RECESS APPOINTMENTS

Brief by Stuart E. Schiffer (additional counsel listed in brief) before the U.S. District Court for the District of Columbia

June 21, 1993

Civil Action 93-0032-LFO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,
Plaintiffs,

v.

WILLIAM J. CLINTON, et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT II

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[*Editors' note*: The table of contents and some superfluous front matter have been omitted.]

[*1] INTRODUCTION

This case concerns the validity of the January 8, 1993 recess appointment of Thomas Ludlow Ashley to be a Governor of the United States Postal Service.

The Recess Appointments Clause to the Constitution grants to the President "Power to fill up all Vacancies that may happen during the Recess of the Senate . . . ." U.S. CONST., art. II, § 2, cl. 3. There are thus three elements that must exist to trigger the President's recess appointment authority: there must be (1) a "Vacancy" which (2) "happens" during (3) a "Recess of the Senate." All three elements are present in this case.

First, the position to which Governor Ashley was appointed was vacant: although Governor Ashley's predecessor, Crocker Nevin, was authorized to continue in office temporarily pursuant to the holdover provision of the Postal Reorganization Act, 39 U.S.C. § 202(b), his term had expired on December 8, 1992. See Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979). Second, the vacancy existed and was filled during the Senate's recess from [*2] January 7 to January 20, 1993. Third, the January 1993 recess was a "Recess" within the meaning of the Recess Appointments Clause. The Senate had plainly adjourned; there was no duty for its members to attend as a body, and the Senate had no ability during that period to act on presidential nominations. The Constitution does not by its terms limit the recess appointment power to recesses between sessions of Congress or impose any lower limit on the length of a recess to which the Recess Appointments Clause applies. Indeed, as shown below, many Presidents have made recess appointments during intrasession recesses and recesses of comparable length to the one at issue in this case.

Finally, the fact that the Postal Reorganization Act permitted Mr. Nevin to continue in office until his successor had "qualified" does not pose a bar to Governor Ashley's appointment. There is nothing in the Act which suggests that an appointee does not qualify within its terms by a recess appointment so long as the Senate is not in session, and this Court may not presume that Congress intended

to restrict the President's recess appointment powers without a more explicit indication.

In sum, the President validly exercised his constitutional authority to fill vacancies that happen during Senate recesses and Mr. Nevin's holdover status did not restrict the President's recess appointment power. Accordingly, summary judgment should be granted for defendants.

[*3] STATEMENT OF FACTS

1. This case originally began as a suit to enjoin the President from removing certain members of the Postal Service Board of Governors. See Complaint, Count I. After Governor Ashley's recess appointment, the Complaint was amended to restate Count I and to include a challenge to the recess appointment. See Amended Complaint, Counts I and II. The parties have reached an agreement by which Count I may be resolved. Accordingly, only Count II is addressed by this motion.

2. On August 15, 1986, Crocker Nevin was appointed a Governor of the United States Postal Service for a term that expired on December 8, 1992. Amended Complaint ¶ 6. On January 8, 1993, Mr. Nevin was serving as Governor pursuant to section 202(b) of Act, which provides that "[a] Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year." 39 U.S.C. § 202(b). Id.

3. On January 5, 1993, Senator Mitchell introduced a "concurrent resolution (S. Con Res. 3) providing for a recess . . . [which] "[R]esolved that when the Senate recesses or adjourns on Wednesday, January 6, or Thursday January 7, 1993 . . ., it stand recessed or adjourned until 3:00 p.m. on Wednesday, January 20, 1993 . . . ." 139 Cong. Rec. S11 (daily ed. Jan. 5, 1993). On January 7, 1993, Senator Dole moved that "the Senate stand in recess as provided under Senate Concurrent Resolution 3, until 3 p.m., Wednesday, January 20, 1993. The [*4] motion was agreed to, and the Senate, at 8:10 p.m. recessed . . . ." 139 Cong. Rec. S53 (daily ed. January 7, 1993).

4. On January 8, 1993, former President Bush appointed Thom-

as Ludlow Ashley to the Postal Service Board of Governors. 29 Wkly Comp. Pres. Doc. 29 (1993).

ARGUMENT

[*Editors' note*: Parts I and II of the Argument have been omitted.]

[*7] III. THE SENATE'S RECESS FROM JANUARY 7 TO JANUARY 20, 1993 TRIGGERED THE PRESIDENT'S RECESS APPOINTMENT POWER

A. The Ordinary Meaning Of The Term "Recess" Establishes That The Senate Was In Recess On January 8, 1993

The recess appointment power, by the terms of the clause, must be exercised during a "Recess of the Senate." That phrase should be interpreted according to its ordinary meaning, unless the Constitution clearly prescribes otherwise. United States v. Sprague, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their ordinary meaning as distinguished from technical meaning. Where the intention is clear there is no room for construction and no excuse for interpolation or addition."). Webster's Dictionary, published in 1828, defines "recess" as, among other things, a "Remission or suspension of business or [*8] procedure; as, the house of representative has a recess of half an hour." II N. Webster, An American Dictionary of the English language 51 (1828). There is no dispute that there was a break in the Senate's session between January 7 and January 20, 1993, during which the business of the Senate as a body was suspended. Hence, the Senate was in "recess" on January 8, 1993, as the meaning of that term is ordinarily understood.

B. The Senate Was In "Recess" On January 8, 1993, Under The Senate's General Definition Of The Term

The Senate also was in recess as that term is defined by the Senate itself. The term "recess" as used in the Recess Appointments

Clause is defined in a Senate Judiciary Committee report issued in 1905. The report states that the word "recess is one of ordinary, not technical signification and it is evidently used in the constitutional provision in its common and popular sense." The committee concluded that "recess" refers to "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions . . .'" id. at 24 (quoting S. Rep. No. 4389, 58th Cong., 3d Sess. (1905) (emphasis in original).

Thus, under the Senate's definition of the term "recess," the President plainly was authorized to exercise his recess appointment authority to appoint Governor Ashley. There can be no dispute that the Senate was not sitting in regular or extraordinary session for any purpose on January 8, 1993, when Mr. Ashley was appointed Governor. [*9]

C. The Senate Characterized Its January 1993 Break In Session As A Recess

On January 5, 1993, the Senate considered a concurrent resolution "PROVIDING FOR A RECESS OR ADJOURNMENT OF THE SENATE AND THE HOUSE" 131 Cong. Rec S11. (daily ed. Jan. 5, 1993). It was introduced by Senator Mitchell as "A concurrent resolution (S. Con Res. 3) providing for a recess or adjournment of the Senate from January 6 or 7, 1993 to January 20, 1993 . . . ." Id. (emphasis added). Moreover, the concurrent resolution itself "Resolved that when the Senate recesses or adjourns on Wednesday, January 6, or Thursday January 7, 1993 . . ., it stand recessed or adjourned until 3:00 p.m. on Wednesday, January 20, 1993 . . . ." Id. (emphasis added). On January 7, 1993, Senator Dole moved that "the Senate stand in recess as provided under Senate Concurrent Resolution 3, until 3 p.m., Wednesday, January 20, 1993. The motion was agreed to, and the Senate, at 8:10 p.m., recessed until Wednesday, January 20, 1993, at 3:00 p.m." 131 Cong. Rec. S53 (daily ed. Jan. 7, 1993) (added emphasis).

Accordingly, that the Senate was in recess on January 8, 1993, is not subject to dispute.

D. The Term "Recess" Is Not Limited To Intersession Recesses Under The Recess Appointments Clause

It might be argued that the use of the term "the Recess of the Senate" in the Recess Appointments Clause limits the President's recess appointment powers to the recess of the Senate between the two sessions of Congress, and not within a session of Congress, as here. But the Constitution does not impose a single [*10] "Recess" on the Senate. On the contrary, there is no limit on the number of sessions that a Congress may have. The first Congress, for example, held a third session from Dec. 6, 1790 to Mar. 3, 1791, and the 67th Congress held a fourth session from Dec. 4, 1922 to Mar. 3, 1923. Congressional Quarterly's Guide to Congress (4th ed.), at 113-A and 116-A. Nor is there is any evidence that the Framers intended the use of the word "the" to have any substantive effect on the scope of the clause.

Moreover, there would be grave practical objections to an interpretation limiting the recess appointment powers to intersession recesses. In the first place, such an interpretation would interfere with the "substantial purpose" animating the Clause, which was to "keep * * * offices filled." 1 Op. Att'y Gen. 632, 633 (1823). The Senate is equally unable to act on Presidential nominations when it is in recess between sessions of Congress, or within a single session. To permit recess appointments only in one instance but not the other would mean that vacancies would necessarily remain unfilled, contrary to the Framers' intent. Indeed, it would leave the President's recess appointment powers at the mercy of the Senate's schedule; and to the extent that the Senate, as in the modern era, decides to rely more heavily on intrasession recesses rather than recesses between sessions, the power to fill offices as provided by the Constitution would be diminished. [*11]

1. Attorneys General Opinions

In 1921, the Attorney General was asked to determine whether the President had the power to make appointments during an intrasession recess of the Senate lasting from August 24 to September 21, 1921. 33 Op. Att'y Gen. 20 (1921). The opinion concluded

that there is no constitutional distinction between an intersession recess and an adjournment during a session, and that a "recess" for purposes of the Clause need only be a practical break in the Senate's session such that its advice and consent to the appointment cannot be obtained. Id. at 21.[4]

In reaching this conclusion, the Attorney General was persuaded by a long line of Attorneys General opinions interpreting the recess appointment power broadly. In 1823, for example, the Attorney General had addressed the question of whether the President could fill a vacancy that arose when the Senate was in session. He opined that:

> the substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the [*12] Constitution will be sacrificed to a dubious construction of its letter.

1 Op. Att'y Gen. 632, 633 (1823). On the same question, in 1866, the Attorney General stated:

> the true theory of the Constitution [is] that as to the Executive power, it is always to be in action, or in capacity for action; and that to meet this necessity, there is a provision against a vacancy in the chief Executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone.

12 Op. Att'y Gen 32, 35 (1866).

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[4] The opinion expressed doubts about whether the power could be exercised during adjournments lasting "5 or even 10 days" but fails to give the analysis or authority for that statement. As noted above, nothing in the terms or legislative history of the clause suggests that there is any bottom limit for the length of a recess before the power can properly be exercised. In any event, the Attorney General further stated that the question did not lend itself to an absolute limit, and that it was up to the President to exercise his discretion in the matter. Id.; see also 3 Op. Off. Legal Counsel at 315.

The President's authority to make recess appointments during intrasession recesses has been reaffirmed on numerous occasions by the Department of Justice,[5] and by the opinion of the Comptroller General. See 28 Comp. Gen. 30, 34-36 (1948).[6] "While opinions of the Attorney General of course are not binding [on the courts], they are entitled to some deference, especially where judicial decisions construing a statute are lacking." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 n.6 (D.C. Cir. 1984) (concurring opinion of Judge Edwards). [*13]

2. Past Presidential Practice

There is also a long-standing practice of making recess appointments during intrasession recesses. For example, intrasession judicial recess appointments include Samuel Blatchford (S.D.N.Y.), appointed in the 1867 intrasession recess; Roy Harper (D. Mo.), Edward A. Tamm (D.D.C.), Samuel H. Kaufman (S.D.N.Y.) and Paul P. Rao (Customs Ct.), appointed during an intrasession in 1948; and William M. Byrne (S.D. Ca.), Oliver J. Carter (N.D. Ca.) and Walter M. Bastian (D.D.C.), appointed during an intrasession recess in 1950. Exhibit 3, p. 1.[7]

Intrasession recess appointments to regulatory agencies have included: John Esch, appointed to the Interstate Commerce Commission in 1928; John H. Fahey, J. Alston Adams, and Nathaniel Dyke,

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[5] See, e.g., 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979); 41 Op. Att'y Gen. 463, 468 (1961). This view also is supported by the court's opinion in Gould v. United States, 19 Ct. Cl. 593, 595 (1867) (service during intrasession recess appointment included in calculation of pay).

[6] The Comptroller General agrees that recess appointments are permissible when the Senate is recessed long enough so as to be unavailable as a practical matter. Id.

[7] The press of time has prevented defendants from obtaining a complete list of recess appointments. Most of the examples referenced in this memorandum were derived from a alphabetical listing of judicial recess appointments up to 1982, filed in Woodley v. United States, 726 F.2d 1328 (9th Cir. 1983), rev'd, 751 F.2d 1008 (1985) (en banc), and a list of recess appointments filed in Bowers v. Moffett, No. 82-0195 (D.D.C. 1982). The Woodley and Bowers lists are attached hereto as Exhibits 1 and 2, respectively. For the Court's convenience, all intrasession recess appointments from these lists, and others that defendants were able to uncover, have been collected into a single list attached as Exhibit 3.

Jr. appointed to the Federal Home Loan Bank Board during a 1947 intrasession recess; Byron D. Woodside and Philip A. Loomis, Jr. to the SEC in 1960 and 1971, respectively. See Exhibit 3, p. 6.

President Nixon made at least 6 recess appointments during a 1970 intrasession recess and President Carter made at least 17 [*14] intrasession recess appointments. President Reagan made at least 22 such appointments in 1981. See Exhibit 3, pp. 2-5.

Evidence of the manner in which the power has been exercised in practice is traditionally accorded considerable weight by the Supreme Court in interpreting the Constitution. See, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915) (acknowledging the rule that "in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself – even when the validity of the practice is the subject of the investigation"); Accord Udall. v. Tallman, 380 U.S. 1, 17 (1965). See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J. concurring). The above examples establish intrasession recess appointments as a long and consistent presidential practice.

E. There Is No Lower Time Limit That A Recess Must Meet To Trigger The Recess Appointment Power

The language of the Recess Appointments Clause does not require that the Recess of the Senate last for any minimum length of time. Hence, nothing in the Clause prevented the President from making recess appointments during the 13 day recess in January 1993.

There also is a long-standing practice of making recess appointments during recesses of comparable durations. President Coolidge made a recess appointment during a 14-day recess;[8] [*15] President Franklin Roosevelt made recess appointments during a recess lasting

[8] On January 3, 1928, John Esch was appointed to the ICC during the recess lasting from December 21, 1927 until Jan. 4, 1928. See Exhibit 2, p. 6; Congressional Quarterly's Guide to Congress (4th ed.) [hereinafter cited as "Cong. Quarterly"), at 116-A (listing the sessions of Congress from 1789 to 1991). For the Court's convenience, defendants have attached the relevant pages of the Cong. Quarterly at Exhibit 4.

15 days;[9] President Truman made a recess appointment during a 4 day recess,[10] and an 18 day recess.[11] President Johnson recess appointed Judge Spottswood Robinson during an 8 day recess.[12]

Moreover, President Nixon appointed the first Board of Governors for the Postal Service under the Postal Reorganization Act during a 19 day recess from January 2, 1971 to January 21, 1971.[13] President Carter made seven recess appointment during a 13 day recess.[14] Six of these appointments were made on the morning of the day the Senate reconvened.

[*16] More recently, in a situation directly analogous to the present case, President Reagan made two recess appointments during the 14-day recess between the convening of Congress and the President's inauguration in 1985.[15] President Bush had previously made a recess appointment during an 18-day recess in January, 1992.[16] The January 1992 recess was approved by OLC. See 16 OLC Op. (Prelim. Print) 15 (1992).

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[9] Paul A. Porter was appointed to the FCC on December 20, 1944, during the recess from December 19, 1944 to January 3, 1945. See Exhibit 3, p. 6; Cong. Quarterly, p. 117-A.

[10] On January 4, 1949, President Truman appointed Oswald Ryan to the Civil Aeronautics Board during the recess from December 31, 1948 to January 3, 1949. See Exhibit 2, p. 23; Cong. Quarterly at p. 117-A.

[11] John Alston Adams and William K. Divers were appointed to the Federal Home Loan Bank Board on December 20, 1947 during a recess from December 19, 1947 to January 6, 1948. Exhibit 2, p. 26; Cong. Quarterly, p. 117-A.

[12] See Exhibit 1. This recess lasted from December 30, 1963 until January 7, 1964. Cong. Quarterly, p. 117-A.

[13] See Exhibit 2, p. 7; Cong. Quarterly, p. 118-A.

[14] See Exhibit 2, p. 12; Cong. Quarterly, p. 119-A.

[15] During the recess from January 7, 1985 to January 21, 1985, President Reagan appointed John A. Bohn, Jr., First Vice President of the Export-Import Bank, and Richard H. Hughes Director, Export-Import Bank. See 21 Wkly Comp. Pres. Doc. 85 (1985); 131 Cong. Rec. 586 (1985).

[16] On January 15, 1992, President Bush appointed Daniel Evans Chairperson, and Marilyn R. Seymann, Lawrence V. Costiglio, and William C. Perkins, members of the Federal Housing Finance Board; and Albert V. Casey, Chief Executive Officer of the Resolution Trust Corp., during a recess from January 3, 1992 to January 21, 1992. 28 Wkly. Comp. Pres. Doc. 129-30 (January 15, 1992); 138 Cong. Rec. S1 (daily ed. Jan. 3, 1992).

The length of a recess is not a ground upon which the Court may distinguish between and among recesses. The Constitution provides no basis for a court to conclude, for example, that a 30 day recess is sufficiently long or that a 5 day recess is too short. Moreover, any lower limit would have to be applied to intersession and intrasession recesses alike because there is no basis for distinguishing between the two. Everyone appears to agree however that intersession recesses are subject to no restrictions. Indeed, there is a long standing presidential practice of making recess appointments within days or even hours of the end of an intersession recess. Yet, this situation is [*17] functionally indistinguishable from making a recess appointment at anytime during a short recess.

In 1789, for example, George Washington appointed Judge William Paca to the bench 13 days before the Senate reconvened from an intersession recess lasting almost 100 days and in 1819, Judge Roger Skinner was appointed 12 days before the end of an intersession recess.[17] This is functionally equivalent to the situation we have here, where the recess appointment was made on the first full day of a 13 day recess. More recently, Spottswood Robinson and A. Leon Higginbotham were appointed 1 day before the end of an intersession recess in 1964 (Exhibit 1) and President Nixon appointed Donald T. Regan and others to the Securities Investor Protection Corp., on the day the intersession recess ended in 1971. Exhibit 2 at p. 7. These are just a few of the many examples that show that this practice has been consistently repeated.

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[17] See alphabetical list of judicial recess appointments attached at Exhibit 1. Evidence that this practice occurred during the time when the Framers were still active in government establishes that the practice is consistent with their understanding of how the Constitution should work. See, e.g., Marsh v. Chambers, 463 U.S. 783, 786-92 (1983). See also Mistretta v. United States, 109 S. Ct. 647, 669-70 (1989); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936); J.W. Hampton. Jr. & Co. v. United States, 276 U.S. 394, 412 (1928). In the context of the Recess Appointments Clause itself, the Ninth Circuit relied upon the historical practice of Presidents making judicial recess appointments, to uphold President Carter's recess appointment of a district judge against a challenge based on Article III of the Constitution. United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc).

These recess appointments also refute the proposition that the President's power to act during a short recess is limited to [*18] exceptional or emergency situations. As the Court recognized in Staebler, "recess appointments traditionally have not been made only in exceptional circumstances, but whenever Congress was not in session." 464 F. Supp at 597. Moreover, "[t]here is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment to be used only in cases of extreme necessity." Id. This construction of the clause is borne out by the historical practice regarding the recess appointment power since its first use.

F. No Further Limitations On The Recess Of The Senate Constitutionally May Be Implied

As demonstrated above, Congress plainly was in recess in January 1993, pursuant to the ordinary meaning of the term. There is no basis to provide that the recess must meet any additional requirements. Indeed, the Court in Staebler refused to impose additional restrictions on the language of the Recess Appointments Clause. Staebler v. Carter, 464 F. Supp. at 597. After reviewing the language of the Recess Appointments Clause and its sparse legislative history, the Court opined:

> [T]wo limitations on the applicability of the Recess Appointments Clause are part of the Clause itself that it may be invoked only when the Senate is in recess, and that the President's recess commissions 'shall expire at the End of (the next congressional) Session. * * * There is no justification for implying additional restrictions [on the recess appointment power] not supported by the constitutional language.'

Staebler, 464 F. Supp. at 597.

[*19] The only constitutional restriction upon the Senate's ability to adjourn its sessions is that adjournments for more than three days require the consent of the House of Representatives. U.S. CONST., art. I, § 5, cl. 4.[18] Apart from this 3 day limitation, the Constitution

[18] It could be argued that the proscription against Senate adjournments for more

provides no basis upon which the Court could approve certain recesses and disapprove others.

G. There Is No Principled Basis Upon Which A Line Might Be Drawn To Invalidate 13 Day Recesses

The courts have no authority to add restrictions to the Constitution. See Nixon v. United States, __ U.S. __, 113 S. Ct. 732, 736 (1993); Powell v. McCormick, 395 U.S. 486, 550 (1969). But even if this legal bar did not exist, it would be very difficult indeed to determine how or where a line might be drawn to distinguish between recesses. As discussed above, recesses cannot be approved or disapproved based upon their length. And, as the Court in Staebler recognized, nothing confines the exercise of the recess appointment power to emergency or exceptional situations. Furthermore, anything less than a bright line would encourage litigation over the validity of the appointment and could force an agency to delay important decisions until the litigation is resolved. It is difficult, [*20] however, to conceive how the court could determine where a line would be drawn. See Nixon, 113 S. Ct. at 736 (word used in Impeachment Clause "lacks sufficient precision to afford any judicially manageable standard of review").

The clause does impose limits and these certainly can be enforced by this Court. As shown above, however, those limits are only that a "vacancy" "happen" during the "recess" of the Senate, all of which are met in this case. Any further refinement of the recess power therefore should proceed only through constitutional agreements between the Legislative and Executive Branches of government.

[*Editors' note*: Part IV of the Argument has been omitted.]

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than three days without House consent manifests the Framer's intent to attach lesser importance to one, two, or three day recesses. However, the Court need not reach that issue. Even assuming arguendo that the recess appointment could not be exercised during adjournments of less than three days, that fact would not invalidate Governor Ashley's appointment.

[*25] CONCLUSION

As demonstrated above, all of the prerequisites for the exercise of the recess appointment power were in existence when former President Bush recess appointed Mr. Ashley to the Postal Service Board of Governors and the Act, as properly construed, did not prohibit the President from issuing the recess appointment. Accordingly, summary judgment should be granted for defendants.

Respectfully Submitted,

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