.

I will mention just one more example. This was my bill, S. 6, which was passed by the Senate, but died in the House. It would have prevented private contractors executing Federal contracts from escaping States sales taxes on their purchases under the guise of Federal immunity. This would have reversed a 1954 Supreme Court decision which closed another State revenue source.

These are merely examples; they will do for starters. There are many ways in which Congress can assist the States to regain the powers they should be exercising and which powers are reserved to them under the Constitution.

Among the many fields of activity which are still under State control, however, there are two which are pre-eminent -- law-
enforcement and public education--; and it is these two which have been singled out for attack by the enemies of States' Rights and of American freedom.

One of the greatest obstacles in the way of any grab for power, by Communists or any other group, is the existence in this country of forty-eight separate and independent police systems. As was demonstrated in the cases of several Eastern European countries, which fell to Communism after World War II, a useful, perhaps essential, factor in seizing power in any country is a centralized police organization, which can be infiltrated, then controlled, then used at the crucial hour to suppress the opposition.

So long as we avoid this centralized control of our police systems, then, no matter what internal crises and tensions the years may bring, there is little likelihood of even an attempt at a Communist-style coup-d'état in this country. Such would not be the case were the weapon of centralized police control available to those who would seize power.

But a Federal government bent on usurpation and complete centralization of power, finds it annoying to be confronted with law enforcement officers who are loyal to State and local governments instead of to the Federal bureaucracy, and who are beyond reach of the threat of "federalization." We can therefore expect increasing pressure to destroy the independence of the States' police agencies. It has already been seriously suggested by one "liberal" that a special Federal police force, similar to the Canadian Northwest Mounted Police, be set up to enforce the integration of Southern schools.

This brings us to the other outstanding function of State
government -- public education. There is a grave risk that this function of State government will be destroyed, to be replaced by a centrally controlled school system operated by the Federal government.

It is true that the proponents of Federal aid to education assert repeatedly that they are not interested in Federal control. Be that as it may, it can be stated as an absolute fact that Federal control of education will follow Federal aid, as surely as the night follows the day.

The pattern is crystal clear. Once the States have geared their whole educational and revenue systems to Federal aid, the Federal government will impose certain conditions. They will appear harmless, even helpful, at first. Certain minimum standards in school equipment, teacher training and level of teaching will be set up as prerequisites for the receipt of Federal aid. Some substandard schools will be improved.

But is anyone naive enough to think that we can have just a little Federal control? Not a chance. Within a very few years, a bureau in Washington would be drawing up the curriculum and a list of approved textbooks. The history books, the texts on government, and the courses in sociology would be lined out to follow whatever school of thought was, at the moment, most popular in Washington.

From this point, the movement to mass brain-washing and despotism would be ready to begin in earnest, needing only a strong and arrogant President to set it in motion.

We must, then, fight with all our strength to maintain control over our educational systems and our law-enforcement agencies. In addition, we must resist, at all points along the line, any further attempts on the part of the Federal government to encroach on any
right still held by the States.

It is not enough to put obstructions in the path of Federal encroachment on the rights of the States. **Obstruction** must be joined with **construction**, by which I mean constructive efforts on the part of State government to provide the essential services the people demand.

One of the arguments most strongly relied on by advocates of Federal Aid to Education is that the States have failed to meet the educational challenge of a world of science and technology. Figures and statistics designed to support this argument are brandished. To counter this argument, we must be able to point to effective measures taken by the States to meet the problem. Such effective steps will not be forthcoming, unless you, as individual citizens, take an active stand in support of independent State action.

In keeping up a constant struggle to preserve the principles of States' Rights and Separation of Powers, we are not fighting for any mere slogans. We are not interested in States' Rights and Separation of Powers in and of themselves, but our interest in them lies in the fact that **these two principles are essential supports of Liberty**. And Liberty, as Lord Acton said, "is not a means to a higher political end. It is itself the highest political end."

The arch enemy of Liberty is usurpation of power. It is, therefore, our duty to resist this usurpation, from whatever source it comes. We would all do well to bear in mind the words of our first President, George Washington, who, in his Farewell Address, warned the people of this country to allow no change to be made in their Constitution except by the constitutionally-prescribed amending process. These are his words:
"If, in the opinion of the people, the distribution, or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

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