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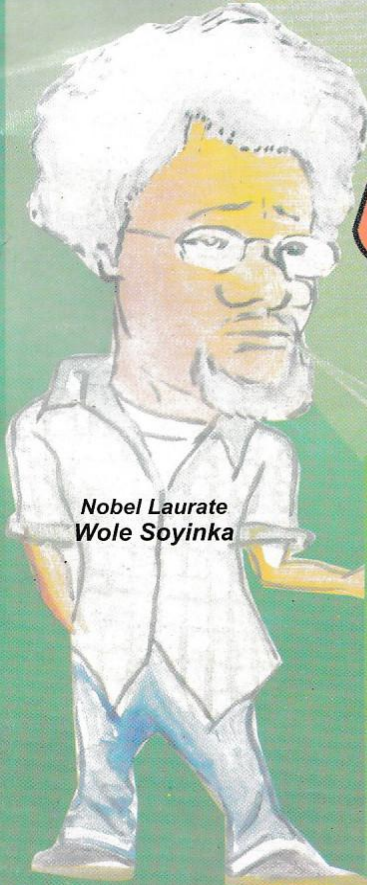
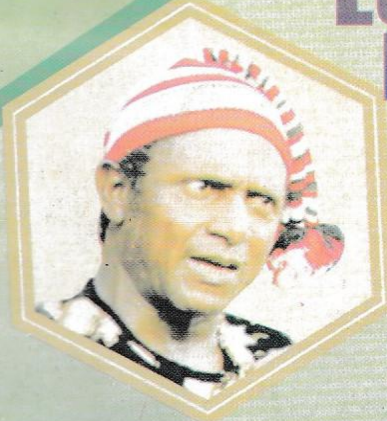
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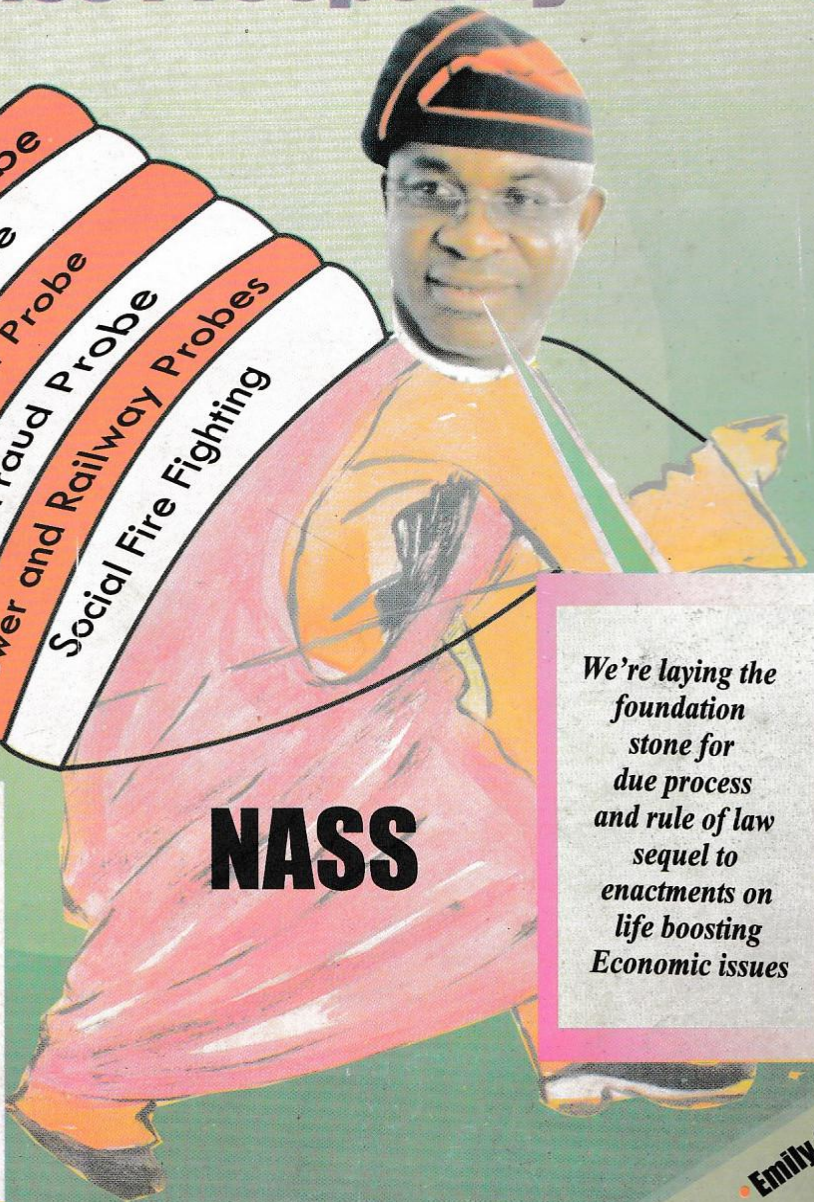
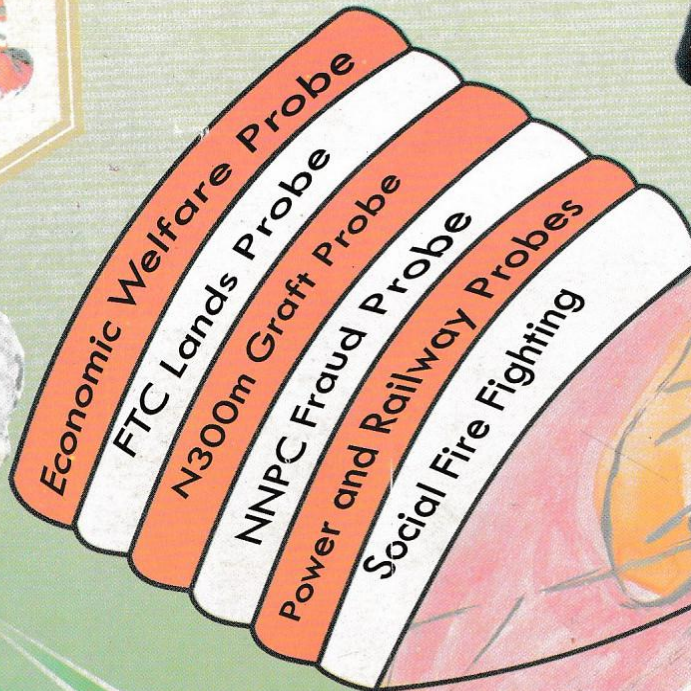
For legislative and Executive impact in democracy

JULY-SEPT. 2008

Precede To Economic Enactments For Mass Prosperity



Nobel Laurate
Wole Soyinka



NASS

*"It is good for the public to know about transactions made in the past and the only way to go about it is to probe into the past."
Vang: 10.5.08*

We're laying the foundation stone for due process and rule of law sequel to enactments on life boosting Economic issues

Emily Chikara

In Democracy Nothing Happens Until It Has First Been Passed Into Law By The Representatives Of The People.

DEMOCRACY CULTURE OF TRANSPARENCY

ELECTORAL REFORM IN NIGERIA: TOO MUCH, TOO SOON?

Being a paper presented by Professor Enefiok Essien, LLB (Hons.) Calabar; LLM (Lagos); PHD (Birmingham); Solicitor & Advocate of the Supreme Court, Notary Public for Nigeria, Dean of the Faculty of Law, University of Uyo, at a Roundtable organized by the University of Lagos Alumni Association Akwa Ibom State Branch, at the Judiciary Guest House, Uyo, Akwa Ibom State, Nigeria, on Sunday 29th June, 2008.



- Prof. Essien

It is generally agreed that electoral reform presents a pressing challenge in all democracies. Electoral reform is indeed a permanent feature of any democracy, all in a bid to attain "more democracy". It is significant that we are talking of *electoral reform*, rather than *electoral change*. Change can be positive or negative, but reform can only be positive. Change, as an aspect of development, is itself a reform. The term "electoral reform" is a broad one. It covers, among other things, improving the responsiveness of electoral processes to public desires and expectations. The main objective of electoral reform is to make politics work a bit better, a bit sooner, by improving the electoral processes, for example, by promoting impartiality, inclusiveness, transparency, voter confidence, integrity and accuracy.

However, in carrying out electoral reforms, care must always be taken to ensure that voters are constantly aware of the law, the rules and the regulations. Though ignorance of the law is no excuse, confusion about the law can be an ill wind that blows the voting public and the electoral system no good. For this reason, electoral reforms must be done very painstakingly, to ensure that another reform is not due too soon. Reforms should not be too random or so frequent as to be confusing, to the voters, and thereby defeat the very purpose of the reform.

Election

The whole idea about electoral reform is about guaranteeing free, fair and violence-free elections. The whole exercise is about election, i.e. a process of choosing by popular votes, a candidate for a political office in a democratic system of government. It is among the most important pillars of democracy. Election is not restricted to what happens on the day of the polls. It entails the process constituting accreditation, voting, collation, recording on all Independent National Electoral Commission (INEC) forms and declaration of results. It may be said that election is both the cause and the result of electoral reforms: Reforms are geared at bettering flawed elections, and flawed elections trigger off reforms. Electoral reforms are premised on the recognised advantages of free and fair elections.

Advantages of free and fair Election

The advantages of free and fair elections are sundry. First, free periodic elections create regular avenues for political competition by aspirants and also create opportunity for voters to evaluate and change leaders. This is a cornerstone of democracy and distinguishes democracy from other forms of government.

Routine elections involve regular cycle of campaigns, voting, and turnover of government by ballots rather

than bullets, thus giving affirmation of democracy as "the peoples government, made for the people, made by the people, and answerable to the people." or, as more popularly defined, "...government of the people, by the people, for the people's."

Competitive elections also offer the citizens with political choice; they offer the citizens political alternatives and allow them to make decisions that express their preferences: they are enabled to weigh the parties, ideas, and candidates, and select among them.

Where legitimacy of a government would have been in doubt because of flawed elections, free and fair elections provide the essential validation for democracy. Seeing that their votes count, the citizens have an increased confidence that they have a stake in politics and the ability to participate directly or indirectly in national life or at the state or local government level, as the case may be.

Where election is free and fair, even the "loser" in a contentious election may come away with a basic regard for democracy if he feels that the contest was fairly fought and won. It is only in that case that he will resign as a good sportsman. If, on the other hand, he feels that the electoral process has been subverted against him, he will definitely not listen to the Supreme Court that "politics in Nigeria should not be a do or die affair."

Free and fair elections can compensate for disappointments in government performance: it gives citizens the periodic opportunities to do away with bad, non-performing or corrupt leaders. This stabilizes the polity and strengthens democracy because, rather than resort to democratic alternatives, which are clearly, undemocratic, the citizens bid their time, waiting for the next election to vent their anger through the ballot box.

Where election is not free and fair these advantages are reversed. Where, there is political violence, rigging, closed political process, electoral fraud, poisoned political climate, antagonism and polarization, -the citizens become politically apathetic. Where election results are pre-ordained, the citizens lose confidence in their political influence because they perceive that their votes no longer count; they perceive that they no longer have their say, let alone their way. Their apathy and cynicism may turn to frustration, which may aggravate to militancy. The only way to close the stable before the horse bolts away is to take another look at the rules of the game by way of electoral reform. This indeed is the background to Nigeria's current attempt at electoral reform.

Some More Background

The 2007 elections were said to have been characterized by various irregularities. These irregularities include violence, thuggery, stolen mandate, improper substitution of candidates by political parties, alleged partiality by INEC which is the Election Management Body (EMB), and outright falsification of results. The consequence was that, there was a mix up between losers and winners. The former naturally felt that they had been robbed of victories. At the

same time, the winners could not really and fully savour their victories, since theirs were tainted and of doubtful legitimacy. Public outcry appeared justified when the judiciary subsequently overturned quite a number of the electoral victories. Further credence came when the European Union Election Observers' Mission: (EUOM) released its report on the April 2007 elections. The ED members, through their leader, Mr. Marx Ven den Berg, said that the elections fell short of Nigerian International and regional standards including Article 25 of the International Covenant on Civil and Political Rights, as well as Articles 3, 5, 6 and 7 of the ECOW AS Protocol on Democracy and Good Governance.

According to the report, "the 2007 process was not credible and in view of the lack of transparency and evidence of fraud, there can be no confidence in the results. Second, urgent and comprehensive reform is required to improve the framework and conduct of future election". The election team further noted that in view of the substantial evidence of fraud in the election, and the lack of equal conditions for political parties as well as candidates, "the Nigerian authorities should immediately begin to take steps to improve the electoral framework and demonstrate sufficient political will to ensure that the next presidential and parliamentary elections, are held in full compliance with international and regional standards".

President Umaru Musa Yar' Adua in his inaugural address to the nation in May 2007, promised to engender electoral reforms such that Nigeria will have a vibrant democracy and in the process assume her rightful place in the comity of nations. In furtherance of this promise,

the President inaugurated an Electoral Reforms Panel, with the specific mandate of reforming the electoral process. Since credible election is central to democracy, and democracy itself is closely linked to good governance and development, everyone is affected and therefore should proffer ideas on areas of electoral reform.

Areas of Electoral Reform

Areas of electoral reform may be categorized into three. The first is legal which involves the amendment of the constitution, the Electoral Act, or related subsidiary regulations and rules of enhance the integrity, relevance, and adequacy of the legal framework. This may include a reform or reorganization of the INEC.

The second is administrative, i.e., the introduction within INEC of new strategies, structures, policies, procedures, and technical invocations that will enable it to implement its legal responsibilities and deliver its services more efficiently and effectively. These could include: policies and practices on issues such as procurement, financial integrity, appointment, introducing new technology for services such as voting, voter registration, or electoral logistics. The third is political, and includes giving more autonomy or independence to INEC or creating a more effective and transparent framework for its funding and accountability. The areas will now be considered in more detail, not necessarily in the tripartite categorization or in any particular order.

1. Intra-party democracy & limitation of party supremacy

Political parties are a creation of section 221 of the 1999 Constitution, which by its section 222 imposes the duty on parties to file copies of their constitution with INEC. The primary method of contest for elective offices is said to be between the political parties. By Section 221 of the

Constitution, it is only a party that canvasses for votes, and therefore it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election. This is so notwithstanding the inclusion of the name and photograph of the candidate on the ballot paper. This may be regarded as an aspect of party supremacy. But this has enabled political parties to use/sponsor popular candidates so as to win the election and thereafter dump/substitute them for the parties' preferred dark horse. Cases abound where candidates who never contested a primary for particular offices suddenly emerge as the party candidate. It is true that Section 34 of the Electoral Act, 2006, has tried to prevent this, but it still happens anyway. The solution to this problem lies in a provision for independent candidacy. This will require an amendment of the Constitution because, as it is now, Section 221 of the 1999 Constitution effectually removes the possibility of independent candidacy in our elections, and places emphasis and responsibility on political parties. Without a political party a candidate cannot contest. It is however a known fact that some people are averse to party politics, or may be frustrated by the party, and therefore cannot contest on party platform. Thomas Jefferson is credited to have said that "if I could not go to heaven but with a party, I would not go there at all". A provision for independent candidacy is therefore strongly advocated. It will be recalled that during the first republic, there was indeed a provision for independent candidates. In this way, the choices before the politicians and indeed the electorate were not confined to the portals of the existing parties. Our democracy will become more robust, more enriched, when there are wider options. Serious thought should be given to independent candidacy with a view to restoring it. This is one big way to ensure that victorious and clearly popular candidates are not short-changed in the name of intra-party democracy and

party supremacy.

Still on the political parties, there is the emergent challenge posed by what is popularly referred to as "consensus" in the parties choice of a candidate to sponsor. You no longer have "elected candidates" rather, you have "consensus candidates". The Electoral Act, 2006, has gone a long way to enthrone intra-party democracy by not leaving any room for a candidate who never contested a primary election to emerge as a party candidate. The requirement of party primary election is to ensure that our democracy is truly reflective of the people's choice even at the party level. Under Section 85 of the Electoral Act, 2006, it is mandatory that political parties inform INEC of the date and time of holding a convention or congress summoned for the purpose of nominating candidates for any of the elective offices. What has emerged recently is the practice where, instead of primary elections, few "party elders" reach a "consensus" on who is the party's sponsored candidate. This practice, apart from thwarting intra-party democracy, promotes internal disharmony, factionalism and encourages ages "god-fatherism", with its many attendant problems. There can be no arguing that just as lack of transparency in party nomination process hinders the emergence of credible candidates, the role of "money-bags" and "godfathers" impacts negatively on the development and functioning of political parties, and ultimately on democracy.

2. Restructuring and True Independence of INEC

The INEC, as an Election Management Body (EMB) should be truly independent in three respects: in

appointment of members, in funding, and in functioning. INEC must not only be independent but must be clearly and manifestly seen to be so. The present constitutional modalities for the appointment of the INEC chairman and members should be reviewed so that INEC is not made captive of the executive arm of government. Both the National Assembly and other stakeholders should be involved in the appointment. The same applies to State INECs *mutatis mutandis*. In other words, as it is done in South Africa and other countries, the electoral, commission should owe its existence and composition to the National Assembly and the various civil society organizations which abound. As to the South African practice, this was re-stated last year at a forum on Public

Interest and Development Law Issues (SPIDEL), a Section of the Nigerian Bar Association, in Abuja. There, speaking on "Electoral and Constitutional Reform for Democracy Building and Development", Pansy Tlakula, the Chairman/Chief Executive Officer of South African Electoral Commission said:

The Electoral Commission of South Africa (Commission) ...consists of five members one of who is a judge. To engender public confidence in the commission, the appointment procedure of members of the commission is transparent. Moreover, the constitution recommends the involvement of civil society in the recommendation process of members of the commission.

The appointment procedure for the members of the Electoral Commission also ensures their impartiality. The names of candidates are solicited from the general public and the selection

process is managed by an open and representative panel consisting of the Chief Justice of the Constitutional Court, who chairs the panel, representatives of the Commission on Gender Equality, the South African Human Rights Commission and the Public Protector. The Panel calls for public nominations, compiles a Short list and conducts public interviews of the short-listed candidates, and thereafter makes its recommendations to a committee of the National Assembly. This committee will in turn make recommendations to the National Assembly, which must approve the recommended candidates by a resolution adopted with the supporting vote of a majority of members... The formal appointment is then made by the President of the country. A member of the commission can only be removed from office by the President if the National Assembly has adopted a resolution calling for that member's removal.

While it cannot be argued that we cannot swallow the South African model hook, live and sinker, it can also not be argued that we can learn very useful and instructive lessons from it. We need not reinvent the wheel, but can study and adopt best practices on election management around the world.

As regards funding, it still remains an aphorism that he who pays the piper dictates the tune. As long as INEC has to go cap in hand to the Executive arm of government for money, so long will it remain a mere captive of the Executive arm. The answer lies in putting the funds of the Commission in a consolidated account, so that the body is insulated from the

"innumerable slings and arrows of outrageous fortune that flesh in heir to." With these two reforms, the Commission would have a real rather than virtual independence, which will in turn enable the Commission function in the way that promotes the conduct of free and fair elections in the country.

3. Curtailment of election rigging and electoral offences

Election rigging has been occurring in this country, but if one is to go by the number of recent judicial reversals of election results, it may be said that the level of rigging in the 2007 elections defies characterization.

I have classed electoral offences together with rigging because in most cases electoral offences lead to rigging. For example, "treating" (giving money to influence voting) and bribery induce rigging. So do "hijacking" of ballot boxes and voting materials, thuggery, alteration/mutilation/falsification of results, over-voting, intimidation and other electoral malpractices. Even abduction, murder and assassination are carried out with the object of influencing election result. Electoral violence in Nigeria has been judicially noticed. In *Buhari V Obasanjo* the Supreme Court likened electoral

violence and blood shed in Nigeria to what Macduff the Thane of Cawdar said when he saw the bloodied murdered King Duncan in William Shakespeare's *Macbeth*. The court decried the "nation-wide spread of violence, intimidation and other acts of terrorization as well as other barefaced acts that literally chill the bones."

While rigging is accentuated by the desire by politicians to win at all cost, electoral offences derive from the thinking that the end justifies the means. This has aggravated the unwillingness of politicians to play by the rules of the game, and has reduced electoral victory to, a matter of who rigs more. This has resulted in competitive rigging. Electoral Offences as provided for in Part VIII of the Electoral Act 2006 are an admixture of both rigging and offences, and they carry the penalty of fine or imprisonment or both. We recommend that additionally, anybody found liable should be disqualified for life from contesting for any elective office.

4. Police and other Security Agents

The involvement of the police and other security agents also has a bearing on election rigging and electoral offences. Security agents are normally drafted in to maintain law and order, and to ensure free and fair election. Rather than remain impartial security men, security agents have been known to take sides and exacerbate crisis and voters disenfranchisement. As a deeply troubled Supreme Court noted:

That in this day and age in this country that has been independent for 45 years we can still witness horrendous acts by security officers who ought to dutifully ensure peace and tranquility in the election process suddenly turning themselves into agents of destruction, and introduced mayhem to what ordinarily would have been a civilized way of exercising franchise by the people who are sovereign, is regrettable.

The Supreme Court deprecated the "nefarious activities of thugs and ...security officers and party men". Police action may be attributable to lack of

understanding of the philosophy and ethics behind election in a democratic state and lack of understanding of the dynamics of election processes. Security agents should be properly tutored that in the exercise of their duty to maintain law and order in election areas, their allegiance is to the Constitution. Security men should have a series of workshops to learn to practice what Police in developed nations do. Police men who engage in rigging or electoral offences deserve higher punishment in view of their position, duty and public expectation.

5. Pendency of election petitions

Right now there is no time limit as to how long election petitions should last. The Electoral Act 2006, by Section 141, stipulates 30 days within which to present an election petition. The 30 days is from the date the result of the election is declared. To ensure a quick determination of petitions, Section 148 of the Electoral Act 2006 provides for accelerated hearing. The Act should go further to stipulate how long a petition should last. Right now it is open-ended, with the consequence that quite often, the presumed winner would have spent two-thirds or more of the term before the deemed loser wins at the tribunal. Such judicial victory can only be pyrrhic, and makes nonsense of the democratic process. An early line should be drawn between authentic winners and losers. *Obi V. Ngige* is a typical case in point. As the Supreme Court warned in *Buhari V. Obasanjo*, with the way our present law is couched, the incumbent would have long finished and left his office and even if the petitioner finally wins, it will be an empty victory bereft of any substance. We have to reform our Electoral Act to make trials very short, setting an upper time limit, otherwise we risk having the

present scenario coming up all the time. This would of course necessitate an amendment of the Constitution.

6. Number of Political Parties

The argument against proliferation of political parties is that they may degenerate into tribal or ethnic groupings, whereas if the parties are few (say, two or three) the national character will be reflected and preserved. Both arguments are correct. But against this must be balanced the freedom of association which is guaranteed by the constitution. I think the wheat and the chaff should be allowed to grow together, and at the end of the day, water will find its level. Interestingly, the 2006 Electoral Act does not limit the number of political parties that may be registered. Section 78 (I) provides clearly that "any political association which complies with the provisions of the Constitution and this Act for the purposes of registration shall be registered as a political party..." This all-inclusive stand should be maintained. This will also prevent the Electoral Commission refusing the registration of a party on some extraneous grounds.

Conclusion

The areas we have suggested for reform are not in anyway exhaustive. I am sure more will be added at this roundtable. However, just in case a summary is necessary, the areas we have touched on for reform are:

Curtailement of party supremacy, provision for independent candidacy, a check on consensus candidacy, advocacy for independence of INEC as regards appointment, funding and functioning; more serious punishment for election rigging and electoral offences; enlightenment for

security personal who are to man election duties and more punishment for breach. A recommendation has also been made for putting a cap on duration of election petitions, and lastly, on number of political parties that should be allowed.

Considering the relative short period that Nigeria has had democratic government, it can be said that Nigeria has had quite a number of electoral laws, starting from the Nigeria Electoral (Transitional Provisions) Act 1961 which was enacted on attainment of independence in 1960. Discounting the periods of military rule, other electoral laws include: Electoral (Amendment) Act 1964, Electoral Decree 1977 (amended in 1978 and 1979), Electoral Act 1982 (Cap. 105 LFN 1990), Electoral Act 2001, Electoral Act 2002, and currently, Electoral Act 2006. The laws have been many, and the changes (reforms) have been rapid, but it is arguable that it reflects the rapidity of changes in the Nigerian polity. Electoral laws must be both reactive and proactive, and this necessitates periodic reforms. This leads me to the conclusion that the electoral reforms in Nigeria at this time, can neither be too much nor too soon. Rather, it is timely.

Thank you.

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