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The Rise of the 60-Vote Senate

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Over the last 50 years there has been a slow revolution in American politics. While members of the U.S. Senate have always had the ability to filibuster legislation—that is, to delay it through open-ended "discussion"—they rarely did so before 1960. Filibustering has skyrocketed since then, from an annual average of 3.2 filibusters during 1951–1960 to 16.5 between 1981 and 2004. But this statistic only tells half the story: obstruction is so *institutionalized* in the modern Senate that labeling some action a "filibuster" is like handing out speeding tickets at the Indy 500. As a Senate leadership aide explained: "Obstructionism is woven into the fabric of things. The [party] leadership deals with it on a day-to-day, even a minute-to-minute basis. . . . You can't underestimate the importance of it. There are offshoots of obstructionism every day."[1]

Filibustering—and the sixty votes required to limit debate using the Senate cloture rule—is so institutionalized into the way the Senate sets the agenda, writes legislation, and considers nominations that scholars label it the "sixty-vote Senate" and treat the filibuster as a veto point on par with the presidential veto.[2] This change has had far-reaching effects: filibustering empowers individual senators to pursue their personal agendas, and it gives the minority party the ability to block the majority party's proposals.

How did the Senate transform into a supermajority legislature? To answer this question, we must have a clear understanding of what filibustering was like before 1960, and why senators abandoned this system. I begin with some definitions and a quick historical survey, and then explain the emergence of the sixty-vote Senate.

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Filibustering: Theory and Practice

Filibustering is delay, or the threat of delay, in a legislative chamber to prevent a final outcome for strategic gain. Filibustering occurs in many legislative settings, not just the Senate. While collecting data on Senate obstruction, I also found references to filibustering in 20 state legislatures, 19 foreign countries, and the United Nations.

Tactics. There are lots of ways to kill legislative time. We might associate filibustering with long speeches, but this is a historical coincidence; the stereotypical Southern senators blocking civil rights favored speaking as the most defensible form of obstruction. Legislators can also delay by calling for unnecessary roll call votes, e.g. on motions to adjourn or dozens of amendments. Another classic technique is refusing

to vote in the hopes of "breaking" a quorum, also known as a "disappearing quorum." The U.S. Constitution requires a simple majority to be in the chamber in order for a vote to be valid. So, if attendance is low, a minority of those present can block a decision by NOT voting.

Responses. There are several ways to respond to a filibuster: voting to end debate (if an effective rule exists), changing the rules of the game, bargaining, and attrition. For anyone who wants to understand the history of filibustering in Congress, the last option is the most important. "Attrition" means that the majority simply waits until the obstructers are exhausted. If there were several senators willing to filibuster, they would take turns while the majority sat silently, day and night, ensuring a quorum was present for the marathon.

While this was somewhat juvenile, the patience of the majority ensured that any filibuster would be conducted openly so that the obstructionists could be held accountable. It also ensured that obstructionists paid a real, physical toll for their illegitimate veto: standing and talking for hours can be exhausting. However, the senators on the other side paid a price as well, since they had to be in or near the Senate chamber day and night as long as the battle of attrition lasted. This tactic is illustrated fairly accurately in the 1939 film, *Mr. Smith Goes to Washington*, in which Mr. Smith eventually collapses on the Senate floor, sleep-deprived and exhausted.

Consider a classic example of attrition. We often cite the fact that Strom Thurmond's 24-hour, 18 minute filibuster against the conference report for the 1957 Civil Rights Act was the longest one-person filibuster in Senate history, but the other side of that factoid is that the rest of the Senate did not file a cloture petition to shut him up. The other senators waited for the limits of human endurance to catch up with Senator Thurmond and then calmly approved the bill after Thurmond was finished. There were two necessary ingredients for this anecdote to play out: one or more senators with intense interests—in this case, an intense interest in position-taking—and a majority willing to devote enough of the Senate's time *and their own personal time* to wait out the obstructionist.

When the majority is able and willing to wage a war of attrition, then filibustering is a contest of endurance with each side paying a price for the length of the contest. As such, classic obstruction was similar to a union strike or a war, and models of bargaining developed for these cases may be applied to filibustering.

Filibustering in the Historical Congress

While the modern Senate filibuster is as important or more important as the presidential veto to the lawmaking process, it is not specified in the U.S. Constitution that members of Congress may filibuster, nor would it be accurate to say that the authors of the Constitution endorsed parliamentary obstruction.[3] Article 1 of the Constitution does, however, codify two rights that have been used to filibuster: the requirement that a simple majority be present to constitute a quorum, and the right for any legislator to request a roll call vote with the consent of one-fifth of those present. These provisions were included with the understanding that they could be used to filibuster, but that is not their purpose. Most important, Section 5 specifies that "Each house may determine the rules of its proceedings," so each chamber has the authority to revise and reinterpret its rules as circumstances change.[4]

Both the House and Senate began with the same Constitution and similar rules, but one chamber gradually became prone to filibustering, eventually leading to paralysis at the hands of an obstructionist minority party and a period of institutional crisis. I am referring, of course, to the U.S. House of Representatives. Whether one measures the number of disappearing quorums, dilatory motions, bills that faced a significant level of obstruction, or references to filibustering in the *New York Times*, during the nineteenth century there was roughly twice as much filibustering in the U.S. House of Representatives as in the Senate, and a trend toward increasing obstruction over time in both chambers. This period came to an end after the House Republicans imposed new precedents (subsequently codified) limiting the use of dilatory motions and disappearing quorums in 1890; after four years of contention, the House Democrats accepted the reign of the majority in 1894. This sequence dispels the notions that the House's "previous question" motion inoculated the chamber from filibustering, that filibustering is a uniquely Senate tradition, and that a filibustering minority can frustrate any effort by a majority to impose reforms that reduce obstruction.

The Rise of Filibustering in the Twentieth Century Senate

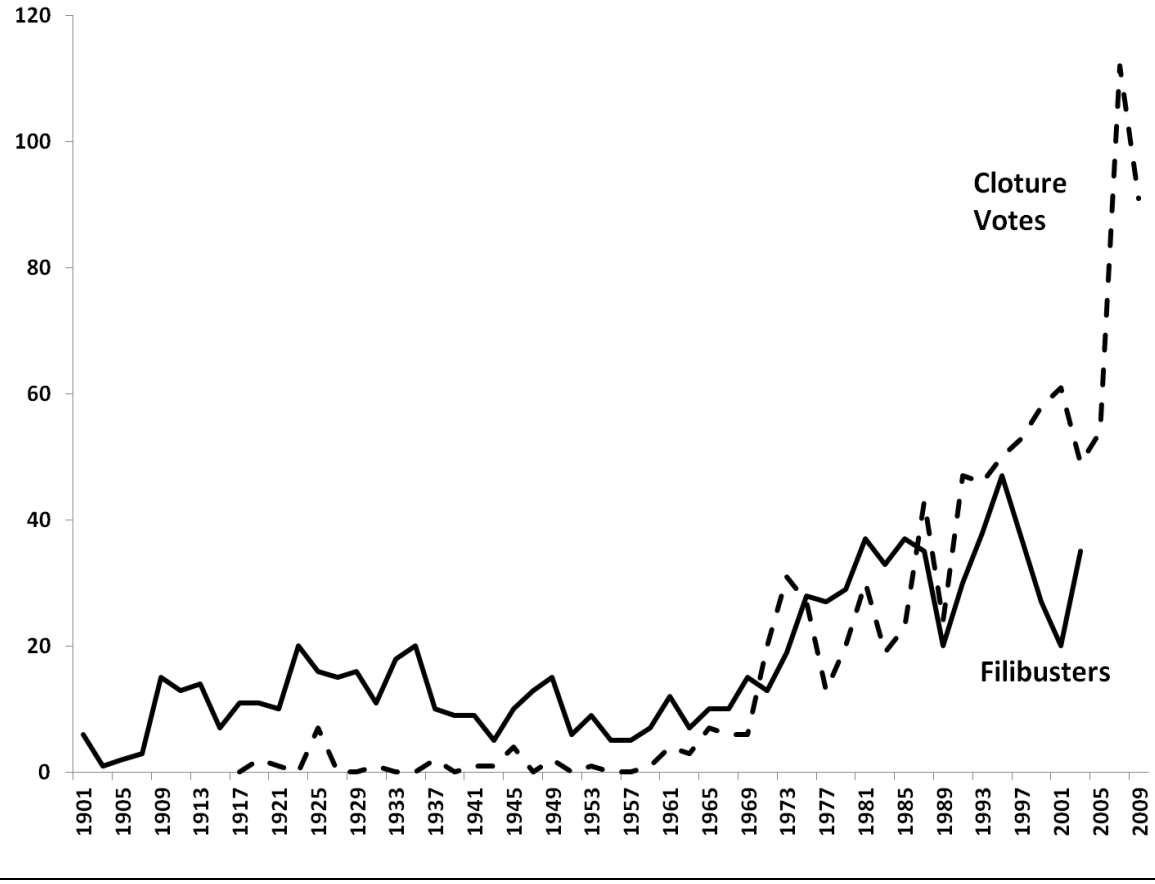
In my recent book, *Filibustering*, I measure the number of filibusters and threatened filibusters in the twentieth century Senate by combing through the *New York Times*, *Time*, and some Congressional Quarterly publications.[5]

I find a dramatic increase in Senate obstruction beginning during the 1960s, as shown in Figure 1.

As shown in Figure 1, filibusters were rare in the early twentieth century Senate. During this period, filibustering senators would usually have to stay on the Senate floor for hours or days on end, enduring physical exhaustion and possible retaliation from other senators; these costs usually exceeded the benefits of obstruction.

Although attrition was generally effective when a majority was determined to win, in 1917 the Senate gave in to public pressure and adopted the "cloture" rule, which limited debate if a two-thirds majority vote of the senators agreed. This rule had little effect.[6] As shown in Figure 1, there were more filibusters than cloture votes during this era, which suggests that senators strongly preferred to resolve filibusters without attempting or invoking cloture. Between 1927 and 1962 the Senate tried eleven times to invoke cloture but did not succeed once. Most of the time, senators found attrition to be a more effective and defensible response to filibuster.

Figure 1: Filibusters and Cloture Votes, 1901-2010



This era of attrition-based filibustering gave rise to the popular impression that Senate filibusters were rare (true) and reserved for "matters of great importance," which was somewhat true. Senators did occasionally wage war for petty causes, but usually it took an important and controversial issue to motivate a team of senators to hold the floor of the Senate indefinitely.

One weakness of the "attrition" strategy was that at the end of each Congress it was easier to filibuster because there would usually be a crush of pending legislation to pass and a finite amount of chamber time; these conditions made it easier to kill proposals and hold others hostage. In these end-of-session jams the new cloture rule was usually unworkable since it takes several days to implement. Instead, the twentieth amendment to the Constitution, adopted in 1933, revised the congressional calendar to eliminate the post-election "short" session and reduced the problem of end-of-session obstruction.

The Rise of the Silent Filibuster

While the Twentieth Amendment helped to restore balance between majority governance and minority rights, attrition became a less viable response to filibustering as time progressed. This failure was most evident in the area of civil rights; from 1937 to 1960, civil rights legislation was repeatedly defeated or weakened by determined and well-organized Southern senators. The difficulty in passing civil rights legislation led to outside pressure to change Senate rules, leading to minor reforms in 1949 and 1959.[7]

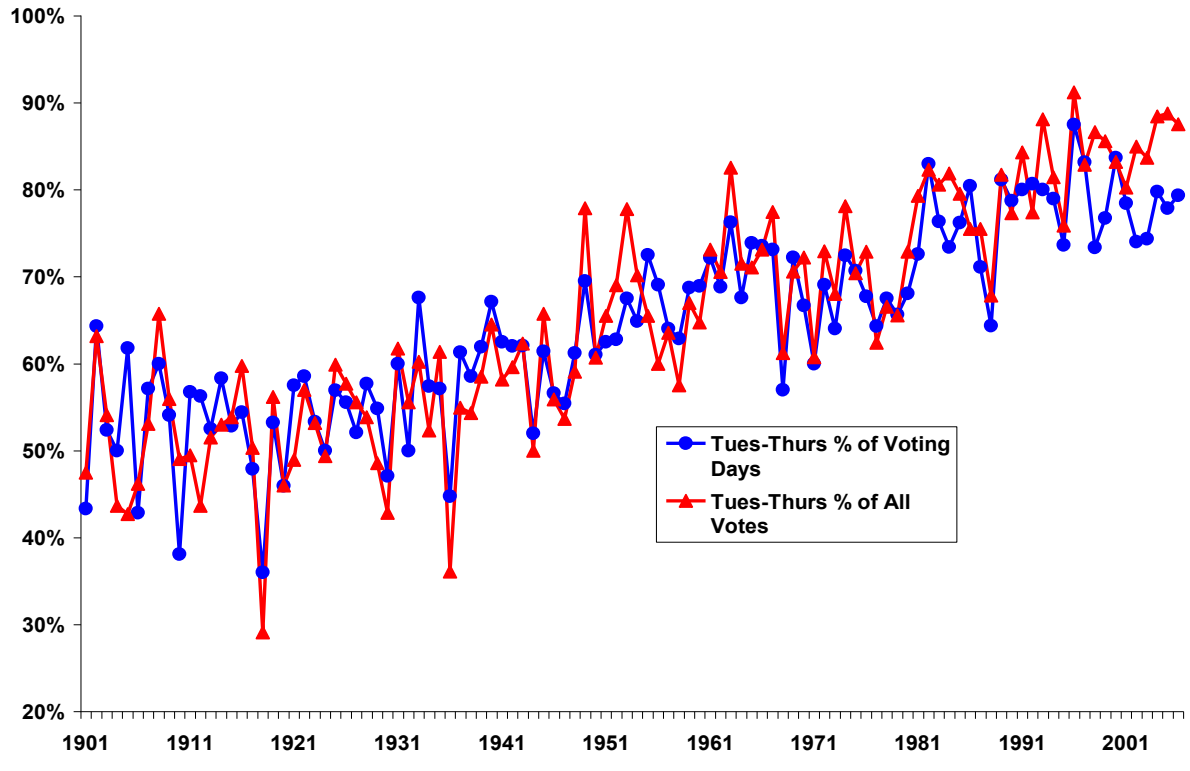
The critical problem was that it was too easy for obstructionists to outlast a majority of the Senate. For the Senate collectively, the days or weeks spent on filibusters were a luxury they could ill afford as the role of the federal government increased in response to the Great Depression and then World War II and its aftermath. For individual senators, the time spent in the chamber was time taken away from family, fundraising, and travel. In particular, the advent of trains and planes that could take senators back to their states, to audiences in major cities, and around the globe made a prolonged battle on the Senate floor a tremendous distraction from their travel schedules.

One way to measure the value of senators' time is to trace the emergence of the "Tuesday-to-Thursday Club" in the Senate. This is shown in Figure 2, which shows a) the percentage of all days with at least one roll call vote that were Tuesday, Wednesday, or Thursday, and b) the percentage of all votes that occur on Tuesday, Wednesday, or Thursday. By either measure, there is a steady trend toward clustering the work of the Senate into the midweek, freeing senators to travel on the weekend. In particular, the trend accelerates in the 1940s so that by the year 2000 about 80 percent of all votes occur in the middle of the week.

The more value senators attached to their own time, and the greater the backlog of legislation waiting for Senate floor action, the more costly an attrition battle was for all senators, but especially the silent majority.

The turning point occurred in 1960. Majority Leader Lyndon Johnson led a determined effort to outlast Southern opposition to the 1960 Civil Rights Act while resisting attempts to invoke cloture. This effort failed on both counts. By the end of 1960, Johnson had been elected as vice president and the job of majority leader fell to

Figure 2: The Emergence of the Tuesday-Thursday Club in the Senate



Mike Mansfield of Montana. Mansfield was chagrined at the spectacle of the 1960 civil rights filibuster and determined not to repeat it. Mansfield advocated using the previously dormant cloture process to limit filibustering instead. Over the next decade, senators gradually accepted the necessity of voting for cloture—first on the Communications Satellite Act of 1962, then on the 1964 Civil Rights Act. From 1961 to the present, cloture votes have risen dramatically: there were two from 1951 to 1960, but 111 during the 110th Congress (2007-2008) alone.

This tactical shift from attrition to cloture led to the dramatic increase in filibustering. While attrition had become an ineffective response, the adoption of cloture had the unintended consequence of dramatically reducing the costs of filibustering. Obstructionists lost no more hours of physical effort—now a senator merely threatens to filibuster with the expectation that Senate leaders will respond with bargaining or a cloture petition instead of calling his bluff. And, since modern filibusters are less visible (and more boring for the media), senators are less accountable for their obstruction. This is especially true for low-salience bills and nominations for which the costs of overcoming a filibuster exceed the benefits of winning, so a simple threat of a filibuster (public or private) is sufficient to keep them off the Senate floor.

The gradual adoption of cloture as the dominant response to filibustering is evident in Figure 1, as the number of cloture votes lags behind the number of filibusters until around 1971. Since the mid-1990s, the number of cloture votes has exceeded the number of filibusters mentioned in the media.

The increase in filibustering since 1960 has coincided with an increase in partisanship in Congress, leading some to conclude that partisanship has caused the increase. Parties do influence the character of the filibusters that occur. As Binder and Smith show, voting on cloture has increasingly broken down along party lines. In the last few years, cloture votes on the stimulus bill, financial regulation, and other key issues have hinged on whether *any* members would cross party lines. But, as I show in my book, it is doubtful that increasing partisanship has *caused* the increase in filibustering. The necessary condition for the partisan filibustering we observe is a Senate in which filibustering is easy, effective, and accepted. When the Senate was similarly polarized during the Gilded Age, we did not observe the level of filibustering we see today, because senators were still willing to combat obstruction with patience.

Institutionalizing the 60-Vote Senate

As senators began to use the cloture process in earnest in the 1960s, they also adapted the rule and their standard operating procedures to reflect this switch. The cloture rule was made more effective and Senate leaders developed a system for collecting and sharing information about potential filibusters.

Cloture Rule. From 1949 to 1975, the Senate cloture rule was the target of almost biennial attempts at reform. Minimal reforms in 1949 and 1959 retained the two-thirds threshold for cloture with liberals clamoring for some form of simple majority cloture.[8] Initially, liberals sought to change the rule to ease the passage of civil rights bills. After major civil rights legislation passed in 1964 and 1965, however, senators still attempted to change the rules in 1967, 1969, 1971, and 1975 using a complex strategy to obtain a simple majority vote on rules changes. In 1975 they finally won a key procedural vote on their strategy and, aided by Vice President Nelson Rockefeller presiding over the Senate, seemed capable of making significant reforms in the cloture rule. Instead, the reformers traded their advantage for a slight reduction in the cloture threshold from two-thirds of those voting (the 1959 rule) to three-fifths of the entire Senate. The 1975 rule essentially ended the long contest over the cloture threshold; subsequent reforms in 1979 and 1986 limited overall debate and limited dilatory amendments after cloture is invoked, but did not alter the three-fifths threshold. A proposal by Tom Harkin (D–Iowa) to allow majority cloture was defeated by wide margins in 1995 and 2011; it appears that the 60-vote Senate is here to stay.

One of the surprising findings of my research is that, for all the efforts senators have invested in debating the threshold for invoking cloture, *changing the cloture threshold has <u>not</u> reduced filibustering*. The adoption of the cloture rule in 1917 had essentially zero effect on final passage margins or appropriations bills or on the number of filibusters. Subsequent reforms in 1949 and 1959 had minimal effects on the number of filibusters, while the 1975 revision to lower the cloture threshold from 2/3 of voting senators to 3/5 of the chamber may have actually increased the number of filibusters. Unless senators impose simple and immediate majority rule, any further

reductions in the cloture threshold will likely lead to senators filibustering *more often* to regain any leverage they lost due to the reform.

Holds. Behind the scenes, senators and their leaders have institutionalized the right to filibuster and the use of supermajority thresholds. First, and most important, during the 1950s Senate leaders began recognizing the right to "hold" legislation off the Senate floor for a period of time. In their benign form, these holds were strictly temporary favors to enable senators to study legislation and prepare amendments, or to balance their travel schedules with their legislative duties. In their malicious form, a hold is explicitly or implicitly a threat to filibuster a bill or nomination. Some hold requests are made by sending letters to party leaders, but senators may make verbal requests to a party leader, or by contacting the party cloakroom off the Senate floor.

In a sense, senators do a great favor to party leaders by communicating their threats to filibuster ahead of time. When leaders know which measures face threatened filibusters, they can avoid wasting the time of the chamber and other senators on measures that will be stalled on the Senate floor. And, if leaders know who is strongly interested in a measure, they can promote the amicable negotiation of compromise legislation and debate agreements before a measure comes to the Senate floor.

The hold system has been controversial, however. First, for some measures, a threat to filibuster is tantamount to a veto by a single senator. This occurs when a bill or nomination is low salience—there are minimal benefits to their approval, and few senators are invested in their success. For low salience measures, the time and effort required to overcome a filibuster—including one or more votes on cloture followed by up to 30 hours of debate after each vote—exceed the benefits, even if only a single senator is forcing the Senate to go through the effort to overcome his filibuster.

Second, since the hold system evolved from communication between party leaders and their caucus members, holds have long been confidential; members communicate their requests to leaders, and leaders honor those requests and object to efforts to act on measures that are subject to a hold. Senators have made repeated efforts to ensure that holds are made publicly, so everyone knows who is blocking a measure and why. In 2007 and 2011, senators adopted formal rules to require that holds be made public under certain conditions; it is unclear how effective these reforms will be. Even if these reforms succeed in bringing holds into the sunshine, however, they leave in place a system that allows individual senators a de facto veto over low salience measures.

Third, just as filibusters are used for a wide range of strategic purposes, senators now place holds for a variety of reasons other than simply objecting to the merits of the bill or nomination. Senators often place holds to force executive agencies to heed their personal priorities. They also place holds to retaliate against other senators' frivolous holds! This reduces the overall efficiency of the Senate and the fairness of the nomination process while significantly increasing the power and effectiveness of individual senators.

In sum, the modern Senate is dramatically different from the Senate of the mid-twentieth century. While senators valued compromise and cooperation, the default practice was that a simple majority was sufficient to pass legislation. Filibusters were rare and spectacular exceptions. Now the default assumption is that a cloture-sized majority is necessary for any action. This system empowers legislative minorities to pursue a range of interests. Some proposals are blocked by filibusters, but others are forced onto the legislative agenda by minority hostage-taking. As a result, the Senate is a less efficient chamber than the U.S. House, but it is also likely to discuss and vote on a wider range of issues than the House will allow.

Notes

1. C. Lawrence Evans and Daniel Lipinski, "Leadership and Obstructionism in the U.S. Senate," in Lawrence C. Dodd and Bruce I. Oppenheimer, ed., *Congress Reconsidered*, 8th ed. (Washington, D.C.: Congressional Quarterly Press, 2005), 227-248.

2. Barbara Sinclair, "The 60-Vote Senate," in *U.S. Senate Exceptionalism*, ed. Bruce I. Oppenheimer (Columbus: Ohio State University Press, 2002); Keith Krehbiel, *Pivotal Politics,* (Chicago: University of Chicago Press, 1998); and George Tsebelis, *Veto Players: How Political Institutions Work* (New York: Russell Sage Foundation, 2002).

3. Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the U.S. Senate* (Washington, D.C.: Brookings Institution Press, 1997).

4. Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press, 2010).

5. Recent commentators have focused on the number of cloture petitions and votes as a measure of obstruction. This is a reasonable measure of the majority party's frustration with filibustering over the last two decades, but for the pre-1960 Senate it understates the level of obstruction because senators were less likely to attempt to invoke cloture against a filibuster.

6. See Gregory Koger, "Filibuster Reform in the Senate, 1913-1917," In *Process, Party and Policy Making: Further New Perspectives on the History of Congress*, eds. David Brady and Mat McCubbins (Stanford: Stanford University Press, 2007), 205-25; Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press, 2010); and also Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton: Princeton University Press, 2006) .

7. Julian Zelizer, *On Capitol Hill* (Cambridge: Cambridge University Press, 2004).

8. Ibid.

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