

# Recent Developments

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## DETAINEE TREATMENT ACT OF 2005

### INTRODUCTION

Reports of Iraqi prisoner abuse by U.S. troops emerged as early as May 15, 2003,<sup>1</sup> but it was not until April 28, 2004 that pictures of such abuse from the Abu Ghraib prison surfaced.<sup>2</sup> The Abu Ghraib scandal intensified public outcry and media inquiry into the tactics and legal justifications used by the George W. Bush Administration in executing the war in Iraq and the war on terrorism.<sup>3</sup> Internal memoranda written by various members of the Bush Administration materialized, revealing controversial interpretations of domestic and international law that led to ambiguities in the standards for detainee treatment. Such ambiguity led to policy choices that resulted in the shocking and morally reprehensible treatment of detainees, as captured in the Abu Ghraib pictures.

On October 5, 2005, the Senate responded by approving an amendment (“S.Amdt. 1977”)<sup>4</sup> to the Department of Defense (“DOD”) appropriations bill for 2006 that would establish a clear source of approved interrogation techniques for use on detainees in DOD custody, and make clear that geographic considerations did not limit the prohibition on the use of cruel, inhuman, or degrading treatment or punishment (“CID treatment”).<sup>5</sup> The Bush Administration threatened to veto the appropriations bill over S.Amdt. 1977, but the amendment remained in the bill after a compromise was reached, resulting in the addition of three other clauses related to detainee treatment: legal defenses

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1. The May 15, 2003 report was made by Amnesty International at a press conference in London. *Out of Sight, Out of Mind*, COLUM. JOURNALISM REV., July-Aug. 2004, at 6.

2. CBS broke the story on April 28, 2004 on its show 60 Minutes II. *60 Minutes II: Court Martial in Iraq* (CBS television broadcast Apr. 28, 2004). Seymour Hersh later published a series of articles in the *New Yorker* magazine regarding the abuse scandal. See Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42; *Chain of Command*, NEW YORKER, May 17, 2004, at 38; *The Gray Zone*, NEW YORKER, May 24, 2004, at 38.

3. Though the Abu Ghraib photos and the subsequent public outcry relate directly to the treatment of Iraqi prisoners, there have also been numerous reports on the mistreatment of detainees and prisoners in Afghanistan, Guantanamo Bay, and other U.S. facilities. See, e.g., HUMAN RIGHTS WATCH, “ENDURING FREEDOM”—ABUSES BY U.S. FORCES IN AFGHANISTAN (Mar. 2004), available at <http://www.hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf>; Amnesty International, *Guantanamo Bay—A Human Rights Scandal*, <http://web.amnesty.org/pages/guantanamo-bay-index-eng> (last visited Jan. 22, 2006).

4. S.Amdt. 1977, 109th Cong. (2005).

5. Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005, at A1. Senator John McCain (R-Ariz.) sponsored S.Amdt. 1977.

available to U.S. personnel accused of abuse, procedure for status review for detainees outside of the United States, and detainee treatment training for Iraqi forces.<sup>6</sup> Congress passed the combined amendments, labeled the Detainee Treatment Act of 2005 (“DTA”) under Title X of Section A of the defense appropriations bill, and the President signed it into law on December 30, 2005.<sup>7</sup>

Two legal questions color the detainee treatment debate: the status of the detainee under the Geneva Conventions, and the applicable law governing the treatment of the detainee based on his classification. The issue of detainee status under the Geneva Conventions has been discussed extensively since the U.S. invasion of Afghanistan in 2001.<sup>8</sup> This Recent Development focuses on the legal standards that would govern the treatment and interrogation tactics applicable to detainees held by the United States abroad after the passage of the DTA.

The confusion generated by the approval of different interrogation tactics for detainees depending on their classification led to a decline in the overall standards of interrogations. For example, interrogation techniques that were approved for use on unlawful combatants were also used in Iraq on prisoners that were not classified as unlawful combatants.<sup>9</sup> Additionally, internal debates as to the exact definition of torture and the extent of restrictions on such treatment under domestic criminal statutes and under the U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”)<sup>10</sup> led to further confusion about the U.S. position on the use of torture or CID treatment. The DTA tries to address both of these issues by applying a blanket prohibition on the use of CID treatment and a firm reference to a single source for interrogation techniques to be used on any person in DOD custody.

This Recent Development will first discuss the legal implications of the DTA as to U.S. law on the use of torture or CID treatment, which primarily concerns Sections 1002 and 1003 of the DTA. Then, the Recent Development will explore certain shortfalls in the scope of these sections on this issue, as they do not fully address all of the potential ways in which detainee abuse and torture might continue. Finally, a brief summary of the other sections of the DTA will be presented.

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6. Cf. Eric Schmitt & Tim Golden, *Lawmakers Back Use of Evidence Coerced from Detainees*, N.Y. TIMES, Dec. 17, 2005, at A21.

7. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006 (2005), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&>.

8. See, e.g., ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW (AM. SOC. OF INT’L LAW TASK FORCE ON TERRORISM Dec. 2002), available at <http://www.asil.org/taskforce/goldman.pdf>.

9. JENNIFER K. ELSEA, LAWFULNESS OF INTERROGATION TECHNIQUES UNDER THE GENEVA CONVENTIONS 1 (CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS Sept. 8, 2004), available at <http://www.fas.org/irp/crs/RL32567.pdf>. See also Seymour Hersh, *The Gray Zone*, *supra* note 2.

10. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

## I. BENEFITS OF THE DETAINEE TREATMENT ACT OF 2005

### A. A Uniform Standard for Detainee Treatment and Interrogation

Senator McCain's S.Amdt. 1977 forms the first two sections of the DTA. Section 1002 establishes a uniform standard for detainee treatment and interrogation techniques available for use on those that are in DOD custody.<sup>11</sup> First, the uniform standard applies to the treatment and interrogation of any person that is in the custody or "effective control" of the DOD, or of any person that is detained in a DOD facility. Thus, the provision does not apply only to DOD personnel, but rather to any interrogator questioning someone that is either detained in a DOD facility or is in the custody or effective control of the DOD.<sup>12</sup> Second, the U.S. Army Field Manual on Intelligence Interrogation ("Interrogation Manual")<sup>13</sup> is specified as the uniform standard on approved interrogation techniques. Accordingly, only the treatment and interrogation techniques approved in the Interrogation Manual are available for use on persons in DOD custody or in a DOD facility.<sup>14</sup>

### B. A Broad Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment

Section 1003 of the DTA provides for a global prohibition on the use of CID treatment on persons in the custody or effective control of the U.S. government.<sup>15</sup> The protection against CID treatment applies to anyone in the custody or physical control of the United States, regardless of physical location or citizenship status. This responds to the Bush Administration argument that the Convention against Torture did not apply to alien detainees held by the United States outside of territory under U.S. jurisdiction.<sup>16</sup> The Administration had determined that the Convention against Torture only obligated signatory states to prohibit torture and CID treatment "in any territory under its jurisdiction."<sup>17</sup> Furthermore, because the Senate provided a clarifying reservation upon ratifying the Convention against Torture that defined CID treatment according to the Fifth, Eighth, and Fourteenth Amendments to

11. Detainee Treatment Act, *supra* note 7, § 1002.

12. In other words, CIA interrogators questioning a detainee in a DOD facility would have to abide by the Section 1002 standard.

13. DEP'T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION (1992), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf>.

14. This would resolve the confusion that resulted from differing standards of detainee treatment approved by Secretary of Defense Donald Rumsfeld. See Memorandum from William Haynes, Gen. Counsel, U.S. Dep't of Defense, to Donald Rumsfeld, Sec'y of Defense (Dec. 2, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf>.

15. Detainee Treatment Act, *supra* note 7, § 1003.

16. See Letter from William Moschella, Assistant Attorney Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Senator Patrick Leahy (Apr. 4, 2005), available at <http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf>.

17. *Id.*

the U.S. Constitution,<sup>18</sup> the Administration had argued that Convention against Torture protections did not apply to aliens abroad, citing Supreme Court precedent holding that those specific constitutional protections did not extend to aliens in U.S. custody overseas.<sup>19</sup>

The protection offered by Section 1003 of the DTA is broader than Section 1002 because it is not limited to persons detained in a DOD facility or in the control or custody of the DOD; rather, Section 1003 protects all persons in the custody or physical control of the U.S. government. The definition of CID treatment under Section 1003 is to remain as per the Senate reservation to the Convention against Torture, but the application of the Convention against Torture is extended to aliens and those detained outside of U.S. soil, explicitly addressing the argument used by the Administration to avoid application of the Convention against Torture to alien detainees held outside of territory under U.S. jurisdiction.

## II. LIMITATIONS OF SECTION 1002 OF THE DETAINEE TREATMENT ACT OF 2005

Although Sections 1002 and 1003 do clarify some of the legal issues and questions involved in the debate on detainee abuse and torture, they still leave many avenues open for the limits on detainee abuse and torture to be circumvented.

### A. No Limit on the CIA

Section 1002 suffers from being too specific. The Interrogation Manual is only the standard for those detainees being interrogated in DOD facilities, or while in the custody or under the effective control of the DOD. Thus, if the Administration wants to use harsher interrogation methods on a detainee, it simply has to transfer that detainee to a non-DOD facility and into the custody or control of another department, such as the CIA. Furthermore, in cases where the facility is not a DOD facility but the DOD is exercising joint control of the facility with the CIA, it is not clear whether the amendment would apply to restrict the interrogation methods available.

Although I characterize this focus on the DOD as a limitation, some might view it as a positive attribute. Since the CIA should theoretically be more experienced at interrogating detainees than the DOD, lawmakers may have narrowed their focus on the DOD to avoid placing restrictions on the CIA's intelligence gathering capabilities. They may consider the CIA less likely to engage in the same abuses that DOD soldiers committed at Abu Ghraib.<sup>20</sup>

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18. See SEN. EXEC. RPT. 101-30, Resolution of Advice and Consent to Ratification (1990), available at <http://thomas.loc.gov/cgi-bin/ntquery/z?trty:100TD00020>: (last visited Dec. 28, 2005).

19. See Letter from Moschella, *supra* note 16.

20. This conclusion would be highly suspect. See, e.g., Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44, available at [http://www.newyorker.com/fact/content/articles/051114fa\\_fact](http://www.newyorker.com/fact/content/articles/051114fa_fact); Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH.

Accordingly, Section 1002 may be characterized as an effort to provide a single mechanism for changes to approved interrogation techniques so that the ultimate standards are always in one place, making it unambiguous for soldiers regarding their reference-point for guidance as to whether certain orders violate the standards for detainee treatment.

*B. Changes to the Army Field Manual on Intelligence Interrogation*

The ability to change the Interrogation Manual is another potential shortcoming. The Interrogation Manual, which dates from 1992, has been under review by the DOD and will likely undergo changes.<sup>21</sup> There is a risk that in changing the Interrogation Manual, standards may be set lower than they should be due to a desire to be tough on terrorism suspects. However, the mutability of the Interrogation Manual is arguably a beneficial characteristic, as an alterable document leaves the door open for further restrictions on detainee treatment and interrogation tactics, which may be the case with the upcoming revision of the Interrogation Manual.<sup>22</sup>

*C. The Provision on Applicability*

Another possible loophole in Section 1002 is the provision on applicability, which notes that the Interrogation Manual standard does not apply to any person in the custody or under the effective control of the DOD pursuant to an arrest for violation of a U.S. criminal or immigration law.<sup>23</sup> This clause seems to indicate that those arrested and placed in DOD control for criminal or immigration violations should be subject to the rules and regulations of the enforcement agencies for those laws. However, it does not preclude the use of a criminal or immigration related detention as a pretext for further interrogation on other issues. In fact, many terrorism suspects have been prosecuted for minor criminal or immigration violations rather than the alleged terrorism charges for which they were detained.<sup>24</sup>

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POST, Mar. 3, 2005, at A1; Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation*, WASH. POST, May 11, 2004, at A1; Associated Press, *Report: 108 Died in U.S. Custody*, CBS NEWS, Mar. 16, 2005, <http://www.cbsnews.com/stories/2005/03/16/terror/main680658.shtml>.

21. Eric Schmitt & Tim Golden, *Pentagon Plans Tighter Control of Questioning*, N.Y. TIMES, Nov. 8, 2005, at A1.

22. *Id.*

23. Detainee Treatment Act, *supra* note 7, § 1002(b).

24. See Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1.

### III. LIMITATIONS OF SECTION 1003 OF THE DETAINEE TREATMENT ACT OF 2005

#### A. *Extraordinary or Irregular Rendition*

Section 1003 of the DTA is broader than Section 1002, making it less susceptible to specific manipulation based on the use of non-DOD agencies. However, Section 1003's prohibition of the use of CID treatment can be circumvented through the use of extraordinary rendition.<sup>25</sup> While extradition is the use of a legal process to transfer a person in the custody of one state to the justice system of another, rendition involves the extrajudicial transfer of a person from one state to another, where that person generally lacks the ability to challenge his transfer and detention through a legal process in either state.<sup>26</sup> It is estimated that the United States has used this process on over one hundred individuals at the very least since September 11, 2001.<sup>27</sup> Many victims of rendition have emerged, revealing the dangers and lack of remedy when the procedure is used.<sup>28</sup> Section 1003 of the DTA prohibits CID treatment on anyone who is in the custody or physical control of the United States; thus, this prohibition would in no way prevent renditions from occurring. In fact, it is plausible that Section 1003, if vigorously monitored, may encourage the use of rendition to avoid such scrutiny.

#### B. *Defining Cruel, Inhuman, or Degrading Treatment or Punishment*

Although Section 1003 grounds its definition of CID in constitutional law, there is still no precise definition for CID treatment. The definition is subject to evolving case law, which may not even be instructive since judges may apply a different standard for CID treatment in the case of a terror suspect or unlawful combatant, as opposed to a domestic citizen charged with a mundane criminal offense.<sup>29</sup> Since comparing the two situations is difficult, a court's ability to directly translate the constitutional "shock the conscience" standard may prove difficult.<sup>30</sup> Also, given the controversial intra-Administration

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25. In this Recent Development, "rendition" will be used to refer to the extrajudicial transfer of a person. Technically, the word rendition refers to the transfer, surrender, or delivery of a person or fugitive from justice. MICHAEL JOHN GARCIA, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE 1 (CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS Sept. 22, 2005), available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>.

26. *Id.* at 1–2.

27. Amnesty International, "Rendition" and Secret Detention: A Global System of Human Rights Violations, Jan. 2006, [http://web.amnesty.org/library/pdf/POL300032006ENGLISH/\\$File/POL3000306.pdf](http://web.amnesty.org/library/pdf/POL300032006ENGLISH/$File/POL3000306.pdf), at 2–3.

28. See, e.g., Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106, available at [http://www.newyorker.com/fact/content/?050214fa\\_fact](http://www.newyorker.com/fact/content/?050214fa_fact); Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1.

29. LEE WOOD, OVERVIEW AND ANALYSIS OF SENATE AMENDMENT CONCERNING INTERROGATION OF DETAINEES 4 (CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, Nov. 2, 2005), available at <http://www.fas.org/sgp/crs/intel/RS22312.pdf>.

30. *Id.* at 4–6.

debates over the exact definition of torture,<sup>31</sup> a complete judicial understanding of the definition of CID treatment is even less likely.

### C. Overriding Presidential Powers as Commander in Chief

One final Administration argument may make Sections 1002 and 1003 completely irrelevant: the assertion of the Commander in Chief power as a superseding power. President Bush issued a signing statement<sup>32</sup> along with the passage of the DTA, in which he stated, “The executive branch shall construe [the DTA] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power . . . .”<sup>33</sup> The Administration argues that the Commander in Chief power grants the President complete discretion and authority over the conduct of war.<sup>34</sup> In other words, Congress lacks the authority under Article 1 of the Constitution to restrict the President in his exercise of authority to control wartime operations.<sup>35</sup> Since the President would be authorizing the detention and interrogation of detainees in pursuance of the war on terrorism, this position would render the DTA’s protections completely irrelevant. Moreover, the problem of enforcing the DTA against the Executive branch would complicate matters considerably, as discussed below.

## IV. OTHER SECTIONS OF THE DETAINEE TREATMENT ACT OF 2005

The three remaining sections of the DTA address other issues in the detainee treatment debate. Section 1004 clarifies the legal defenses available to U.S. government personnel that are subject to any civil action or criminal prosecution for acts, officially authorized and determined to be lawful at the time, involving the detention or interrogation of an alien who the President has determined to possibly be associated with terrorist activity posing a threat to the United States.<sup>36</sup> Such an agent of the U.S. government would be able

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31. Compare Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (arguing for an excessively broad definition of torture), with Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to James B. Comey, Deputy Attorney Gen., U.S. Dep’t of Justice, regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> (repudiating and superseding the Memo from Aug. 1, 2002).

32. See Memo from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Bernard N. Nussbaum, Counsel to the President, regarding The Legal Significance of Presidential Signing Statements (Nov. 3, 1993), available at <http://www.usdoj.gov/olc/signing.htm>.

33. George W. Bush, President’s Statement on Signing of H.R. 2863 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

34. See Memorandum from Bybee, *supra* note 31, at 32–34. The Levin Memo did not reject this argument in its repudiation of the Bybee Memo. Memorandum from Levin, *supra* note 31, at 2.

35. Memorandum from Bybee, *supra* note 31, at 34–35.

36. Detainee Treatment Act, *supra* note 7, § 1004.

to argue as a defense that he was unaware that the practices were unlawful and that a person of “ordinary sense and understanding”<sup>37</sup> would not know that the practices were unlawful. Moreover, according to President Bush, “the executive branch shall construe [the DTA] not to create a private right of action.”<sup>38</sup> Section 1004, therefore, supplies another potential way in which Sections 1002 and 1003 might be circumvented, as the perpetrators of the actions in question would have a valid legal defense, grounded in the Commander in Chief power, that they were following the orders of the President, and that those orders did not appear to be unlawful.

Section 1005 limits the remedy available to detainees who seek to challenge their status under the Geneva Conventions, as determined by the Administration, to Combatant Status Review Tribunals and Administrative Review Boards.<sup>39</sup> Section 1005 provides that the Secretary of Defense shall submit reports to the Senate and House Armed Services Committees regarding the procedures established for the Combatant Status Review Tribunals and Administrative Review Boards for the detainees held in Guantanamo Bay, and the procedures in operation for status determination for detainees in Iraq and Afghanistan. The rules of evidence regarding admissibility of coerced statements, the characteristics of the reviewing authority, and other procedural issues for these review boards are defined in Sections 1005(a)–(d). The jurisdiction of the U.S. court system to hear petitions for habeas corpus and other actions filed by detainees in Guantanamo Bay is explicitly restricted.<sup>40</sup> The U.S. Court of Appeals for the District of Columbia Circuit has exclusive, but limited, jurisdiction to hear appeals to review the final decisions of the Combatant Status Review Tribunals and final decisions of the Military Commissions.<sup>41</sup>

The DTA concludes with Section 1006, which addresses the issue of training Iraqi forces for detainee treatment.<sup>42</sup>

#### CONCLUSION

The Abu Ghraib scandal has forever tainted the U.S. armed forces and America’s moral standing globally. Congress attempted to legislate a solution to the issue of detainee abuse and torture by passing the Detainee Treatment Act of 2005. While Sections 1002 and 1003 of the DTA, originating from Senator McCain’s S.Amdt. 1977, may help bring some legal clarity to the situation, there are other aspects to the detainee abuse and torture issue that have yet to be addressed, and still other ways in which a determined President could easily ignore or circumvent the restrictions in the DTA. Indeed,

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37. *Id.* at § 1004(a).

38. Bush, *supra* note 33.

39. Detainee Treatment Act, *supra* note 7, § 1005. This section was originally a separate amendment, S.Amdt. 2516, sponsored by Senator Lindsey O. Graham (R-S.C.). S.Amdt. 2516, 109th Cong. (2005).

40. Detainee Treatment Act, *supra* note 7, at § 1005(e)(1).

41. *Id.* at §§ 1005(e)(2)–(3).

42. *Id.* at § 1006.

Section 1004 of the DTA helps to immunize officials from accountability in violating the previous two sections, and Section 1005 limits the ability of detainees to access the domestic U.S. legal system. Overall, the Detainee Treatment Act of 2005 is a feeble and incongruous attempt to restore America's credibility as a country that does not practice or condone torture and the use of cruel, inhuman, or degrading treatment or punishment.

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