

# **“Rules of Disengagement: The Politics and Honor of Military Dissent”**

Reviewing Marjorie Cohn and Kathleen Gilberd's book

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Marjorie Cohn is a Distinguished Law Professor at Thomas Jefferson School of Law in San Diego where she's taught since 1991 and is the current President of the National Lawyers Guild. She's also been a criminal defense attorney at the trial and appellate levels, is an author, and writes many articles for professional journals, other publications, and numerous popular web sites.

Her record of achievements, distinctions, and awards are many and varied – for her teaching, writing, and her work as a lawyer and activist for peace, social and economic justice, and respect for the rule of law. Cohn's previous books include “Cameras in the Courtroom: Television and the Pursuit of Justice” and “Cowboy Republic: Six Ways the Bush Gang Has Defied the Law.”

Her newest book just out, co-authored with Kathleen Gilberd (a recognized expert on military administrative law), is titled “Rules of Disengagement: The Politics and Honor of Military Dissent.” It explores why US military personnel disobey orders and refuse to participate in two illegal wars in Iraq and Afghanistan. It also explains that US and international law obligate them to do so.

Cohn and Gilberd write:

“Rules of engagement limit forms of combat, levels of force, and legitimate enemy targets, defining what is legal in warfare and what is not. (They're also) defined by an established body of international (and US) law” that leave no ambiguity.

Nonetheless, in past and current US wars, virtually no “Rules” whatever are followed. Soldiers are trained to fire at “anything that moves,” place no value on enemy lives, and often treat civilians no differently from combatants. It results in massive civilian casualties, dismissively called “collateral damage.” It also gets growing numbers in the ranks to resist – to challenge so-called “Rules” they believe are illegal and immoral.

“Rules of Disengagement” “discuss(es) the laws and regulations governing military dissent and resistance – the legal rules of disengagement (and offers) practical guidelines (that include) political protest to requesting discharge from the service.”

Today, growing Iraq and Afghanistan casualty counts are enormous as well as the disturbing toll on the GIs involved – including long and repeated deployments, often leaving permanent debilitating effects, physical and/or psychological.

US soldiers have a right and duty to dissent and resist, and today it's easier than ever through all the modern ways of communicating, including blogging, sharing stories, photos, videos, and "developing new ways to speak out to fellow soldiers and civilians online and in the media."

"Rules of Disengagement" goes into courtrooms where military personnel "have spoken out, arguing that (today's) wars are illegal (and immoral) under international (and US) law." It's a "practical guide" providing "specific discussion(s) of applicable regulations and laws" for readers "to form their own conclusions and consider their own options." Above all, it's a way for honorable young men and women to dissent, resist, and disengage from two illegal, immoral wars, in hopes many others will follow their example.

## Resisting Illegal Wars

Every US war since WW II has been illegal. Article 51 of the UN Charter only permits the "right of individual or collective self-defense if an armed attack occurs against a Member....until the Security Council has taken measures to maintain international peace and security."

In addition, Article I, Section 8, Clause 11 (the war powers clause) authorizes only both houses of Congress, not the president, to declare war. Nonetheless, that process was followed only five times in our history and last used on December 8, 1941 after Japan attacked Pearl Harbor.

Yet many judges won't apply "the law to the wars, and then to service members' refusal to take part" in them. They say it's "not their role, not a matter under their jurisdiction, or not 'relevant.'" In case studies the authors use, court-martial judges, juries, and the public increasingly accept these arguments but also recognize that "men and women of conscience have put their futures on the line for their opinions and actions against illegal wars (and) orders."

It hasn't shown up in court-martial decisions except in more lenient sentences, indicating growing respect for those brave enough to resist on matters of conscience and their opinions regarding the law. Pablo Paredes for one.

The Navy petty officer third class and weapons-control technician refused duty on the USS Bonhomme Richard as it deployed to the Persian Gulf on December 6, 2004 to take part in Operation Iraqi Freedom. He was charged with unauthorized absence and willfully missing his ship's deployment. On May 10, 2005, Paredes avoided jail and a dishonorable or bad conduct discharge when the court-martial judge dismissed the former charge, convicted him on the latter one, sentenced him to two months restriction, three months of hard labor without confinement, and reduction in rank from E-4 to E-1.

Lt. Cdr. Robert Klant denied expert testimony on the war's illegality, but let Cohn testify as an expert witness, at the sentencing hearing. At its conclusion, Klant astonished attending spectators by saying:

"I believe the government has successfully demonstrated a reasonable belief for every service member to decide that the wars in Yugoslavia, Afghanistan and Iraq were illegal to fight in." Paredes benefitted from that view. Others have as well, but not often or easily.

## Modern Conscientious Objectors (COs)

They're persons who refuse to perform military service, and request noncombatant status or discharge on grounds of religious, moral, ethical, or philosophical beliefs with regard to wars and killing. Objecting on the basis of conscience is 'a long and honorable' tradition going back to the beginning of the republic. It was used frequently during the Vietnam war.

Objectors help others by expanding the right to resist and dissent. Under DOD regulations, "the military must grant CO status to any service member who (consciously opposes all) war(s) in any form, whose opposition is founded on religious training and beliefs, and whose position is sincere and deeply held." This position "must have developed or become central to the CO's beliefs after entry into the military," and applicants must provide "clear and convincing evidence that he or she is a CO."

US Army Reserve Staff Sergeant Camilo Mejia was the first Iraq War veteran to refuse further involvement on matters of conscience after serving in it earlier from April - October 2003. Following leave, he failed to rejoin his National Guard unit and filed for discharge as a CO on grounds that the invasion and occupation were illegal and immoral. The Army then charged him with desertion to send a strong message to others who resist.

His May 2004 court-martial was a kangaroo-court show trial, widely broadcast to all military personnel worldwide on internal Pentagon television, radio and newspaper outlets. At trial, the military judge disallowed prepared defense testimony under Army Field Manual 27-10, the Constitution, and established international law.

Mejia was found guilty of desertion with intent to avoid hazardous duty. He was sentenced to a year in prison, reduction in rank to E-1, one year's forfeiture of pay, and a bad conduct discharge after which Amnesty International declared him a prisoner of conscience, its highest honor.

After the verdict, international law expert Francis Boyle was allowed to testify during the sentencing phase - but under strict limitations imposed by the judge. He cited relevant domestic, international, and military law, reviewed crimes of war and against humanity under them, and explained the culpability of commanders and government officials to the highest levels for abusing and torturing prisoners.

Mejia served nine months in prison and in August 2007 was elected chairman of the board of Iraq Veterans Against the War. Hundreds of others have filed for CO status while many more go AWOL or refuse deployment to combat zones. The military never makes it easy, yet the illegitimacy of two illegal wars and the immense hardships on young GIs and their families makes growing numbers resist and dissent. Still many others aren't aware that they qualify for CO status.

Current CO stereotypes stem from the Vietnam era when they were viewed as subversives and cowards. Other myths are that wars must be ongoing for those in the military to apply, the process is lengthy, discharges, if granted, won't be honorable, and federal benefits will be lost as well as eligibility for government jobs. "Needless to say, these myths are not true," but exist to discourage applicants and impede the process.

Various civilian organizations provide good information on CO rights, regulations on them, and procedures on how to apply. Also, the "CO process is one of the most legally protected of discharge proceedings - COs have greater rights than those who seek discharge for family hardship or similar reasons." Yet command hostility exists and rights are often

denied. "Success rates vary among the services." Some COs are discharged for other reasons. Many applications are rejected. Some go AWOL as a result, and others do or don't succeed through court intervention. Imperial America doesn't make it easy, so applicants have to persist all the harder.

## Winter Soldier

Iraq and Afghan veterans willing to come forward provide the most compelling evidence of "war crimes beyond imagination." Yet those familiar with Vietnam, WW II, and other US wars have heard it before. John Dower's powerful WW II book, "War Without Mercy," documented how both sides in the Pacific war depersonalized the opposition, abandoned the rules of war, and fought with equal savagery.

Later examples include:

— Winter Soldier 1971 – the Vietnam My Lai massacre killing around 500 civilians was a mere skirmish compared to death squad campaigns like Operation Phoenix that contributed to an estimated 80,000 deaths from around 1968 – 1971. Numerous other stories documented mass murder, torture, rape and other atrocities – the same kinds committed earlier and today;

— Winter Soldier 2008 – "traumatized" veterans today tell similar horrors stories to ones from past wars, including Vietnam, Korea, and WW II; Iraq Veterans Against the War (IVAW) offer testimonies as ammunition for their three unifying principles:

(1) immediately ending the Iraq and Afghan wars and occupations and withdrawing all troops;

(2) paying reparations to Iraqis; and

(3) providing proper medical care for all US war veterans.

Short of these, all imaginable atrocities will continue, including mass killings, torture, rape, destruction, and much more. Wars are ugly business, and laws or no laws, the worst of abuses happen routinely by a military command teaching rank and file soldiers to commit them with impunity. And they're besides the harm done to GIs, many of whom are never the same from the experience – if they survive. Vietnam destroyed an entire generation of American youths, and today's wars are doing it again.

The rules of engagement are stipulated in various laws of war – the Constitution, Hague and Geneva Conventions; UN Charter; Nuremberg Charter, Judgment and Principles; Convention on the Prevention and Punishment of the Crime of Genocide; Universal Declaration of Human Rights; Supreme and lower Court decisions; US Army Field Manual 27-10; and the Law of Land Warfare (1956). They state that nations must abide by the laws of war. No exceptions are ever allowed, and failure comply constitutes a crime of war and/or against humanity.

At the Nuremberg Tribunal, chief US prosecutor Robert Jackson cited wars of aggression as the "supreme international crime against peace differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Yet this standard indicts America on all its wars since WW II.

And young GIs are affected. Winter Soldiers 2008 say “they were subject to amorphous and contradictory rules of engagement – often free-fire zones where they could shoot at anything that moved (including noncombatants). These rules, or lack thereof, led to the commission of atrocities and war crimes,” not occasionally but often.

Aside from the 2001 Afghanistan bombings and March 2003 “shock and awe” attack, the worst of them took place in April and November 2004. In retaliation for the killing and mutilation of four Blackwater mercenaries, the first and second Fallujah Battles waged some of the fiercest urban combat since the 1968 Battle of Hue in Vietnam. Several thousand or more were killed, mostly civilians. Major war crimes were committed. Illegal weapons were used. Vast destruction was inflicted. The city was held under siege. Free-fire zone rules applied. A “shoot-to-kill” curfew was imposed, and according to Adam Kokesh: “we changed our rules of engagement more often than we changed our underwear.”

Winter Soldiers 2008 speak out publicly over what they saw and did in their tours, including in testimonies to Congress. “So far (none of them) have been prosecuted for their testimony, though some active duty witnesses were harassed by superiors.”

### Dissent and Disengagement

Resistance includes refusing illegal orders, objecting on the basis of conscience, requesting a discharge, demonstrating, picketing, dissenting as the Constitution allows, attending rallies, petitioning Congress, going underground, taking refuge abroad, speaking out publicly, and through the media. It’s acting according to one’s principles and morality and not backing down when the going gets tough.

Lt. Ehren Watada’s case is instructive. In June 2006, he refused to deploy to Iraq and publicly said why – that “as an officer of honor and integrity, (he could not participate in a war that was) manifestly illegal....morally wrong (and) a horrible breach of American law.” He became the first US military officer to face court-martial for his action and was charged with:

- one specification under UCMJ article 87 – missing movement;
- two specifications under article 99 – contempt toward officials (for making public comments about George Bush); and
- three specifications under article 133 for conduct unbecoming an officer.

If convicted on all charges, he faced possible dishonorable discharge, forfeiture of all pay and allowances, and seven years in prison. A military equivalent of a grand jury convened on August 17, 2006 to review the charges and rule on their justification. Watada called three expert witnesses in his defense:

- former UN Iraq Humanitarian Coordinator (1997 – 1998) Denis Halliday who resigned under protest because he was “instructed to implement a policy that satisfies the definition of genocide (and already) killed well over one million individuals, children and adults;”
- US Army Colonel Ann Wright who resigned her commission as a State Department foreign service officer in March 2003 to protest a “war of aggression (in) violat(ion) of international law;” and

— Professor Francis Boyle, international law and human rights expert, activist, and author of numerous books, papers, and articles on these topics.

On August 22, the Army reported on the proceeding and recommended all charges be referred to a general court-martial. It began in February 2007 under very constricted rules – denying a First Amendment defense, disallowing one’s questioning the legality of the war, and refusing to allow expert testimony, including from Cohn.

However, legal issues couldn’t be excluded as they directly related to charges brought, so the prosecution introduced them at trial. In addition, Watada firmly stated before testifying that he refused to deploy because of the war’s illegality.

Unable to stop him from saying this, judge John Head declared a mistrial. He’d lost control of the proceeding, knew Watada was on solid ground, and had to prevent his evidence from being introduced to avoid the embarrassing possibility of an acquittal on one or all charges. If it happened, the war’s illegality would be exposed and its continuation jeopardized.

Under the Fifth Amendment’s “double jeopardy” clause, Watada can’t be retried on the same charges. It states no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” Watada’s triumph by mistrial was a powerful tribute to his convictions and spirit. It’s also an inspiration to civil resisters and all members of the military to follow in his footsteps.

On October 22, 2008, US District Court Judge Benjamin Settle agreed with Watada’s double jeopardy claim and dismissed three of the five counts against him. In mid-May, beyond the timeline of Cohn and Gilbert’s book, the Department of Justice dropped plans to retry him on two remaining counts, but his legal problems continue as the Army is still weighing further action. Fort Lewis spokesman Joe Piek said the base’s leadership is considering “a full range of judicial and administrative options that are available, and those range from court-martial on those two remaining specifications, to nonjudicial punishment, to administrative separation from the Army.”

If they can’t win one way, they may keep harassing Watada and make him pay by attrition. Millions of war resisting Americans may have other ideas, and organizations like Project Safe Haven, Courage to Resist, Veterans for Peace, and Iraq Veterans Against the War are united with others in demanding an end to Watada’s persecution as well as two illegal wars and occupations.

They also support “high-visibility demonstrations, protests and street theater,” along with the right to resist and dissent. The law supports them “to speak out on a broad range of issues” using all means of technology to do it. Military regulations also “can be powerful weapons for service members who choose to dissent.”

DOD Directive 1325.6 Guidelines for Handling Dissent and Protest Activities among Members of the Armed Forces describes basic rights for “dissident and protest activities” with guidelines pertaining to:

- possession and distribution of printed materials;
- off-base locations allowed;
- publishing underground newspapers and materials;



- off-base demonstrations and protests; and
- rules for military personnel participation.

Resisters have the law and regulations on their side if they conform to their provisions therein – “consistent with good order and discipline and the national security.” But going up against the Pentagon and Department of Justice is never easy, and even winning exacts a great toll.

But fundamentally, “GIs do in fact have the right to express their opposition to the wars verbally and in writing, share that position with the media, state it on the Internet, distribute it to other GIs in newspapers or leaflets, say it from the microphone at national antiwar rallies, and show it by marching in off-base antiwar demonstrations and picket lines” – as long as they’re off-duty, off-base, and out of uniform.

Imperfect as it is and getting worse, it’s still America, and growing numbers of GIs, their families and friends are resisting two illegal wars and occupations, demanding they end, and the nation returned peace. Those goals are worth everyone’s time to fight for, and it’s high time more among us did it..

### Challenging Racism

For many decades, young recruits are taught to kill by portraying enemies as subhuman. So the Japanese were called “Japs” and portrayed in cartoons as apes or savage gorillas; North Koreans, North Vietnamese and Viet Cong were called “gooks;” and Arabs are called “rag-heads,” “camel jockeys” and “sand niggers.” As a result, extreme racism is a pervasive problem in the military. But it’s a proved effective way to motivate soldiers to fight and kill by viewing Westerners as superior to nonwhite enemies globally.

Many Winter Soldiers (2008) “discussed the pervasiveness of racist behavior,” admitted using racial epithets, and “engag(ing) in brutality that dehumanized Iraqis and Afghanis.” However Vietnam-era history “shows that organizing and protests by African American, Latino, and other minority GIs (with support from other service members)” offer the best chance of achieving real change. But success depends on ending the Pentagon’s proven way to teach young recruits to kill, so getting the top brass to abandon it won’t be easy.

### Sexual Harassment and Sexual Assault in the Military

Teaching recruits “sexism and sexual imagery” works the same way as indoctrinating racism. Soldiers are taught to equate “strength and discipline in combat (to) sexual prowess,” military violence to the sexual kind, and “disobedience, nonconformity, or weakness as feminine.”

Today, sexism is so embedded in military culture that female soldiers pay the price. They’re discriminated against in training, assignments, promotion, much else, and are frequent victims of harassment and sexual assault – the former through “unwelcome sexual advances, requests for sexual favors,” and other similar behavior; the latter includes “rape and other forcible or unwanted sexual contact....”

In a male-dominated military, this behavior is embedded, ritualized, and symbolic of male power. The highly-publicized September 1991 Tailhook incident is a prominent example but a rare one that made headlines. It involved a group of Naval aviators sexually assaulting 26

women at one of their annual gatherings. They cornered and surrounded them, passed them down a gauntlet, jeered, taunted, grabbed, fondled, and tried to strip them.

Similar incidents are all too common, and for years top brass knew of and tolerated them. They have documented evidence that half or more of women in all branches have been victims of sexual harassment or assault. It shows a profound contempt many military men (including top brass) have for women in the ranks, at the enlisted and officer levels.

Complaints, studies, hearings and regulations do little to halt these practices. Reports surface often about harassment, assaults, rape and other demeaning behavior in basic training, the service academies, duty assignments of all kinds, and in combat. The military today is no safer for women than it ever was. It never will be unless the Pentagon changes its ideology, how it trains GIs, and if it's willing to impose stiff penalties to offenders.

### The Medical Side of War

The state of the military's health care system is deplorable. Pressed to fund and fill the ranks for two illegal and unpopular wars, Congress and the Pentagon pay scant attention to the injured, sick, and psychologically damaged. It's further testimony to a nation defiling its principles – ones observed only rhetorically, hardly ever in practice, and not at all once the usefulness of combatants is over.

The Iraq and Afghan wars have produced an epidemic of psychological wounds that for many end up permanent. Post-traumatic stress disorder (PTSD) is frighteningly common, yet care delivered is minimal, inadequate, and dismissive of a major problem afflicting many tens of thousands of returning vets.

Others from the Vietnam era retained their scars, and it's happening again today. Many couldn't find work then or now, abused their spouses, and too often ended up homeless or committed suicide (before or after coming home). An uncaring nation didn't notice nor does it today. The real crime is that the Pentagon and Congress are well versed on these problems, yet do little to address them. Only unbridled militarism, advancing imperialism, filling the ranks, funding numerous weapons systems and munitions, and enriching war-profiteers matter.

The result for hundreds of thousands returning from past and current wars is untreated medical needs, an uncertain future, and the knowledge that the nation they fought for doesn't care when they're no longer needed. Vietnam vets know it, and so do ones today from Iraq and Afghanistan.

Without a draft, the military needs volunteers to fill the ranks. The result is the stop-loss practice of involuntarily extending enlistment terms and frequent redeployments, even for those with serious physical or psychological injuries.

The Pentagon denied the affects of Agent Orange in Vietnam and the existence of Gulf War Syndrome from the first Iraq war. In 1990 – 91 and now, its likely cause was the widespread use of depleted uranium (DU), the proliferation of other toxic substances, and the illegal use of dangerous vaccines in violation of the Nuremberg Code on medical experimentation. No rules apply in our war fighting, nor does the health and welfare of our recruited men and women matter – enlisted to be used, then discarded when their service ends. It's especially evident in the “medical side of war” when those most in need are largely ignored and



forgotten.

How the US Department of Veterans Affairs (VA) handles disability claims highlights a problem reaching epidemic levels. In early May 2009, the Veterans Benefits Administration and Board of Veterans Appeals at VA had a backlog of 915,000 claims, and their rate is growing so fast it may now be approaching or past one million and climbing.

Things are so bad for returning vets that most face an average six month wait for benefits and up to four years to have their appeals heard when they're denied - which is often. It's in addition to the shameful treatment GIs get for their health needs - many serious and requiring extensive, expensive treatment, often not gotten from an uncaring nation.

## Discharges

Many GIs become disillusioned when they learn promises made are hollow. Some seek early discharges that can be gotten honorably but not easily most often with the nation at war on two fronts and needing all the troops it can get. Still numerous reasons qualify for an Expiration of Active Obligated Service (EAOS), including CO status, disability and illness.

Others include:

- family hardship or dependency factors;
- parenthood for single parents or in cases where husbands and wives are in the military;
- pregnancy or childbirth;
- inadequate performance or conduct during the first six months of training;
- qualification under the "don't ask, don't tell" for gays and lesbians;
- specific personality disorders;
- other physical or psychological factors that don't qualify for medical discharges;
- erroneous enlistments, including contract violations and recruiter fraud;
- alien status; especially relevant at a time undocumented Latinos (mainly Mexicans) are recruited with promises (then broken) of a green card for them and their family as well as free education, medical care, and post-service employment;
- being a sole surviving family member;
- unsatisfactorily performing duties;
- "separation from the Delayed Entry Program (DEP)" that entraps "youths still in school or the Delayed Training Program (DTP)" for enlistment in the reserves; and
- less than honorable discharges for misconduct, drug abuse, court-martial, and other undesirable factors.

Other administrative discharges are also available, all honorable, including "general" ones under honorable conditions. But recruits get little information during training. Those

requesting them are told discharges are impossible, so to get the facts civilian sources must be consulted. It takes time, and following proper procedures is essential. But the payoff is worth the trouble for those willing to do it and counseling is available to help.

A GI Rights Network has a toll-free hotline, and there are other organizations as well. They're in it "for the long haul" to instruct today's military how to exit honorably from two illegal wars and avoid the risk of death or disabling injuries.

## The Families

America's wars harm families as well as GIs. They must cope with the same problems of long, repeated deployments, possible death or permanent impairment, and the lasting affects of war-related trauma that afflict even those visibly or otherwise unscathed.

Some families go public against the Iraq and Afghan wars, recruiter lies and misconduct that entrap their loved ones, and as civilians they're free to speak publicly with no restrictions on what they may say.

Gold star mothers spoke out against the Vietnam War, and today Cindy Sheehan (whose son Casey was killed in Iraq five days after he arrived) and other parents who lost sons and daughters founded Gold Star Families for Peace. They say honor our lost loved ones by ending these illegal wars and occupations, stop invading other countries, and return the nation to peace.

Military Families Speak Out (MFSO) is the largest organization of its kind against the Iraq war with chapters in 29 states. They support their loved ones, demonstrate, speak out publicly, and lobby Congress the way some of their members did earlier against the Vietnam war. "These courageous families....endure unspeakable suffering....join together to support one another....work to end the war....(and represent) the power of collection action."

They're "a powerful force in the effort to end these wars. They can tell the truth to counter recruiters' deceptions." They can effectively represent their loved ones and help others through a common effort to free us all from the scourge of war.

## Conclusion

America's Iraq and Afghan wars are illegal and immoral. Every service member is obligated by law to disengage, resist, and refuse any longer to participate. US and international laws support them, and as Ehren Watada stated in his defense: "An order to take part in an illegal war is unlawful in itself. So my obligation is not to follow the order to go to Iraq."

Increasing numbers of others are deployed as part of America's permanent war and occupation agenda - continuing no differently under Obama than George Bush. To know what's planned for Iraq, Afghanistan and future US targets, think Korea. US forces arrived in 1950 and never left. Think Japan as well. They've been there as well since WW II, on the mainland and choicest real estate of the country's southern-most and poorest prefecture - Okinawa.

Further, since the Japanese surrendered in August 1945, America has had no enemies anywhere - except those invented to advance a global imperial agenda at the expense of our nation's youths and their families, other loved ones, and friends at home. Wars guarantee new ones and a permanent cycle of violence, death and destruction, the only

winners being profiteers who benefit hugely.

As a result, growing numbers of GIs, veterans, families, and the general public are opting to “disengage” and resist. Together they represent power enough to impact “whether or not the United States is able to carry out these and future wars of aggression.”

Most Americans oppose the Iraq war and its continued toll on GIs and their families. It’s just a matter of time until opposition to Afghanistan is as great and with luck whatever new conflicts the administration plans. Those sent to fight them and their families end up losers. Their choice is clear and unequivocal – absolutely refuse any longer to participate and with enough sharing that view, they’ll end. With overwhelming homeland needs unmet at a time of grave economic crisis, honor and necessity must dictate our future course. It’s up to mass public activism to demand it.

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