HON. ROBERT HENRY

CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

A LIFE IN LAW AND PUBLIC SERVICE FROM SHAWNEE, OKLAHOMA, TO THE COURT OF APPEALS AND BEYOND

JUDICIAL PROFILE BY RABINDRANATH RAMANA

n spring 1971, the trustees of the William Randolph Hearst Foundation selected a bookish and inquisitive high school student from Shawnee, Okla., as one of the state's delegates to the U.S. Senate's Youth Program. The program had been created nine years earlier, when the Senate adopted a resolution to bring two talented students from each state to Washington, D.C., for a week of meetings with federal officials and senior members of the national media. Through this in-depth exposure, the Senate sought to fuel and sustain the student delegates' commitment to public service.

For the young Robert Henry, the Hearst Foundation Scholarship was a transformative experience. During his week in Washington, he met Sen. Hubert Humphrey (D-Minn.), Justice Harry Blackmun, and many other public officials. Henry returned to Oklahoma inspired and determined to pursue a career in public service and to emulate accomplished statesmen like Sen. Robert S. Kerr (D-Okla.) and Rep. Carl Albert (D-Okla.), both of whom had ventured beyond their small hometowns to serve their state and their country. By January 2008, when Robert Henry became the chief judge of the U.S. Court of Appeals for the Tenth Circuit, his career in public service was as distinguished as that of many of those he met during his first trip to Washington.

Robert Harlan Henry was born in Shawnee, Okla., in 1953, the middle child of Lloyd and Hazel Henry. The judge's grandfather, Tom Henry, was an educator who had an interest in politics and insisted that his children and grandchildren choose a candidate and work for his or her election. Lloyd Henry served with the 82nd Airborne Division during World War II and fought in the Battle of the Bulge; he was wounded three times and received a Purple Heart. "My father came back from the war a changed person," Judge Henry recalls. "He decided he wanted to become a lawyer. He thought that government had the ability to make things better or make them worse."

Lloyd Henry graduated from the University of Oklahoma College of Law, returned to practice in Shawnee, and then served as county attorney and district judge of Pottawatomie County. Oklahoma's governor, Brad Henry, is Judge Henry's first cousin and remembers that "Robert and I both had the good fortune of having grown up in a loving, close-knit family that deeply valued public service and the idea of giving back to the community. My Uncle Lloyd used to tell us that 'public service is the rent you pay for the space you occupy,' and that notion really stayed with us."



Judge Henry's mother says that, as a child, "he was always so interested in so many things. He was like his father in that way." Family friends remember a boy who was fascinated by both science and politics. One friend describes a 10-year-old Robert "crawling on hands and knees down the sidewalk in front of our school, carefully with great concentration, laying a yardstick end over end, to establish conclusively that his uncle's opponent [in a campaign for the state legislature] had the temerity to place his campaign signs too close to the door of the school."

When Robert Henry was growing up, Shawnee—located about 40 miles east of Oklahoma City—was home to about 25,000 people and had much to offer a curious youngster. Originally settled by the Sac and Fox, Pottawatomi, Kickapoo, and Shawnee Tribes after the Civil War—when the federal government removed them to that location—the town quickly became an agricultural center and a railroad hub. In 1901, at the town's invitation, a group of Benedictine monks arrived and soon began constructing an abbey and a school—St. Gregory's College, which enrolled its first

students in 1915 and offered a liberal arts education to hundreds of students from the area. In 1919, a monk from a nearby abbey moved a small art collection to the college. The collection grew rapidly, and became the Mabee-Gerrer Museum of Art, a place where the young Robert Henry saw artifacts from Ancient Egypt, Mesopotamia, Greece, Rome, and China, as well as European religious art from the Middle Ages. Some years later, the president of St. Gregory's College, Father Mike Roethler, would become Judge Henry's mentor and close friend.

A short distance down the road, the State Baptist Convention founded Oklahoma Baptist University, which opened its doors in 1911. Judge Henry recalls that the two colleges brought a variety of accomplished people into Shawnee. There was also tremendous music at the First Baptist Church, which he attended during his youth and which served as a kind of university chapel. "Every year we did Handel's "Messiah" with the full orchestra," the judge remembers.

Judge Henry was an outstanding student at Shawnee High School, where he was Student Council president and was voted most likely to succeed by his classmates. Governor Henry recalls that, "as a teen, Robert was keenly intelligent and studious. He used those wits in ways one might not typically expect. He was a brilliant table-tennis player, for example, among the best in his age bracket in the country. But his greatest passions were always in the realm of public service. He was fascinated by politics and public policy, even at a young age, and we knew early on to expect great things from him." As Judge Henry recalls, President John F. Kennedy had a lasting impact: "his idealism, his quest for science, his gift for language and love of literature, the Peace Corps, those things just influenced me all my life."

After graduating from high school, Judge Henry enrolled in the College of Arts and Sciences at the University of Oklahoma. He was selected for the University Scholars program, which allowed him to take challenging classes with senior faculty. Dr. Craig Reitz, now a leading oncologist and a fellow of the American College of Physicians, was Judge Henry's roommate. "Robert's tastes and acquaintances in life were eclectic to say the least," Dr. Reitz recalls. "He was and is a wonderful cook, and had a special interest in various types of Oriental food in particular—he loved to cook for anyone and everyone on a moment's notice. I remember Robert at that time as always being respectful to others with a voracious intellectual appetite."

Judge Henry majored in political science, but he took a broad range of courses in the liberal arts. Professor Duane H.D. Roller's course in the history of science had a profound effect on the judge; the course demonstrated the power of ideas, challenging students to think critically about the conditions under which science develops. Dr. Reitz adds, "Little known to the rest of the world, the history of science section at the OU library has one of the most incredible collections west of the Mississippi, if not the Western Hemisphere (and I am not exaggerating). There were graduate courses that University Scholars and honors program students could take as undergraduates. Those of



Judge Henry with Justice Sandra Day O'Connor and Second Circuit Judge John Walker in Prague in 2007 for a meeting of the Central European and Eurasian Law Initiative.

us who took those courses have truly turned the pages of volumes handwritten by Galileo and others." As a testament to the lasting influence of Professor Roller and those courses and books, Judge Henry would later co-found the University of Oklahoma's Academy of the Lynx, which supports the History of Science Department's programs and its library collection.

Judge Henry graduated from college with high honors in 1974 and then enrolled in the University of Oklahoma College of Law. During his last semester, at the age of 23, he decided to run for the seat in the Oklahoma House of Representatives that had been held by his Uncle Charles. Robert Henry had five opponents and discovered that coming from a well-known Shawnee family was both a weakness and a strength. Some voters were critical of his decision to run, saying that "this seat doesn't belong to the Henrys." On the other hand, the support from his family and its many friends was a valuable asset. His grandmother Alma went door-to-door in some of the precincts where her grandson was not doing too well. "I think everyone whom my grandmother taught voted for me. It's pretty hard to say no to a grandmother," Judge Henry recalls.

Judge Henry won the election in a runoff contest, becoming the youngest person in his legislative freshman class—a distinction that was not without its challenges. "Every now and then, one of the old hands would snap his fingers at me and ask me to get him a cup of coffee. Frequently, I would just do that. People could tell I had a sense of humor. That helps a lot, in the Oklahoma legislature in particular."

Judge Henry served in the state House of Representatives from 1976 to 1986, proving so popular with his constituents that he ran unopposed for his last four terms. He chaired the House Judiciary Committee, the Education Committee, and the Appropriations Subcommittee on General Government; championed the development of a venture capital industry in the state; and co-authored the bill that created the Oklahoma School of Science and Mathematics, a two-year residential public high school for academically gifted students. He also advocated reforms to the state's corporation code that would make it more supportive of busi-

ness. He was part of a group of legislators who unofficially named themselves the "Flaming Moderates."

During his time in the state legislature, his proudest accomplishment involved Dr. Angie Debo, an Oklahoma historian, whose classic work *And Still the Waters Run*, first published in 1936, chronicles the systematic deprivation of the lands and resources granted to Oklahoma's "Five Civilized Tribes" by treaty. In the words of another historian, the book "advanced a crushing analysis of the corruption, moral depravity, and criminal activity that underlay white administration and execution of the allotment policy." Ellen Fitzpatrick, *History's Memory: Writing America's Past*, 1880–1980 at 133 (2002). Many of Dr. Debo's conclusions were highly controversial.

Near the end of Judge Henry's legislative career, his colleague Penny Williams from Tulsa persuaded him that the state should commission a portrait of Dr. Debo. He contacted an artist, Charles Banks Wilson, and they drove to Dr. Debo's home in Marshall, Okla., to meet with her. Wilson completed the portrait, which now hangs in the rotunda of the State Capitol in Oklahoma City, and thousands of the area's schoolchildren can learn about Dr. Debo's contributions to Oklahoma's history. Judge Henry explains that she remains one of his heroes: "Rare is the single scholar who can change the world, and, by speaking the truth, she absolutely changed Oklahoma for the better with its Indian people."

In 1986, Judge Henry left the legislature to run for Oklahoma attorney general. The statewide campaign brought him before a wide variety of audiences, and his considerable gifts as a public speaker—one who could discuss policy issues with clarity leavened by humor and witbecame more widely known. Gerald Adams, a friend from Shawnee who worked on the campaign and later became Judge Henry's press officer, recalls him as "a great candidate when it came to speaking on the hustings. He's an extraordinarily talented speaker and had no problem standing up in front of any crowd and making a connection." Robert Butkin, who served as an assistant attorney general and later as state treasurer, remembers Judge Henry's campaign for its civility. At a small-town debate, Butkin noticed that no one was paying attention to Judge Henry's opponent, "except for one nicely dressed, bespectacled,



Robert Henry, while in the Oklahoma Legislature, with Speaker of the U.S. House Carl Albert.

academic-looking sort standing at the side of the stage who was giving [the opponent] his fullest attention with a demeanor of utmost courtesy and respect." After Judge Henry's opponent finished his talk, Robert Butkin recalls, "the emcee asked for the next candidate, Robert Henry, to take the stand, and it turned out that the young man who had listened so attentively was that candidate. Robert's talk was warm, engaging, and focused on the issues. He drew good contrasts between his positions and his opponent's while at the same time showing the utmost respect for his opponent and his points of view. I remember this 23 years later as a great example of Robert's professionalism and civility—traits that were rare then and are even more rare now in our election campaigns."

Judge Henry won that election and began his service as attorney general at the age of 33. In that position, he provided legal counsel to state agencies and employees, represented the interests of Oklahoma's consumers and the state's natural resources, and issued opinions on questions of state law. He would later describe the office as "the greatest advocacy job that anyone can have," and he was re-elected in 1990 without opposition.

Judge Henry's legislative experience proved fruitful during his tenure as attorney general; he worked well with politicians from both parties and obtained substantial increases in funding for the office. He had an extraordinarily productive relationship with the state's Republican governor, Henry Bellmon, and the two of them co-chaired a constitutional revision effort to modernize and shorten Oklahoma's unwieldy constitution. One of the proposals, approved by a 2-1 margin in a statewide vote, established Oklahoma's Ethics Commission, which now promulgates rules of ethical conduct for state officials and campaigns and investigates and prosecutes violations of those rules.

As the state's attorney general, Judge Henry supported legislation that authorized a state multicounty grand jury and a Medicaid fraud unit. The legislation led to the successful prosecution of public corruption cases across the state. He emphasized customer service for state agencies, instigating reforms that permitted the attorney general to enter into contracts with agencies to give them greater access to legal services; the program is still thriving today. Attorney General Henry also championed environmental protection and was named Conservationist of the Year by the Oklahoma Wildlife Federation.

In April 1991, during his second term as Oklahoma's attorney general, Judge Henry announced that he would resign in order to become the ninth dean of the Oklahoma City University School of Law. He was the search committee's first (and unanimous) choice, and a wide range of the university's graduates, faculty, friends, and supporters encouraged him to take the post.

During his years as dean, he secured funding for a wide array of projects, including faculty support, student scholarships, a new building for the law school—the Sarkeys Law Center—and the rehabilitation of the older Gold Star Building. He also oversaw the hiring of excellent new faculty members and forged important relationships between the law school and the bench and bar.

Dean Henry took an active role in the life of both the law school and the university, teaching a course in legislation in the law school, studying Ancient Greek with a professor of religion, and supporting the performing arts on campus. Art LeFrancois, a law professor who served as associate dean, said that "Judge Henry was an unusually effective advocate for the law school both on and off campus. He used his considerable powers of persuasion, diplomacy, and charm to advance the interests, heighten the profile, and strengthen the foundation of the school. He was consumed with his work and did it extraordinarily well."

In 1994, Hon. William J. Holloway Jr., who had served with great distinction on the Court of Appeals for the Tenth Circuit since 1968, took senior status. President Clinton nominated Judge Henry, and after the Senate confirmed him, Judge Henry assumed his duties on the bench in May 1994.

At his investiture ceremony, Judge Henry expressed his appreciation for the process of judicial review: "The excitement that comes," he said, "is the fact that three women and men, and more in en banc cases, three women and men of diverse legal backgrounds and experiences, with talented staffs and clerks and assistants can view the law from different perspectives, within the common framework of the law itself, which is never static." He noted the restraint placed on judges-by the U.S. Constitution ("whose masterful generalities and important amendments have created the finest government of a large populace yet produced"), by law and tradition, by legislatures and law school education in the common law, and "by our friends and especially those friends of ours who are judges at the trial level whom we know and respect." Yet, he concluded, "Judges, like legislators, executives, and citizens all share a responsibility to keep the courts open so that the aggrieved, whether multinational corporations or pro se prisoners, can have their day in court." His own words about the lessons learned from the life of a fellow jurist and friend, Justice Sandra Day O'Connor, aptly describe his own approach to the job: "We must work hard, inform ourselves, and not make up our minds until hearing the whole story."

The hard work speaks for itself. As of this writing, Judge Henry has issued 1,146 decisions. He strives to produce clear and concise opinions that accurately and fairly consider the facts at hand and the applicable law and also can be understood by the litigants and the generalist lawyer. Over the years, Judge Henry has become a connoisseur of good legal writing, studying the subject and taking every opportunity in his talks to lawyers to urge the importance of writing well. Judge Henry's colleagues and clerks can testify to both his appreciation and his affinity for the right word, the well-turned phrase, and the well-formulated argument or holding. In his book *The Redbook: A Manual on Legal Style*, Bryan Garner places Judge Henry in a group of distinguished jurists whose written work should be studied and emulated.

Despite his heavy caseload, Judge Henry has made substantial contributions to the judicial system far beyond the resolution of individual cases. He has chaired the Tenth Circuit's Lawyer's Advisory Committee and History Com-

mittee, organized two of the court's Judicial Conferences (which received glowing reviews), and served on the Committee on Codes of Conduct of the Judicial Conference of the United States. He has delivered lectures—to bar associations, law school gatherings, and academic and judicial conferences as well as to high school students—on a wide variety of subjects, including appellate advocacy, ethical considerations for judges and public officials, the way judges think, initiatives and referenda, international law, Oklahoma history, and tribal sovereignty. He has published articles on many of those subjects, in addition to articles on the Burger Court, the Rehnquist Court, the values of Oliver Wendell Holmes, and the Bible as legal literature. He has also taught law school and college courses on jurisprudence, legislation, and Shakespeare and the law.

In addition, Judge Henry has worked hard to promote the rule of law abroad, working closely with the American Bar Association, the Open World Leadership Center, and the U.S. Agency for International Development, among other organizations. Perhaps most influential in sparking his international work has been Justice Sandra Day O'Connor's unflagging support and tireless energy in the international arena. The two jurists first met at a conference of the College of American Trial Lawyers, where Justice O'Connor heard him speak about judicial independence, and assessed his skill in these words: "with his passion for dialogue and diversity, he was an absolute natural in international relations." At her invitation, he participated in the United States-China Exchange in 2002, a meeting that was arranged by the Supreme People's Court of China, at which participants met with President Jiang Zemin in the Forbidden City. The following year, Justice O'Connor and Judge Henry attended the American Bar Association's Arab Judicial Forum held in Bahrain.

In 2005, the late Chief Justice William H. Rehnquist appointed Judge Henry as chair of the Committee on International Judicial Relations. In that position, Judge Henry worked closely with the committee and his staff from the Article III Division of the Administrative Office to coordinate dozens of judicial delegations from abroad. In addition, he has participated in various colloquia, led several roundtables, and delivered multiple lectures focusing on the rule of law in many countries around the world, including Algieria, Austria, Bulgaria, Canada, the Czech Republic, Egypt, Equatorial Guinea, Hungary, Jordan, Morocco, Qatar, Russia, Ukraine, the United Arab Emirates, and the United Kingdom. In 2007, the American Bar Association appointed Judge Henry to chair its Rule of Law Initiative-Middle East and North Africa Division, and in that capacity he has been involved in highlevel meetings with the ambassador of Egypt. Judge Henry recently participated in a debate at the House of Lords in London focusing on the relationship between terrorism, democracy, and the rule of law.

Given the breadth of his interests and experiences, it is not surprising that the task of "informing ourselves" is also central to Judge Henry's work. When grappling with a case, it is not uncommon for the judge to explore the thoughts of legal scholars on the issues at hand, as befits a former law school dean. "What do the scholars say?" is

a familiar question he directs to his clerks. He also enjoys the give-and-take of oral argument and is known to ask probing questions that range from the details of the trial record to the academic view of the correct legal principles. Judge Stephanie Seymour, who was the court's chief judge when Judge Henry came onto the court, observes that "for Robert, the task at hand is not one he considers in terms of its generalized effect on people, viewed at the safe distance from which a legislator, attorney general, dean or judge might comfortably view the world. Instead, Robert approaches each issue, each project, each case with the same intensity and care as if it affected his own life."

On the practical side, Judge Henry's work as a legislator and as attorney general adds a valuable perspective to his judicial tasks, and his colleagues have come to appreciate those contributions. For example, Judge Michael Murphy describes Judge Henry as "a liberally educated, Renaissance man with vast interests; a lover of music, literature, art, Native American and Oklahoma history, lore, and culture; the owner/developer of a sense of humor challenging that of his hero Will Rogers." Judge Murphy continues, "It is a particular delight to participate with Robert on a panel, en banc, and even administratively. It is with some frequency that Robert's approach to an issue or a case influences my own or causes me to revisit my preliminary views."

Nevertheless, for Judge Henry's case work, the inquiry is necessarily grounded in the law. In a recent speech on appellate advocacy, he reminded the audience of the following:

... we judges, believe it or not, prefer to do what is just (as we see it). But you are likely to get a stern rebuke, particularly from an appellate judge, if you appeal to "justice" standing on its own. Keep in mind, an appeal to justice must be firmly grounded in the law. In an appeal some months ago, a lawyer began his argument to our panel, in a loud voice and with a flourish, thusly: "I have come to this court to demand justice." But the presiding judge thought he had better nip this in the bud and get the lawyer to the real task at hand, and simply said: "Well, you've come to the wrong place then. We do law up here. Let's talk about that."

Hearing the whole story is also an important part of Judge Henry's approach. If a lawyer at oral argument suggests in response to a question that his adversary's position lacks any merit whatsoever, Judge Henry often offers a quick correction. Colleagues and clerks who have been privy to his deliberative process will testify that a change of mind—once or twice or more—is always a possibility. Judge David Ebel observes that. "as a judge, he is fair, thorough, and balanced, giving respect and consideration to both sides of every argument." Judge Paul Kelly agrees: "He is the consummate gentleman and always attempts to address the concerns of his colleagues."

During his years on the bench, Judge Henry has developed close and productive relationships with those colleagues. Shortly before becoming chief judge, he reflected that "[t]he chance for a small-town lawyer from Shawnee,

Oklahoma, to work closely with such talented judges has just been the most amazing educational experiences of my life." Judge Murphy observes that "[o]ne might speculate that a person of such endowment could intimidate those whom he engages. To the contrary: Robert's background and talents contribute significantly to the strength of his bond with colleagues; they neither challenge nor daunt; they enrich." And Judge Kelly adds, "Outside the courtroom Judge Henry is fun to be with. ... He includes everyone and I think that one trait has made life on the Tenth Circuit a unique and enjoyable endeavor."

To that one trait, most would add Judge Henry's keen sense of humor. Those who have heard his speeches and observations will remember amusing stories, clever quips, and witty retorts, often mixing legal, political, and cultural references and adding a little local color. Justice Sandra Day O'Connor recalls hearing Judge Henry speak for the first time and observing that he used humor (along with history, philosophy, and stories) to get his points across. Although his humor frequently occurs in the midst of a more serious discussion, the judge does make time for some pure comic relief. For example, he has publicly debated a federal district judge, Hon. Lee West, on the relative merits of trial and appellate judges—a topic that often veers off into a series of ad hominem (but good-natured) attacks. One example from Judge Henry's comic assault: "In our last debate, to use a charitable description, I routed Judge West. True, a few sniveling sycophants with scheduled settlement conferences before Judge West blandished about his performance. They will lose anyway. And they will learn that, compared to a settlement conference with Judge West, trial by ordeal has its benefits—at least someone wins in trial by ordeal."

Over the years, Judge Henry has become both a mentor and a friend to many law clerks who have worked in his chambers. They have found that he invites discourse, keeps an open door and an open mind, and encourages them to do so as well. He has been generous with his time and thrilled to share his love of Oklahoma—at times, by visiting a favorite restaurant or museum, and at other times, by introducing his clerks to one of his many accomplished friends and colleagues in the judiciary, academia, medicine, and the arts. Ariel Waldman, a University of Chicago Law School graduate who clerked for Judge Henry in 2002–03, recalls attending Judge Henry's Christmas party and meeting not only a chief judge of the Tenth Circuit but also Brad Henry, Oklahoma's governor; Leona Mitchell, an opera star with the Metropolitan Opera Company; and Barry Switzer, former coach of the University of Oklahoma's football team and the Dallas Cowboys.

Greg Gilchrist, who came to Oklahoma City from Columbia Law School to clerk for Judge Henry explains that "Judge Henry's love of learning was inspirational. It was during my clerkship that I decided I too must have an *Oxford English Dictionary* because, well, sometimes you really do need to know how and when a word came to mean what it means." Gilchrist continues, "Perhaps the best thing about clerking for Judge Henry was learning by his example. The judge manages not just to balance his family,

his intellectual pursuits, his profession, and his hobbies—he melds them. This is why clerking for Judge Henry is so fun—where else would you discuss new cases and musical theory over a home-cooked (and judge-cooked) family dinner?"

Judge Henry has also had a rich and rewarding personal life. He is the proud father of 21-year-old Rachel Henry, who is studying dramatic writing at the Tisch School of the Arts at New York University, and 19-year-old Joshua Henry, who studies acting at Oklahoma City University. In 1993, the judge married Dr. Jan Ralls, and their blended family now includes her four children and seven grandchildren. Judge Henry and his wife share a love of gardening, growing native plants at their Oklahoma City home, and staying at their casita in Santa Fe.

A lifelong music lover, Judge Henry enjoys classical works—Chopin is his favorite composer—as well as Broadway tunes and Irish songs. He calls himself "a rusty piano player." "My kids and I like to sing," he adds. Over the years, he has acquired a considerable collection of Native American and Western art. And despite all the briefs, bench memos, and law review articles that cross his desk, he still loves to read publications outside the law. When pressed, he cites the *Iliad* as his favorite book. Shakespeare's *Merchant of Venice* and *Measure for Measure* are also high on his list.

Finally, as many a well-fed friend, colleague, and law clerk can attest, the judge loves to cook. He and Jan throw an annual Christmas party, "The Boar's Head Feast," for about 200 people as well as a party for artist friends in Santa Fe in the summer; both gatherings are widely known for their wonderful food. The judge particularly likes to make ice cream and sauces, Indian curried dishes, pies,

and tarts. Some say that, in the Tenth Circuit, Judge Henry's recipe for bread pudding will endure as long as—or longer than—any of his opinions will.

For the last few years, Judge Henry has returned to the Hearst Foundation program in Washington, D.C., to meet with a new generation of aspiring public servants. When he is there, one suspects, he tells them a few encouraging stories about the high school student from Shawnee who made the long trip from his small-town home almost 40 years ago and went on to achieve so much. If asked by one of his young listeners how such a life is possible, he might invoke the observation of his friend, Professor Art LeFrancois, who believes that "more than anything, Judge Henry is a Platonist, which I've always thought he got from his Bible studies in Shawnee. He believes in the reality of abstract objects and ideas. He thinks that good and bad and truth and falsehood and beauty and unseemliness are real, and that we ignore their reality at our peril." Or the judge might cite another good friend, Judge Seymour, who says, "If I had to use one word to describe Robert Henry, it would be 'passionate.' Robert's passion about people, life, tolerance, justice, and the law, to name a very few of the things Robert is passionate about, has driven him to give the very best of himself to public service." TFL

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