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MILITARY COMMISSIONS AND THE INTERAGENCY PROCESS – PUTTING THE CART BEFORE THE HORSE

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MILITARY COMMISSIONS AND THE INTERAGENCY PROCESS – PUTTING THE CART BEFORE THE HORSE

"Nobody wants to capture Osama bin Laden and have him tried by Judge Ito for two years." [1]
Justice Antonin Scalia

"This is a grotesque Magna Charta for a new Star Chamber."[2] Rogers M. Smith

Typically, the interagency process is a deliberate, bureaucratic, often lengthy procedure that involves communication, coordination, and cooperation between and amongst the various Executive Departments and Agencies, as well as with Congress. Administration officials, politicians, the media, and interest groups are all familiar with what some call "red tape" but most recognize as democracy. During periods of national crisis, however, priorities change. In the aftermath of 11 September, "business as usual" became the exception, not the rule, and the normal tensions between the branches of government were heightened. This paper will examine the interagency process surrounding President Bush's Military Order creating military commissions. It will analyze the roles of Congress, the Administration, the media, and concerned citizens and how they, and the process, affected the final product.

The War on Terror

Nine days after the terrorist attacks of September 11, 2001, President Bush addressed a Joint Session of Congress and defined the Nation's mission – a war on terror. This war, he promised, would use "every resource at our command – every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary

[1] "Terrorists on Trial II," *Wall Street Journal*, 4 December 2001.
[2] Rogers M. Smith, "With Justice for Some, Not All?," *Christian Science Monitor*, 20 November 2001.

instrument of war" to defeat our enemy.[3] The response to the President's address was overwhelmingly favorable. Congress, working with the Executive Branch, exhibited remarkable bipartisanship by quickly authorizing a $40 billion emergency spending bill,[4] passing the Joint Resolution on September 14, 2001,[5] and enacting the USA PATRIOT[6] Act on 25 October.

By early November, however, some were alarmed at the extent of the Executive Branch's actions. In quick succession, the Administration announced that it would detain terrorist suspects without hearings and eavesdrop on attorney-client conversations. On 13 November, President Bush issued a Military Order authorizing military commissions. Determining that criminal trials in federal district courts would be impracticable during the "state of armed conflict," the President established military commissions for non-citizens who were members of al Qaeda, who were involved in terrorist acts against the U.S., or had harbored any of these individuals.[7] The Order expressly authorized the death penalty, established the evidentiary standards, prescribed conviction and sentencing requirements, and limited the right to appeal the conviction. The President also directed that the Secretary of Defense issue appropriate procedures for a "full and fair trial."[8]

Some Key Questions

A significant policy decision had been announced. How was it developed? Who played the key roles in its deliberation? How did the interagency process influence the outcome? Remarkably, there was very little process beforehand and the Executive Branch remains

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[3] President, "Address to a Joint Session of Congress and the American People," White House Press Release (20 September); available from http://www.whitehouse.gov/news/releases/2001; Internet; accessed 4 December 2001.
[4] John Lancaster and Helen Dewar, "Congress Clears Use of Force, $40B in Emergency Aid," *Washington Post*, 15 September 2001, p. A4.
[5] Ibid.
[6] "United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."
[7] Section 2(a)(1)(i)-(iii) of President Bush's Military Order, November 13, 2001; available from http://www.whitehouse.gov/news/releases/2001; Internet; accessed 4 December 2001.
[8] Ibid at Section 4.

uniformly tight-lipped about the issue.[9] The proverbial cart was before the horse -- there was no interdepartmental deliberation or coordination and the National Security Council had little, if any, involvement.[10]

Furthermore, Congress had not been consulted on the Order prior to its release and was caught flat-footed. As early as September, the Senate Judiciary Committee had received press inquiries on military "tribunals" but was unaware of any action by the Administration in this regard.[11] The Committee, acting on the media's information, did submit written follow-up questions to Attorney General John Ashcroft after his testimony before the Committee on 25 September. One question specifically asked whether the Attorney General "favor[ed] using the military tribunal system as an alternative to civilian criminal trials" and if the President were considering this option.[12] The response by the Assistant Attorney General on the 18th of October was evasive. He stated it would be "inappropriate for the Department to make premature pronouncements" about the anticipated use of commissions, but did note there existed precedent for commissions and assured the Committee that "any recommendation of the Department concerning [commissions] will reflect careful consideration of the important constitutional issues presented."[13]

Less than a month later, the President issued his Military Order. The Senate Judiciary Committee was first informed of the Order by the Wall Street Journal.[14] The Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, had to withhold comment on the Order until he had seen a copy the following day.[15] Despite long days of intense negotiations in October

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[9] Attempts to interview individuals at the N.S.C., the Department of Justice, and the DOD General Counsel's Office received similar replies: "We want to help you, but we can't."
[10] Nonattribution interview with NSC staffer of 27 November 2001.
[11] Nonattribution interview with Senate staffer of 10 January 2002.
[12] Daniel J. Bryant, Assistant Attorney General, to Senator Patrick Leahy, 18 October 2001. Copy provided by Senate Staffer.
[13] Ibid.
[14] Nonattribution interview with Senate staffer of 10 January 2002.
[15] Ibid.

between the Justice Department and Congress on the USA PATRIOT Act, there was no direct communication from the Executive Branch to Congress on the Order prior to its issuance.[16]

Congress Provides a Forum for Consensus

The reaction by the media, Congress and nongovernmental organizations was swift, vocal and critical, and the intensity appeared to catch the Executive Branch off-guard. Institutions such as the American Civil Liberties Union, Human Rights Watch, and Amnesty International chastised the Administration for abdicating the moral high ground in the fight for human rights and ignoring domestic and international laws prescribing basic due process rights.[17] Congress contended that the Executive Branch was acting beyond its constitutional authority.[18] Many politicians, academics, and institutions felt that the recent wave of antiterrorism measures reflected the Administration's belief that it could use the political energy of a wartime atmosphere to gain even more power and autonomy for federal law enforcement and intelligence agencies. Chairing a Senate Judiciary Committee hearing, Senator Russ Feingold said he feared "that America's beacon of freedom and justice is threatened as we face almost daily revelations of extraordinary steps by the Justice Department that snub the rule of law and threaten to erode fundamental constitutional rights."[19] The question became where to properly strike the balance between security on the one hand and personal rights on the other, and many clamored for oversight hearings.

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[16] Ibid.

[17] See, e.g., Amnesty International Press Release of 15 November 2001, "USA: Presidential Order on Military Tribunals Threatens Fundamental Principles of Justice," available from http://www.amnesty.org/web/news.nsf; Internet; accessed 5 December 2001; 15 November 2001 letter from Human Rights Watch to President Bush, available from http://www.hrw.org/press; Internet; accessed 5 December 2001; ACLU Press Release of 4 December 2001, "In Testimony Before Senate, ACLU President Urges Congress Protect Against Executive Branch Overreach," available from http://www.aclu.org/news; Internet; accessed 5 December 2001.

[18] John Lancaster, "Hearings Reflect Some Unease with Ashcroft's Legal Approach," *Washington* Post, 2 December 2001, p. A25.

[19] Congress, Senate, Judiciary Committee, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, 107th Cong., 1st sess., 4 December 2001; prepared statement of Sen. Russ Feingold; available from http://judiciary.senate.gov/ rf120401f.htm; Internet; accessed 11 December 2001.

Eventually, five Senate hearings were held. The Senate Judiciary Committee held four hearings and the Senate Armed Services Committee (SASC) held one. The first Judiciary Committee hearing was on 28 November with Chairman Leahy presiding. Two additional full committee hearings were held on 4 December, presided by Senators Feingold and Schumer. The final Judiciary Committee hearing was on 6 December, chaired by Senator Leahy and the only witness called was Attorney General Ashcroft. On 12 December, Deputy Secretary of Defense Paul Wolfowitz and DOD General Counsel William Haynes appeared before the SASC.

The media were driving the Committees' actions from the very beginning.[20] Some politicians, notably Senator Arlen Specter, were vocal about the Administration's actions early on, but most did not offer comments until the media exerted some pressure. There was political risk in overtly opposing the President, especially considering his popularity and the support for the Administration's actions.[21] No one wanted to appear soft on terrorism. In fact, House Democrats prevailed upon Representative Dennis J. Kucinich (D-Ohio) to withdraw a proposal that would have cut off funding for any military commissions.[22] But there were legitimate questions, and it was Congress's role to ask them. As Senator Leahy stated, it was not a "question of whether you are for or against the terrorists. Everyone is against the terrorists. This is about whether we are adequately protecting civil liberties."[23] Many on the Hill felt that the Administration was intentionally bypassing the legislative and judicial branches and that, therefor, Congressional scrutiny was required to preserve the checks and balances on governmental authority.

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[20] Nonattribution interview with Senate staffer of 10 January 2002. The press was the first to alert the Senate on the issue in September. During hearings, however, the press focused more on the supposed tension between Sen. Leahy and Attorney General Ashcroft than on substance.

[21] In mid-December, the President enjoyed an 80% approval rating and 81% supported his actions. Jackie Calmes, "Washington Wire," *Wall Street Journal*, 14 December 2001, p. 1. However, Senator Leahy is less exposed than many as he is extremely popular in Vermont and has had no serious challenge for his Senate seat.

[22] John Lancaster, "Hearings Reflect Some Unease with Ashcroft's Legal Approach," *Washington Post*, 2 December 2001, p. A25.

[23] Dan Eggen, "Civil Liberties Groups Attacks 'Only Aids Terrorists,' Senate Panel Told," *Washington Post*, 7 December 2001, p.A1.

Key Positions on the President's Military Order

The hearings elicited a variety of arguments for and against the President's Military Order. To summarize the key assertions:

Pros

• The President had authority to issue the order based upon the Joint Resolution authorizing the use of force, his inherent constitutional power as Commander in Chief, and the legislative authority granted under the Uniform Code of Military Justice, U.S. Code, Title 10, Section 821.

• The Constitution contemplated that Executive authority would expand during a time of national crisis or armed conflict, allowing swift action and unity of purpose.[24] Attorney General Ashcroft testified that "our constitutional founders didn't expect us to have a war conducted by committee" and that "the Constitution vests the President with the extraordinary and sole authority as Commander in Chief to lead our nation in times of war."[25]

• There existed ample historical precedent and judicial authority supporting the use of commissions. Further, there is a favorable comparison of the commissions to prior and current international tribunals in terms of evidentiary standards, majority voting, and ability to close proceedings. The world has accepted these international tribunals as "full and fair trials."

• The commissions would protect participants and safeguard national security secrets, sources, and collection methods. Civil criminal trials and the Classified Information Procedures Act (CIPA) are inadequate in these aspects.

Cons

• The Order violates the separation of powers. Congress alone has the authority to declare war and authorize military tribunals. Historical and judicial precedents indicate that

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[24] Congress, Senate. Judiciary Committee, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, 107th Cong., 1st sess., 28 November 2001; prepared statement of William Barr; available from http://judiciary.senate.gov/ te112801f-barr.htm; Internet; accessed 11 December 2001.

these are necessary predicates for constitutional military commissions. As Senator Leahy noted, "The American people will have greater confidence if the rules for this new war are undertaken by partners in our country's effort against a common and terrible enemy." [26]

• Our system of justice will be on trial as much as any member of al Qaeda. The world will observe how fairly victor's justice will be meted out. The use of commissions sends the message that we have no confidence in our civil criminal system. The Order expressly denies certain fundamental rights, and anything that creates the appearance of second-rate justice will cause the U.S. to lose credibility and moral persuasion. Americans could then be similarly tried in foreign courts that afford little or no due process.

• Federal district courts have previously successfully prosecuted terrorists, safeguarded the participants, and protected classified information. The Government has failed to show that the CIPA is inadequate.

• Commissions will inhibit allied support, prevent the extradition of suspects, and diminish law enforcement cooperation.

• The Order violates international treaties such as the Third Geneva Convention of 1949 (Protection of Prisoners of War) and the International Covenant on Civil and Political Rights, both of which were ratified by the United States.

The Administration's Efforts at Damage Control

After noting the reaction to the Order, the Executive Branch initiated an effort to respond to the criticisms. On 19 November, the Justice Department sent lawyers over to Capitol Hill to brief Senate staffers.[27] At White House Press Briefings, Ari Fleischer emphasized the exigency of the situation. Admitting that the President did not consult with Congress, he said "it is not

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[25] David G. Savage, "Bush Writes Off Congress, Takes Reins in War," *Los Angeles Times*, 10 December 2001.
[26] Ibid.
[27] Nonattribution interview with Senate staffer of 10 January 2002.

always the role of the Administration to consult with all parties. The President has powers granted him under the Constitution to take actions, as an executive, that he thinks appropriate."[28] As the hearings were commencing, Mr. Fleischer noted that "the President view[s] the hearings [as] absolutely, perfectly appropriate and fitting for Congress to engage in," but noted the popularity of the Administration's antiterrorism efforts.[29] White House Counsel Alberto R. Gonzales, appearing at a national security law conference sponsored by the A.B.A., stated that "we fully contemplate habeas review will be available for any defendant with a U.S. nexus."[30] Shortly thereafter, the individual charged with drafting the commissions' procedures, DOD General Counsel Haynes, stated that he was 'confident they would withstand judicial review."[31]

The exception to the conciliatory tone was the Attorney General. He claimed that critics of the Administration "only give aid to terrorists because they give ammunition to America's enemies and pause to America's friends." He made it clear he was not interested in collaborating with Congress.[32] His voice, however, was drowned out by others in the Administration who sought to soothe the critics. Secretary of Defense Rumsfeld, appearing on 2 December's "Meet the Press," said that the public debate had "elevated a lot of issues that are important and need to be considered." He went on to say that "outside experts had been brought in to ensure that we do this in a very measured, balanced, thoughtful way that reflects our country's values and approaches."[33] Those "outside experts" included William H. Webster (the former DCI and FBI Director), Griffin Bell (President Carter's Attorney General), William T. Coleman (President

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[28] Ari Fleischer, White House Press Briefing, 28 November 2001; available from http://www.whitehouse.gov/ releases/2001; Internet; accessed 5 December 2001.
[29] Ari Fleischer, White House Press Briefing, 29 November 2001; available from http://www.whitehouse.gov/ releases/2001; Internet; accessed 5 December 2001.
[30] Vernon Loeb and Susan Schmidt, "U.S. Wants Custody of Enemy Leaders," *Washington Post*, 1 December 2001, p. A14.
[31] Ibid.
[32] "John Ashcroft Misses the Point," *New York Times*, 7 December 2001.
[33] Jess Bravin, "Justice Department Weighs Stepping Up Monitoring of Religious, Political Groups," *Wall Street Journal*, 3 December 2001.

Ford's Transportation Secretary), Lloyd N. Cutler (President Clinton's White House Counsel), and former DOD General Counsel Martin Hoffman.[34]

By late December, a limited number of copies of the draft procedures were distributed to the N.S.C., Defense, State, and Justice officials for their review. One individual – an anonymous "administration official" – called the Washington Post and the New York Times and read significant portions of the draft to reporters. Articles the following day in both papers summarized the draft regulations, which addressed many of the concerns offered by critics of the military commissions. The draft included an appeal process, indicated that unanimity was required for a death sentence, allowed for the hearings to be open, and outlined a defendant's right to counsel.[35] The following day, an irate President stated that the drafts were "preliminary" and expressed annoyance at the individual who gave the details to the press, even though it yielded political benefits for him.[36] Many on the Hill believed it was an intentional leak, but given the President's exasperation and the subsequent gag order, it appears to be one person acting independently.

Throughout the "process," direct formal communication between the Administration and Congress was limited. However, there appears to be some informal or indirect communications between Senate leaders and senior Executive Branch officials or their spokesmen.[37] Attorney General Ashcroft and Senator Leahy converse frequently. Lloyd Cutler, who was one of the experts advising the Secretary of Defense, wrote a letter to the editor of the Wall Street Journal. Mr. Cutler was involved in the 1942 prosecution of the eight German saboteurs and the subsequent Supreme Court case. He admitted that a defendant's rights today were far greater than those sixty years ago and that favorable judicial review of the commissions cannot be

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[34] Charles Lane, "Terrorism Tribunal Standards Weighed," *Washington Post*, 28 December 2001, p. A1.
[35] Ibid. Neil A. Lewis, "Rules on Tribunal Require Unanimity on Death Penalty," *New York Times*, 28 December 2001, p.1.
[36] Charles Lane, "Bush Calls Draft on Tribunals 'Preliminary'," *Washington Post*, 29 December 2001, p. A8.
[37] Nonattribution interview with Senate staffer of 10 January 2002.

assumed. Nevertheless, he was confident that the Administration could hold these commissions "under the full glare of the media in a manner that meets all legitimate concerns. Success depends upon [our] ability to show justice is in fact being done. In a very real sense, it is the American legal system, not just al Qaeda's leaders, that would be on trial."[38]

The Outcome

It is apparent this unusual process has affected the policy. By the end of the hearings, all the Senators and witnesses agreed that there existed a requirement for the commissions. The question became not whether to have commissions, but what rules they should follow. The Order, broad and vague in its terms, was fleshed out during the hearings, in press interviews, and as a result of the leak. One reporter commented that "the critics should take heart – and some of the credit" since it appears as though "the Administration has gone to great lengths to assure accused terrorists a fair and open forum."[39] Senators Joseph Lieberman (D-Connecticut) and Leahy stated that the press reports and proposed draft were encouraging since they reflected that the Defense Department was sensitive to the criticisms and incorporated provisions to deal with some of the complaints.[40]

However, some academics and Senators still believed that Congressional authorization was necessary. In anticipation of judicial review, the President acts more clearly within his Constitutional limits when he does so pursuant to congressional authorization, and his actions are least defensible on review when taken in contravention of Congress's will. Senators Leahy, Feinstein, and Schumer confirmed that they would propose legislation allowing the limited use of military commissions.[41] What is not yet clear is if Congress will define the procedures and, if so, will they mirror those already prepared by the Defense Department.

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[38] Lloyd Cutler, "Lessons on Tribunals – From 1942," *Wall Street Journal*, 31 December 2001.
[39] "Military Tribunals, the Right Way," *Chicago Tribune*, 2 January 2002.
[40] Katherine Q. Seelye, "Draft Rules for Tribunals Ease Worries, But Not All," *New York Times*, 29 December 2001; Joseph I. Lieberman, No Excuse for Second-Class Justice," *Washington Post*, 2 January 2002, p. A13.
[41] David G. Savage, "Bush Writes Off Congress, Takes Reins in War," *Los Angeles Times*, 10 December 2001.

The third branch of government has, for the most part, remained silent since the issue is not yet theirs to deal with. Justice Antonin Scalia did comment that "nobody wants to capture Osama bin Laden and have him tried by Judge Ito for two years,"[42] indicating that, at least in his opinion, civilian trials do not equate with speedy justice and that the concept of military commissions would pass judicial muster. But Presidential authority during times of war is not unfettered, as President Truman realized during the Korean Conflict when, because of striking union members, he seized the steel mills. The Court ruled his action unconstitutional, especially without any Congressional coordination or authorization.[43] Other Supreme Court cases have found military tribunals constitutional but did so when Congress had declared war or authorized the commissions.[44] As many have noted, it is not clear upon whom Congress would declare war, but Congressional authorization seems to be the best method to guarantee the constitutionality of the commissions.

Additionally, the process has revealed how those arrested in the war against terrorism would be handled. The Justice Department will determine what to do with terrorist suspects captured in the U.S., the Defense Department will decide upon those captured in Afghanistan, and the State Department will handle those captured in other countries.[45] Secretary Rumsfeld divided the detainees into four groups:

• lower-level Afghan Taliban would be dealt with by Afghanistan;

• the U.S. would handle Afghan Taliban leaders;

• lower-level al Qaeda members would be returned to their country of origin, as long as the U.S. felt comfortable that their cases would be "properly" handled; and,

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[42] "Terrorists on Trial II," *Wall Street Journal*, 4 December 2001.
[43] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 759 (1952).
[44] *Ex Parte Quirin*, 317 U.S. 1 (1942).
[45] Katherine Q. Seelye, "Justice Department Decision to Forgo Tribunal Bypasses Pentagon," *New York Times*, 13 December 2001.

• the U.S. would deal with senior al Qaeda leadership.[46]

A Couple of Wrinkles

Two issues have complicated the President's plan. They are John Philip Walker Lindh, the American who was captured fighting for al Qaeda in Afghanistan, and Zacarias Moussaoui, the French national who was arrested in Minnesota and held on conspiracy charges involving the September attacks.

The issue in Walker is not legal, it is political. In our attempts to fashion a system of justice that would guarantee the safety of those participating and not compromise intelligence, Walker's situation split from the anticipated norm: he was a U.S. citizen. If Walker is tried in federal district court, some will complain about the disparate treatment between citizens and non-citizens. Others will say it weakens the Administration's claim that the commissions are necessary because of security concerns. The issue now is for the President to decide if he wants to expand the jurisdiction of the commissions to include U.S. citizens.

Moussaoui on the other hand, seemed like the perfect candidate for a military commission, yet the Attorney General recommended that he be tried in federal district court. The President agreed after receiving assurances that there was a strong case against Moussaoui and that the evidence will not likely compromise intelligence sources or methods.[47] Senator Lieberman has complained that this decision undermines the legitimacy of the commissions.[48] Most, however, see the decision as a reassuring signal that commissions will only be used in limited circumstances, which will help the Administration domestically and with our allies who had reservations about turning suspects over to the United States.[49]

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[46] Karen DeYoung and Walter Pincus, "Rumsfeld Wants Every Member of Al Qaeda Imprisoned," *Washington Post*, 12 December 2001, p. A16.
[47] Toni Locy, Richard Willing and Kevin Johnson, "Lieberman: Trying Suspect in Federal Court is Risky," *USA Today*, 13 December 2001, p. 4.
[48] Ibid.
[49] There will be continued resistance if the death penalty is sought. Spain has held 11 suspects, refusing to extradite them because of concerns they would face capital punishment. France likewise cautioned the U.S. that it would

Conclusion

The polls show incredible support for the President and the actions taken by the Administration in the fight against terrorism. Some think the measures do not go far enough, and many are willing to subvert the Bill of Rights in this fight. Yet, in the end, the press, concerned citizens, Congress, and the Administration have resisted the temptation to do what is popular, and the system of checks and balances helped keep everyone focused on what our system represents and those values for which we are fighting. Key players helped ensure that reasoned compromise prevailed. As Justice Scalia said, the Bill of Rights is not dependent on nor does it bend to the will of the majority, it exists to protect our country's minorities.[50] The process appears to have affected the policy. During the process, that horse was dragged back in front of the cart, and put in his rightful place. He may not be the fastest horse, but he is on the right road and, for now, appears to be going in the right direction.

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object if the death penalty were sought in Moussaoiu's case. Keith B. Richburg and T.R. Reid, "France Cautions U.S. Over Sept. 11 Defendant," *Washington Post*, 13 December 2001, p. A13.

[50] Justice Scalia's comments to the NWC, 4 December 2001.

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