

USAWC STRATEGY RESEARCH PROJECT

**POSSE COMITATUS AND THE USE OF THE MILITARY
IN DENYING TERRORIST ACCESS TO THE UNITED
STATES ALONG THE BORDER WITH MEXICO**

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ABSTRACT

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Mexico is one of our largest trading partners and a supplier of cheap labor that crosses our border on a daily basis at numerous ports of entry from Texas to California.

The ease with which cross border traffic occurs is proving to be a monumental security challenge. The largely unsecured border we share with Mexico is an enticing avenue for illegal immigrants and drug smugglers but also, and more importantly, for potential terrorists hostile to the United States.

Due to the events of September 11, 2001 we are now placed in the position to re-think our immigration policies and security procedures. Since 9/11 an increased emphasis has been placed on defense of the homeland and border security. Use of the military to secure our borders is increasingly being weighed as an option. Due to interpretation of the Posse Comitatus Act of 1878, restrictions are in place to limit direct involvement of military forces to secure the border.

This SRP will analyze current restrictions of the Posse Comitatus Act as it applies to the use of the military as well as several recent laws that have been enacted that grant specific exceptions to the application of the PCA.

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POSSE COMITATUS AND THE USE OF THE MILITARY IN DENYING TERRORIST ACCESS TO THE UNITED STATES ALONG THE BORDER WITH MEXICO

Our Nation learned a terrible lesson on September 11, 2001. Unless we act to prevent it, a new wave of terrorism, potentially involving the world's most destructive weapons, looms in America's future. American soil is not immune to evil or cold-blooded enemies capable of mass murder and terror. Today's terrorists can strike at any place, at any time, and with virtually any weapon. Securing the American homeland is a challenge of monumental scale and complexity. But the U.S. government has no more important mission.

- National Strategy for Homeland Security. July 2002.

The United States has had a long and valued tradition of welcoming immigrants from virtually all corners of the globe for well over 250 years. In fact, the United States is a country of immigrants. This nation, from its inception, was built from the ground up by the large influx of immigrants that came here looking for a better life and for the chance to succeed under our system of law, civil liberties and freedom embodied by the inscription of Emma Lazarus' famous words engraved on the Statue of Liberty, "Give me your tired, your poor, your huddled masses yearning to breath free". The overwhelming majority of immigrants to the United States, both legal and illegal, come here to better their lives and the lives of their family. Unfortunately, due to the events of September 11, 2001 we are now placed in the position to re-think our immigration policies and border security procedures and the ease at which foreigners have been afforded easy access to cross into United States due largely to our virtually unprotected and lengthy borders with Mexico and Canada.

This research paper will focus on the border security challenges and issues regarding our border with Mexico. While it is acknowledged many of the issues presented may also exist along the border with Canada, the thrust of the research will focus only on Mexico.

Homeland security has become an integral part of the national security strategy of the United States. An increasing fear since the attacks of 9/11 is that terrorists will exploit our porous border to the south to gain access to the United States in order to kill our citizens and disrupt our economy. With almost half a billion people crossing U.S. borders each year, maintaining a well-regulated border is a tall order. There must be a dramatic increase in efforts to control the border with Mexico in order to deter and prevent possible terrorist efforts. There is every reason to believe that if other means of entering the country become more difficult, and the Mexican border remains relatively easy to cross, terrorists would begin to use it as an avenue to enter the United States.¹ The proliferation of nuclear, chemical, and biological weapons and the means to deliver them poses a serious and growing threat to the people and

interests of the United States. The threat is qualitatively different because of its potential to do extreme damage, physical and psychological, with a single strike. Due to their availability, relative affordability, and easy use, weapons of mass destruction give terrorist organizations the capability to attack the American homeland with catastrophic results. Due to the current inability of the Border Patrol to stem the flow of illegal immigration and human smuggling as well as the ever increasing illicit drug trade into the U.S., alternate means and methods must be thought of and utilized to secure our borders.

THE PROBLEM

Today, the U.S.-Mexico border covers approximately 2,000 miles, encompassing four U.S. and six Mexican states. The sheer size of the border area coupled with the historical open border policy has produced a recognized easy and enticing avenue not only for illegal immigrants and drug smugglers but also for terrorist organizations hostile to the United States. The sheer magnitude of the border security problem can best be illustrated by statistics compiled by the University of California, Davis. Apprehensions of Mexicans just inside the border with the United States totaled 1.1 million in 2003, and increased to 1.3 million in 2004.

The United States employs a liberal open door policy with Mexico on along the Southwest Border where approximately 700,000 Mexicans cross legally into the United States every day to shop and work, returning at night to their homes in Mexico. A much smaller number of border crossers come illegally. Illegal immigrants represent only about 0.5 percent of total south-north border crossings. Still, the continuous flow of illegal aliens over the past 35 years has contributed to an illegal immigrant population estimated at between 7 million and 9 million people—about 60 percent of them from Mexico.² This near freedom of access also has very real and recognized risks. The Southwest Border has developed into a region where organized crime has been allowed to proliferate, human smugglers operate with little fear of apprehension and illicit activity thrives. Mexican criminal syndicates and cartels move drugs, illegal immigrants and other contraband nearly unencumbered into the United States. The vast sum of money generated by these transnational criminal organizations is the driving force that encourages lawlessness all along the border region.

Prior to 9/11 Mexico border security was viewed mainly as an immigration issue due to the huge influx of illegal immigrants overwhelming the social services systems in Texas, California, New Mexico and Arizona. In a recent *San Diego Union Tribune* article, it reported that by hosting America's largest population of illegal immigrants, California bears a huge cost to provide basic human services for this fast growing, low income segment of its population.

Recent studies from the Federation for American Immigration Reform (FAIR) concluded that in 2004 the costs to the state of California topped \$10.5 billion up from \$1.1 billion in 1994. Among the key findings of the report are that California's already struggling education system spends approximately \$7.7 billion a year to school the children of illegal aliens who now constitute approximately 15 percent of the student body. Another 1.4 billion of the taxpayers money goes toward providing health care to illegal aliens and their families, the same amount that is spent incarcerating illegal aliens in prison for crimes committed in the United States.³

The financial impact to California to support illegal immigration is staggering. But why are these numbers important? President George W. Bush's FY 2006 budget request calls for \$41.1 billion for the Department of Homeland Security (DHS). Of this total, 6.7 billion is earmarked to support the U.S. Customs and Border Protection Division (CPB) which is tasked to manage, control and protect the Nation's borders, at and between the official ports of entry⁴. As can be seen, California is spending more to educate the children of illegal aliens than the U.S. government is spending to protect our borders. How has this been allowed to happen?

The borders with Mexico, as well as, Canada have been made relatively easy to cross due to the North American Free Trade Agreement or NAFTA. This agreement has had a positive impact on the economies of all three countries but unfortunately has possibly made it easier for terrorists to threaten the U.S.⁵ NAFTA was expected to create jobs in Mexico, raise wages, and , eventually decrease unauthorized Mexico –U.S. migration. Trade between the US and its NAFTA partners increased sharply between 1993 and 2001. US exports to Mexico rose by 44 billion while imports from Mexico to the US rose by 86 billion during the same time period. NAFTA got off to a promising start in Mexico, where employment rose significantly from 1994-2000. However, when the U.S. went into recession in 2000-01, employment at Mexico's factories along the border lost in excess of 300,000 assembly type jobs. Most of these jobs moved to China and other countries with lower wages.⁶ Due in part to the loss of jobs in Mexico and the higher standard of living found in the U.S. illegal immigration has increased in recent years. The focus on NAFTA and expanding economic ties with Mexico led not only to increased trade opportunities but increased opportunities for workers from Mexico and other South American countries to come to the U.S. looking for employment. ⁷

The trend of increased illegal immigration accelerated during 2004 as evidenced by a Time magazine investigation that estimated that the number of illegal aliens flooding into the U.S. will total 3 million- enough to fill 22,000 Boeing 737-700 airliners, or 60 flights every day for a year. It will be the largest wave since 2001 and roughly triple the number of immigrants who come to the U.S. by legal means. ⁸

Who are these new arrivals? While the vast majority are Mexicans, a small but sharply growing number come from countries, including those with large populations hostile to the U.S. From Oct.1 of 2003 until Aug 25, 2004 along the border with Mexico, the border patrol estimates that it apprehended over 55,000 people into the category described officially as other than Mexicans, or OTMS. The Department of Homeland Security refuses to break down OTMS by country but locals have indicated they have encountered individuals from Afghanistan, Bulgaria, Russia and China as well as Egypt, Iran, and Iraq.⁹ Steve Emerson, a radical-Islam researcher and author of *American Jihad: The Terrorists Living Among Us*, says Mexico could become a conduit by which terrorists would be able to access U.S. soil with very little difficulty.

Terrorists may have already exploited our porous Mexico border. On November 2001, a U.S. federal judge sentenced a former Mexican immigration inspector, Angel Salvador Molina-Paramo, to 30 months federal prison for his role in a global human smuggling ring spanning several continents. Molina-Paramo's partner and the chief of the smuggling operation was George Tajirian, an Iraqi-born human smuggler accused of trafficking hundreds of illegal immigrants from the Middle East across the U.S.-Mexican border during the 1990's. U.S. authorities had arrested Tajirian in 1998 and, following a plea agreement, he was sentenced to 13 years in U.S. federal prison. Prosecutors alleged that the ring smuggled Palestinian, Jordanian, Syrian, Iraqi, Yemeni, and other illegal immigrants through Mexico to the United States.¹⁰

As can be seen, Illegal human smuggling has already occurred from countries hostile to the United States. Moreover, U.S. counter-terrorism specialists indicate Al Qaeda has established " sleeper cells" in the midst of Latin Americas several million Muslims. Authorities warn cells linked to Al Qaeda, Hezbollah, and Islamic jihad may already be operating in Brazil, Ecuador, Paraguay, Uruguay, and Argentina.¹¹ There is no definitive proof that any of those smuggled were terrorists with hostile intent to our homeland. There is also no proof to the contrary.

Due to the cheap and willing labor that illegal immigrants provide to countless businesses not only in the border region but throughout the U.S. as well has led sophisticated networks of human smugglers bringing illegal immigrants across the borders via clandestine routs through the desert or even in semi- tractor trailers appearing to crossing the border legally. The impetus for change to a tightly controlled border is not there. The legal as well as illegal immigration problem with Mexico has turned into a political issue that apparently politicians are unwilling to address. While this occurs, the number of undocumented Mexicans continues to grow at an

alarming rate and currently it is estimated that there are in excess of 4.8 million currently living in the U.S., a 58% increase from 1990.¹²

THE THREAT

In 1981 the U.S. military began assuming a greater role in the war on drugs, on both the domestic and international fronts both on land and at sea. Since that time, the supporting role performed by active duty military units and the Department of Defense has continued to increase. The Posse Comitatus Act of 1878 (PCA) places certain restrictions on direct military involvement and has served as the primary statutory guard against the direct use of the U.S. military in domestic law enforcement duties.¹³

A brief definition and history of the origins of Posse Comitatus Act of 1878 as it applies to the U.S. military is in order. The posse comitatus doctrine comes from English common law. Posse comitatus means, literally, the "force of the county": the posse comitatus is that body of men above the age of 15 whom the sheriff may summon or raise to repress a riot or for other purposes.¹⁴ It's origins in the U.S. initially began in the 1850's when Caleb Cushing then the attorney general for President Franklin Pierce blessed the idea that militia and regulars in organized bodies could be members of a posse to enforce the Fugitive Slave Act of 1850 in the apprehension and safeguarding of fugitive slaves.¹⁵

It was further utilized and one can argue had its official beginnings as it applies to the military today after the Civil War during a time when unrest in the south necessitated the use of federal troops from northern states to provide policing duties and to protect the populace. Prior to the Civil War the local militias (both in the north and south) under state control could be called upon by U.S. Marshals to provide assistance and to control local disorders. After the Civil War in the south virtually all policing duties were conducted by northern soldiers. Additionally, conditions on the western frontier required the use of federal troops. Frontier fort commanders were most often the only means of law enforcement and by necessity assumed and exercised civilian law enforcement responsibilities. These responsibilities included protecting settlers from criminals but from renegade Indians as well who were menacing the populace. In the majority of cases the troops were the only authority in the region and the only security for settlers moving west.¹⁶

The extensive use of Army soldiers in the South to maintain civil order during the period of reconstruction after the Civil War resulted in an ever increasing concern for Congress at the time. Not only were soldiers being engaged in normal policing duties they were additionally being used at political events and at polling places in order to maintain order. Congress

expressed its concern that the use of federal troops in this manner was straying from the Army's original mission related to national defense.¹⁷ Additionally, Congress had become disenchanted with the habit of U.S. marshals and sheriffs to press Army troops into their service without the approval of the commander in chief.¹⁸ The Posse Comitatus Act of 1878 became the culmination of what Congress viewed as an undesirable encroachment of the use of federal troops in civilian law enforcement duties. The intent of the PCA was clear and remains today as the primary statutory guardian against the use of the military in domestic law enforcement. The Act as passed stated:

Title 18, US Code, Section 1385: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both."¹⁹

John Brinkerhoff argues that in the last 125 years, the meaning of the Posse Comitatus Act has been stood on its head. The intent of the act was not to preclude the Army from enforcing the law but instead was designed to allow the Army to do this only when directed to do so by the President or Congress. Many have now wrongly interpreted the PCA and turned the law around into believing that the Army cannot be used for any civil law enforcement purposes. This is undeniably false and contrary to the initial framers intent when the law was originally enacted. Likewise, the PCA has provided the Department of Defense with a convenient shield to protect it from missions that it does not want. The PCA has been modified by recent laws that have been enacted that grant specific exceptions to the application of the law. The language of the PCA calls for two instances when the PCA does not apply; when an exception is expressly authorized by the Constitution, and when Congress expressly authorizes an exception. The first of these provisions has created the most confusion in the application of the PCA since the Constitution contains no provision expressly authorizing the use of the military to enforce the law.²⁰ The second provision allowing for exceptions to the PCA, Congressional authorization has been utilized by Congress on several occasions in an effort to codify and clarify the use of the military during civilian law enforcement duties. Congress enacted 10 USC 331 and 332 to allow the President and/or state governors upon to the President to call into Federal service members of the militia in sufficient numbers to suppress civil disturbances or insurrection and enforce law and order.

Congress further addressed the use of the military in the civilian arena by recognizing the inability of civilian law enforcement agencies to interdict the smuggling of drugs into the United States by air and sea. One of the most controversial uses of the military during the past 25

years has been to involve the Navy and Air Force in the “war on drugs”. As a result of the increased smuggling of illegal drugs into the United States, the Reagan Administration directed the Department of Defense to use naval and air assets to reach out beyond the borders of the United States to preempt drug smuggling. This use of the military in opposing drug smuggling was approved by Congress in 10 U.S.C., sections 371-381.²¹ These sections authorize a wide range of military related assistance to civilian law enforcement agencies for counter drug operations. They allow the Secretary of Defense to provide information to civilian authorities collected during the course of normal military training that may be relevant to a violation of any Federal or State law. Additionally and more importantly, the sections 372-373 allow for the use of military equipment and facilities, train law enforcement officials in the operation and maintenance of military equipment, and maintain such equipment. This use of equipment includes base facilities, aircraft, vehicles and in the case of the Navy, the use of ships and embarked aircraft. Under these sections direct military support for law enforcement agencies shall not adversely impact military readiness.

In an effort to address concerns, it was reiterated in section 10 U.S.C. section 375 that military personnel shall not be permitted to directly participate in searches, seizures, arrests, or similar activities unless such participation is otherwise authorized by law. Under these sections, the U.S. government has been routinely using federal assets and personnel to combat the illegal drug flow coming across the Mexican border. What has yet to occur is direct use of federal troops to patrol and secure the porous border with Mexico.

Post 9/11, an increased emphasis has been placed upon homeland security and where the assets should be placed to combat terrorism. Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government stated President George W. Bush in *The National Security Strategy of the United States of America*, September 2002. With this statement the President has placed protecting American citizens at the forefront of his policy. The enemy we face now is not one with a country with borders we can retaliate against but an elusive foe that is willing to sacrifice themselves to achieve their goals. This new enemy will attempt to find and utilize our weaknesses against us at every turn. They will use the unorthodox in an attempt to get around our defenses. No one ever thought prior to 9/11 that individuals would be willing to sacrifice themselves for their cause by hijacking airliners and crashing them into buildings. The question now is how do you combat such an enemy and can be best illustrated by a statement by the Irish republican Army after a failed attempt to kill British Prime Minister Thatcher in 1984: “Remember, we only have to be lucky once. You have to be

lucky always". Homeland security starts with knowing that a perfect defense against terrorism is not possible.²²

Homeland security is a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur. One of the priorities for the future in regards to homeland security revolves around securing America's borders to prevent future attacks. Today's terrorists can strike at any place, at any time, and with virtually any weapon. Securing the American homeland is a challenge of monumental scale and complexity. But the U.S. government has no more important mission.²³

The Reserves and National Guard have been used extensively for over a decade to assist in border protection related to illegal drug activity. But their involvement stops there. Joint Task Force North (JTF North), formerly known as Joint Task Force Six, is based at Biggs Army Airfield, Fort Bliss, Texas. JTF-North is a subordinate command of United States Northern Command (USNORTHCOM) headquartered in Colorado Springs, Colorado. JTF-North has been a critical military asset in the national war on drugs since it was established on November, 13, 1989, in response to President George H. W. Bush's declaration of the "War on Drugs."²⁴ On October 1st, 2004, the Department of Defense expanded the mission of JTF-North, to include counter-terrorism. It is now the Department of Defense's agent in helping federal law enforcement protect our borders from threats such as international terrorism, weapons of mass destruction and organized crime.²⁵ JTF-North is a joint service command comprised of approximately 160 active duty and reserve component Soldiers, Sailors, Airmen, Marines, and Department of Defense civilian employees and contracted support personnel.

JTF North is the Department of Defense organization tasked to support our nation's federal law enforcement agencies in the interdiction of suspected transnational threats within and along the approaches to the continental United States. Transnational threats are those activities conducted by individuals or groups that involve international terrorism, narco-trafficking, weapons of mass destruction, and the delivery systems for such weapons that threaten the national security of the United States. JTF-North serves as a force multiplier to federal law enforcement agencies by enhancing their effectiveness.²⁶

JTF North's new homeland defense support role is articulated in its mission statement:

Detect, monitor and support the interdiction of suspected transnational threats within and along the approaches to CONUS; fuse and disseminate intelligence, contribute to the common operating picture; coordinate support to lead federal agencies; and support security cooperation initiatives in order to secure the homeland and enhance regional security.

The National Guard and Reserves have provided assets and personnel under the control of Joint Task Force North (JTF-North). Since 1989, JTF-North has made significant contributions to homeland security by combating the flow of illegal drugs. JTF-North assets include rotary and fixed wing aircraft equipped with forward-looking infrared radar (FLIR) systems, unmanned aerial vehicles (UAV), ground sensor units, tunnel detection elements, and construction engineer units.²⁷ JTF-North has provided vital assets to the drug activity along the Mexico border but they have stopped short of deploying actual ground troops to protect the border region from potential terrorists. It would appear at first glance that the military has in place the infrastructure along the border to provide a deterrent to potential enemies attempting to cross into the U.S.

As stated in the September, 2001 Quadrennial Defense Review Report, "The highest priority of the U.S. military is to defend the Nation from all enemies. The United States will maintain sufficient military forces to protect the U.S. domestic population, its territory, and its critical defense related infrastructure against attacks emanating from outside the U.S. borders". The Army has historically played a critical role in ensuring the nation's security at home and can expect to be called upon in the future to deter and counter terrorist attacks and respond to other types of domestic emergencies.²⁸ Existing procedures must be enhanced and other mechanisms developed to coordinate DOD involvement to deter terrorist activity.²⁹ The Army and Air National Guard serving under Title 32 is one viable option. The Army and Air National Guard may be best suited for a homeland defense and security missions due to the deep roots in their local communities and because some state adjutants general also serve as both emergency manager and homeland security directors.³⁰ Because of the ability for National Guard personnel to operate under Title 32 and free of posse comitatus restrictions, they are able to perform law enforcement tasks free of the restrictions imposed on federalized active duty units operating under Title 10. The ability to utilize National Guard personnel in civilian law enforcement functions has already been authorized by Congress while performing actions in the war on drugs. This model could easily be expanded beyond the counterdrug arena to include counterterrorism and border security.³¹ Current law authorizes the use of up to 4,000 Guardsman for counterdrug operations including information analysis, ground reconnaissance and surveillance, and aerial observation. However, current funding restrictions only provides for use of 3,000 guardsman nationwide.³² Funding increases to fully utilize guardsman along the border region could potentially enhance the security posture of the region by creating an increased deterrence level. Currently, the Border Patrol has approximately 10,000 agents along the 2000 mile border with Mexico. Unfortunately it is estimated that in order to fully deter

unauthorized immigration and properly enforce the U.S. immigration laws across the U.S.-Mexico more than 16,000 Border Patrol agents would be required.³³

SUMMARY AND RECOMMENDATION

Military support to civilian law enforcement agencies has undergone significant growth in recent years, primarily due to the U.S. war on drugs. The U.S. military has specialized personnel, equipment, facilities, and training, which are of great benefit to civilian law enforcement agencies, and thus the demand for Department of Defense (DOD) support has increased. The challenge that we now face is fighting the war on terrorism all the while ensuring that we are ready and able to protect our citizens and rapidly respond in the event of another terrorist attack on the U.S. homeland. The expansion in the use of federal troops from only supporting the war on drugs to using increased levels of troops for Mexico border security and law enforcement duties should be weighed as a viable option. We are now faced with the realization that the continental United States has been attacked and we remain vulnerable to future asymmetric threats unless we prepare now to counter the threat posed by terrorist organizations. Our ability to respond to attacks on the homeland must be tempered with our ability to protect the homeland in the first place. The ability to protect our citizens must begin with the ability to secure our borders from the very people bent on doing us harm.

This demand to protect our borders with federal troops must be balanced with the limits Congress placed on military support to civilian law enforcement through the Posse Comitatus Act and other laws.³⁴ The Posse Comitatus Act was instituted in an era when the threat to national security was from foreign overseas powers with armies and navies. Fortunately and up until now, the United States has been insulated from outside attack due to our advantageous location in being surrounded by oceans but also in being adjacent to countries in our hemisphere in which we have strong economic ties. Today the threat we face to national security is one that does not come from a nation state but from a lone individual possessing weapons of mass destruction (WMD) intent on inflicting as much damage as possible on our citizens. The events of 9/11 highlighted in extreme fashion the enemy we face today. They will exploit our every weakness and work around our defenses in an effort to destroy our way of life. The U.S. must now be prepared to conduct military operations against asymmetric threats within our borders. We must use every asset at our disposal to prevent, confront, deter and destroy the enemy we now face. There is no way to develop a perfect defense against every possible terrorist attack given the propensity of terrorists to utilize any means available to inflict damage.

The United States must now utilize a new way of thinking about the enemy and develop new ways to combat the threat to the U.S. homeland. Due to the wealth of the United States, the technological edge we possess and the assets at our disposal, bolstering the border area with Mexico with military assets seems, at least in the short term, a prudent if not absolutely necessary action to undertake given the threat we now face

The Posse Comitatus Act is still a viable law in its own right and a safeguard to the American people. The PCA has stood the test of time, with minor modifications, to serve the public. While the period in which the PCA was established was a different time and the architects could not have envisioned the future and imagined the threat we now face, the PCA as currently viewed is not an impediment to securing the southern border with Mexico. PCA exceptions are currently in place that allows discretion on the part of the President in the use of Federal troops in varying circumstances.

Due to the National Guard operating under state control in Title 32 status, they are not subject to the posse comitatus restrictions barring Federal military forces from enforcing civil law. The National Guard's number one priority is the security and defense of the U.S. homeland at home and abroad. To this end, use of the National Guard to provide additional border security should be viewed as a viable and necessary option if we are to protect our populace. Clearly the benefits of gaining complete control of our borders are profound. If we fail to act now to deter aggression and protect our southwest border the consequences could be catastrophic.

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