[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,
Petitioner-Appellee,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF MILITARY ATTORNEYS DETAILED TO REPRESENT ALI HAMZA AHMAD SULAYMAN AL BAHLUL BEFORE A MILITARY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

All parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellants or the Brief for Appellee.

(B) Rulings Under Review.

References to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases.

There are two related cases brought by detainees being tried by military commission pending in the district court in this Circuit:

1. *al Qosi v. Bush*, Civ. No. 04-1937 (D.D.C.)(J. Friedman)
2. *Hicks (Rasul) v. Bush*, S.Ct.; D.C. Cir. No. 02-5284; Civ. No. 02-0299 (D.D.C.)(J. Kollar-Kotelly)

CERTIFICATE OF COUNSEL IN COMPLIANCE WITH CIRCUIT RULE 29(d)

This brief is filed separately from other *amici curiae* in support of Appellee because the issue addressed – the right of confrontation, and its relation to the right of self-representation – is not an issue being addressed by any other *amici*.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

FEDERAL CONSTITUTIONAL PROVISIONS:

REGULATIONS:

OTHER AUTHORITIES:

GLOSSARY

GPW	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
ICCPR	International Covenant on Civil and Political Rights
MCO	Military Commission Order
Protocol I	Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977

INTEREST OF THE *AMICUS CURIAE*[1]

Lieutenant Commander Philip Sundel and Major Mark A. Bridges are military counsel detailed to represent Ali Hamza Ahmad Sulayman al Bahlul, a detainee at Guantanamo Bay, Cuba, before a military commission convened to try "war crimes" pursuant to the President's Military Order of November 13, 2001.[2] The views expressed in this brief do not represent the official views of the United States Government.

Lieutenant Commander Sundel and Major Bridges submit this brief to highlight the importance of the confrontation issue addressed in *Hamdan v. Rumsfeld* to the related issue of self-representation presently being considered by Mr. al Bahlul's military commission – for Mr. al Bahlul to be able to exercise the right of self-representation in a meaningful way the related right of confrontation must also exist.

At his initial hearing on August 26, 2004, Mr. al Bahlul told the military commission that he wanted to represent himself during his trial for war crimes.[3] The Presiding Officer informed Mr. al Bahlul that the military commission rules did not allow an accused to represent himself,[4] a statement that is consistent with the existing provisions governing military commissions.[5] Nonetheless, the Presiding Officer directed

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[1] This brief is filed with the consent of all parties. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the *amicus* made a monetary contribution to it. Associated costs were paid by the Office of the Chief Defense Counsel, Office of Military Commissions.

[2] Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[3] Dep't of Defense, Unofficial Transcript of Initial Hearing Before a Military Commission, *United States v. al Bahlul*, at 6-7, 15, *available at* http://www.defenselink.mil/news/Nov2004/d20041109hearing.pdf (visited Dec. 21, 2004).

[4] *Id.* at 6.

[5] Military Commission Order No. 1, para. 4(C)(4), 32 C.F.R § 9.4(c) (an accused "must be represented at all relevant times by Detailed Defense Counsel."); Military Commission Instruction No. 4, para. 3D(2), 32 C.F.R. § 13.3(c) ("Detailed Defense Counsel shall

the defense and prosecution to file briefs related to the self-representation issue, and stated he would not schedule further proceedings until a higher authority resolved the issue.[6]

Ultimately, the prosecution agreed that an accused tried before a military commission must be afforded the right to represent himself.[7] Subsequent to that concession the Appointing Authority for Military Commissions continued all proceedings in the case, pending appointment of new commission members. While Mr. al Bahlul's request to represent himself was never acted on by the military commission, it is likely that it will be honored once commission proceedings resume.

SUMMARY OF ARGUMENT

There is no question more fundamental to a criminal proceeding than the question of who will represent the defendant. The answer to that question will shape the course of the proceeding. There is no right more fundamental than the right of a defendant to choose to represent himself. Domestic and international law recognize that right as being an indispensable element of a fair criminal process. *Amicus* anticipates that Mr. al Bahlul's request to represent himself before his military commission will be granted soon after his commission proceedings resume.

Along with recognizing the fundamental right of self-representation, however, military commissions must also be required to recognize the related right of an accused to be present at his own trial and to confront the witnesses against him. Otherwise, the

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represent the Accused . . . notwithstanding any intention expressed by the Accused to represent himself.").

[6] Note 3, *supra*, at 19-20.

[7] Dep't of Defense, Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, *United States v. al Bahlul*, *available at* http://www.defenselink.mil/news/Oct2004/d20041006pro.pdf (visited Dec. 21, 2004).

power that presently exists to involuntarily exclude Mr. al Bahlul from closed sessions of his trial will render his right of self-representation meaningless.

The right to self representation is integrally bound up with the issue presented in this case, that the military commission is improperly constituted because it violates the Uniform Code of Military Justice and other federal guarantees. As the decision below recognized, a defendant's right to be present and to confront the witnesses against him is fundamental. The military commission abridges this fundamental right, asserting that the presence of counsel alone is enough. The view that a military commission is not bound by the longstanding right of confrontation, and that the President has the raw power to abridge these rights, cannot be correct. Judge Robertson disagreed on this specific question, finding that a defendant cannot be excluded from the courtroom. Should this Court affirm Judge Robertson's decision, it will necessarily end the uncertainty around the right to self-representation in the commission.

ARGUMENT

I. THE RIGHT OF SELF-REPRESENTATION IS A FUNDAMENTAL TRIAL RIGHT APPLICABLE TO MILITARY COMMISSIONS.

One of the first matters addressed in any criminal proceeding is the question of who will represent the defendant. It is a decision that is central to the entire proceeding, and one which will affect all that follows. The central nature of this question is illustrated by the fact that the right of a defendant to choose to represent himself is universally recognized as a fundamental right in criminal trials. As the Court concluded in *Faretta v. California*, 422 U.S. 806 (1975), the right is implicit in the Sixth Amendment of the United States Constitution, and was long recognized in English and

Colonial jurisprudence as one of the indispensable guarantees of a fair criminal justice system.

The Court opined in *Faretta* that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 817. In surveying the history of self-representation in English criminal jurisprudence the Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821. A proceeding of "mixed executive and judicial character . . . . the Star Chamber has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (emphasis in original, footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as

> his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

Id. at 827-28 (footnote omitted).

The Court has even rejected the view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

The right of self-representation is recognized as well in international tribunals. Both of the currently operating *ad hoc* international tribunals for the prosecution of war crimes provide for the right of self-representation. Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 21(4)(d), adopted at New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159; Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 20(4)(d), adopted at New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598. The ICTY Appeals Chamber recently reaffirmed this fundamental right in holding that the right of self-representation is "an indispensable cornerstone of justice," and cited *Faretta* in doing so. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on

Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Nov. 1, 2004, at para. 11.[8]

Historic precedence also recognizes the right of self-representation. Rules of procedure governing the post-World War II Nuremberg military tribunals provided that "a defendant shall have the right to conduct his own defense."[9] Similarly, the war crimes tribunals held in the Pacific theater recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[10]

Subsequently, the right of self-representation was implicitly guaranteed by the Geneva Conventions of 1949, formally adopting it as part of the law of armed conflict in treaties ratified by the United States. Common Article 3 of the Geneva Conventions requires "regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable by civilized peoples" in trials for law of war violations or other criminal offenses during armed conflict. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 [hereinafter GPW].[11] Domestic law, including treaties of the United States, as well as

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[8] *Available at* http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm (visited Dec. 21, 2004).

[9] Rule 2(d), Rules of Procedure for the Trial of the German Major War Criminals, (Oct. 29, 1945); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules), *available at* http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules (visited Dec. 21, 2004).

[10] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal), *available at* http://www.yale.edu/lawweb/avalon/imtfech.htm (visited Dec. 21, 2004).

[11] Although Common Article 3 is specifically addressed to "armed conflict not of an international character," its protections are widely recognized as a minimum due process guarantee in all armed conflicts. *Prosecutor v. Tadic*, Case No. IT-94-1-A, ICTY, Trial

customary international law help define which judicial guarantees are "recognized as indispensable by civilized peoples."

The first additional protocol to the Geneva Conventions, which similarly provides "minimum" guarantees for "persons who are in the power of a Party to the conflict," is another source for understanding the "judicial guarantees" protected by Common Article 3. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. Pursuant to Protocol I, persons may only be tried by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . *all necessary rights and means of defense*." Protocol I, art. 75(4)(a) (emphasis added).[12]

The minimum trial rights which the United States is bound to afford are reiterated and further defined in human rights law such as the International Covenant on Civil and Political Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR]. Not surprisingly, the ICCPR provides that a "minimum guarantee" that must be

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Chamber, Decision of Defense Motion on Jurisdiction, Aug. 10, 1995, at para. 67, *citing Nicaragua v. United States*, 1986 I.C.J. 4 (Merits Judgment of 27 June 1986), *available at* http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm (visited Dec. 20, 2004)("the rules contained in common Article 3 constitute a 'minimum yardstick' applicable in both international and non-international armed conflicts.").

[12] Although the United States has not ratified Protocol I because of disagreement with some of its provisions, the United States considers Article 75 of Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.").

afforded "[i]n the determination of any criminal charge," is the right of an accused "to defend himself in person" if he so chooses. ICCPR, art. 14(3).[13]

The right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 283 (Spring 1993). As even the prosecution has acknowledged the applicability of this fundamental right,[14] it is anticipated that Mr. al Bahlul's request to represent himself will be granted once his military commission proceedings recommence.

II. AN ACCUSED'S RIGHT OF SELF-REPRESENTATION CAN BE RENDERED MEANINGLESS IF OTHER COMMISSION RULES ARE ALLOWED TO DENY HIM THE RIGHT TO BE PRESENT AT TRIAL AND TO CONFRONT THE WITNESSES AGAINST HIM.

An accused's right of self-representation can be effectively gutted by procedures restricting his right to confront the witnesses against him and to be present at trial. Military commissions would allow just such a gutting, in the form of rules that permit an

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[13] The Executive branch is bound to apply the provisions of the ICCPR and Common Article 3, as informed by the customary international law recognized in Article 75 of Protocol I, in formulating military commission procedures, as both the ICCPR and GPW have been ratified by the United States. Their provisions are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The Executive branch is not free to disregard these individual rights, regardless of whether the treaties are considered self-executing. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998)(requiring all "executive departments and agencies . . . including boards and commissions . . .to respect and implement [international human rights obligations, including the ICCPR] fully."); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 79 (2d ed. 2003)("the President must faithfully execute an otherwise non-self-executing treaty.").

[14] Note 7, *supra*.

accused to be excluded from the courtroom during any proceeding and for a broad and loosely defined array of reasons.

Both the Presiding Officer of an individual military commission and the Appointing Authority responsible for all military commissions may close the proceedings any time one of them believes that it is justified for "the protection of information classified or classifiable []; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." Military Commission Order Number 1, para. 6B(3) [hereafter MCO No. 1], 32 C.F.R. § 9.6(b). This sweeping authority to close the proceedings may include exclusion of the accused from the courtroom. *Id.*

The power is not limited to hearings involving the discussion of preliminary matters such as discovery or the admissibility of evidence. Rather, it extends to any proceeding, and has already been shown to include *voir dire. Hamdan v. Rumsfeld*, 2004 U.S. Dist. LEXIS 22724 at *12, 14 (D.D.C. November 8, 2004).

Excluding an accused from essential proceedings would effectively deny a *pro se* accused his right of self-representation. Further, forcing counsel representation on a *pro se* accused for the limited purpose of representing him during closed sessions, as the prosecution in Mr. al Bahlul's military commission has suggested,[15] is no substitute. First, while detailed military defense counsel is permitted to remain in the courtroom at all times, he is prohibited from disclosing any information presented during a closed

[15] Dep't of Defense, Answer to Presiding Officer's Questions on the Issue of Self-Representation, para. h, *United States v. al Bahlul, available at* http://www.defenselink.mil/news/Oct2004/d20041029rep.pdf (visited Dec. 21, 2004).

session to an accused that has been excluded from the proceeding. MCO No. 1, para. 6B(3).

More significantly, the right of self-representation necessarily includes the right of confrontation, and both of the rights belong to the accused, not counsel:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "*confronted with the witnesses against him*," and who must be accorded "compulsory process for obtaining witnesses in his favor."

Faretta v. California, 422 U.S. at 819 (emphasis added). Any suggestion that an unwanted counsel could adequately represent the interests of the *pro se* defendant in a session of trial from which the accused has been excluded is a legal fiction.

> It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. Cf. *Henry v. Mississippi*, 379 U.S. 443, 451; *Brookhart v. Janis*, 384 U.S. 1, 7-8; *Fay v. Noia*, 372 U.S. 391, 439. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Id. at 820-21 (emphasis in original).

A *pro se* accused must be given "a fair chance to present his case in his own way." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). Because of the danger that multiple defense voices will confuse the defendant's message, limits must be placed on "the extent of standby counsel's unsolicited participation":

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's

> objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.
>
> Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

McKaskle v. Wiggins, 465 U.S. at 178 (emphasis in original). Standby counsel does not represent the accused and should not be perceived as doing so. *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991)("the key limitation on standby counsel is that such counsel not be responsible – *and not be perceived to be responsible* – for the accused's defense. Indeed, in many respects, standby counsel is not counsel at all.")(emphasis in original). A standby counsel who speaks instead of the accused with respect to important matters violates the right of self-representation. *United States v. McDermott*, 64 F.3d 1448 (10th Cir. 1995)(exclusion of accused from thirty bench conferences, attended by standby counsel, violated the right of self-representation).

The ability of the *pro se* accused to present his defense is further complicated by the structure of military commissions. Unlike a court-martial or criminal trial in federal court, where issues of law are decided by a judge outside the presence of the jury, military commissions are comprised of members who serve as both judge and jury. *See* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 4(c)(2) (Nov. 16, 2001)("the military commission sit[s] as the triers of both fact and law").[16] Thus, all proceedings before a military commission will be in the presence of the "jury." Any participation by standby or unwanted detailed defense counsel would take place before the ever-present

[16] To make matters worse, only one of the commission members – the presiding officer – need be a lawyer or "judge advocate." MCO No. 1, para. 4A, 32 C.F.R. § 9.4(a). Thus, a majority of the required 3 to 7 commission members are likely to be non-lawyers. *Id.*

military commission "jury." Such participation by counsel during a closed session would substantially interfere with tactical decisions by the accused and be viewed as destroying the commission's perception that the accused is representing himself, violating both parts of the *McKaskle* test.

Standby counsel's participation in the presence of the jury is "more problematic" than participation outside the jury's presence because "excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*." *McKaskle*, 465 U.S. at 181. In the presence of the jury, standby counsel, even over the accused's objection, may assist the accused "in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, *that the defendant has clearly shown he wishes to complete* . . . [and] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." *Id.* at 183 (emphasis added). When standby counsel ventures beyond these basic procedural functions, the accused's self-representation rights are eroded.

The right to represent oneself cannot be separated from the right to confrontation, and the military commission cannot be permitted to ignore these two related, fundamental rights. Resolution of the correctness of Judge Robertson's recognition of the right of confrontation is necessary to ensure that *pro se* accused, like Mr. al Bahlul, are entitled to a meaningful opportunity to represent themselves before military commissions.

CONCLUSION

For the foregoing reasons, *amicus* Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman al Bahlul Before a Military Commission urges this Court to affirm the decision of the United States District Court.

December 29, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 29, 2004, I served two copies of the foregoing *Brief of Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman al Bahlul Before a Military Commission as Amicus Curiae in Support of Petitioner-Appellee and Affirmance* on counsel for each party, listed below, by electronic means, pursuant to their written consent.

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