

BODY:

Beth Davis's e-mail to her classmates in December 2002 began with a casual, upbeat tone—"Hi, guys." But that greeting soon gave way to a chilling account of brutality and conspiracy. Davis claimed not only that rape was prevalent at the U.S. Air Force Academy, but that its leaders had buried that truth by turning against the victims.

Originally a member of the class of 2003, Davis wrote her e-mail about two months after being officially discharged from the academy in Colorado Springs, Colorado. Davis says she was raped by an upperclassman when she was a freshman. But after she finally summoned the courage to report the attack almost a year later, she says, she faced a bait and switch: Academy officials first encouraged her to file charges, then abruptly closed the investigation six months later for lack of evidence. Adding insult to injury, they slapped her with demerits for "having sex" in the dorms. In her e-mail, Davis gave detailed instructions on what cadets should do in case of rape—everything from preserving evidence to driving directions to the nearest civilian hospital. Rape, she wrote, is "a dirty secret" at the academy that has existed for more than 20 years.

Sent to roughly 100 female cadets, Davis's e-mail eventually landed on the desk of Air Force secretary James Roche, who directed his general counsel to investigate. So in January 2003, at the invitation of the Air Force legal office, Davis made the two-hour drive from her family's poultry farm in Maryland to the Pentagon. For moral support, she brought along a classmate, another alleged rape victim. They went through several rounds of security checks at the visitor's center, where Air Force associate counsel Denise Greskowiak was waiting for them. The three chatted as they walked through the executive wing of Air Force headquarters, passing by portraits of fighter jets and generals, before arriving at the office of Mary Walker, the Air Force general counsel.

Davis recalls Walker's first words: "She told us how much she admired our courage [in speaking out]." But what stuck in Davis's mind was what ensued: "We just sat there in her office. No one knew what to say. There was a long, awkward silence . . . I really felt she [Walker] was about to choke up. . . . I don't know her, but I felt she identified with our situation." The meeting with Walker lasted ten long minutes. Afterward, Davis and her friend talked for another two hours with Greskowiak about their ordeal at the academy. The three bonded and exchanged addresses. "Denise treated us like little sisters," Davis says. By the time she returned her security badge, Davis was convinced that the Air Force would get to the bottom of the academy's sexual assault problem: "I felt at heart they were going to do something."

That turned out to be Davis's last contact with the Air Force legal office. "I've e-mailed them at least two times and called two times," Davis says, "but they never replied."

Since that meeting, the sexual assault scandal at the Air Force Academy has unfolded into a national drama. Though the problem spans at least ten years, the scandal only began to reach critical mass a year ago. Another former cadet Jessica Brakey, unbeknownst to Davis, had sent her own e-mail to senators and media members alleging widespread cadet-on-cadet sexual abuse. More than 60 women cadets, current and former, have subsequently claimed to have been assaulted while at the academy. In May the inspector general of the U.S. Department of Defense released a poll in which 19 percent of the current female cadets said they had been victims of sexual assault at the academy, and that 81 percent chose not to report the assaults; moreover, of those who did report, 42

no money in taking them on—Brakey turned to Madonia, a family friend. Both women liked Madonia's entertainment experience, because they were overwhelmed by media requests for interviews after the scandal broke. Realizing that this case might need the resources of a big firm, Madonia contacted Katz at Greenberg, who roped Cox into the matter. And once the women met Cox—the more paternal and established of the two—they signed on. Gradually, the other five women joined the bandwagon.

Cox takes care of most legal questions, while Madonia handles the publicity. But it's clearly the weight of publicity that's tipping the scales so far. Since the story broke a year ago, the women have been featured on 20/20 and The Oprah Winfrey Show, as well as in Vanity Fair. And though Madonia says he doesn't actively seek the press [he claims he's turned down more interview requests than he's granted], publicity is central to their strategy. In a complementary effort, both men have also made the rounds repeatedly on Capitol Hill, recently persuading the Senate Armed Services Committee to hold hearings, which could prove crucial to their campaign.

The lawyers say they share a deep frustration that has driven them to go so public. "Everyone is conceding cover-up," Cox says, "but no one seems very concerned with making it right." Cox says he's been stymied in his dealings with the Air Force legal office—particularly by GC Mary Walker. He says Walker has not shown any real interest in negotiating a deal for his clients. Though Cox says the GC initially asked him to postpone any suit, hinting that another resolution might be possible, she rebuffed him when he tried to propose a settlement: "When I asked her what we can do for the ladies, her reaction has been consistently adversarial. . . . Her response was, 'Why should we talk about settling when we have a perfectly good defense in Feres?'" [Aside from a quickly truncated interview, Walker declined repeated requests for comments on this article.]

The so-called Feres doctrine has long been the bane of military plaintiffs. Based on a 1950 Supreme Court decision, the doctrine prevents military members [which includes cadets at military academies] from winning claims against the armed forces for active duty injuries. In the original case, the widow of Lieutenant Rudolph Feres sued the government for negligence, claiming that the military was responsible for her husband's death in a barracks fire. The Supreme Court unanimously held that the plaintiff had no right to sue under the Federal Tort Claims Act. The rationale for the doctrine is that the military is unique among governmental institutions and would be compromised if exposed to suits. [Federal prisoners, by contrast, are allowed to sue the United States for medical malpractice in prison hospitals.] Because Feres has withstood challenge in its 50-year-plus history, few military victims have sued.

But Cox and Madonia are not deterred by Feres. Cox says Walker is missing the point when she cites that doctrine as a defense. "This is not just about the law," he says. "But about what's right." Besides, Madonia adds, this case might topple the doctrine.

Jonathan Turley, a professor at George Washington University Law School, agrees. "The Feres doctrine has done untold harm to military members and their families," says Turley. "We have cases [in the Air Force Academy] where women

have been subject to outrageous sexual assaults and abuse, and they're barred from recovery. That means the military is allowed to do something which is prohibited by law." Turley says a case involving an academy victim would "be ideal to challenge Feres because the abuses have gotten so much public attention. It would force the military to publicly invoke Feres," which, he adds, would be embarrassing to the government. And that, he predicts, could change the law: "It would be like *Plessy v. Ferguson*."

Even conservative legal scholar John Yoo, a professor at the University of California at Berkeley's Boalt Hall School of Law and a visiting scholar at the American Enterprise Institute, thinks that the academy's assault cases should be exempt from Feres. "I've got a lot of sympathy for the victims," says Yoo. Though he doesn't think judges should tinker with the doctrine ["They are not the best ones to protect national security concerns," he says], "Congress might pass legislation that carves out an exception for military college [victims]." Senator Wayne Allard of Colorado, though unfamiliar with Feres, was an early supporter of the academy's victims as a member of the armed services committee. In response to a description of the doctrine and a possible congressional carve-out, he replies, "Yes, I think our committee will look into it."

If the victims are getting so much attention, why doesn't Walker just negotiate this problem away? Is she serving the best interest of her client by being such a tough advocate, or is she miscalculating the political consequences of her actions? And whose interest is she representing—the top brass of the Air Force or the institution as a whole?

George Bush appointed Walker to the post of Air Force GC in 2001, so she is hardly a Beltway neophyte. She was also a political appointee in the Reagan administration, where she served in various positions at the U.S. Department of Energy, the U.S. Department of Interior, and the U.S. Department of Justice. Between the two administrations, she was a partner specializing in environmental work at the San Diego office of the now defunct Brobeck, Phleger & Harrison.

Someone in Walker's current post would not normally ignite such controversy. What thrust her so abruptly into the public eye was the report she put out in June, known as the Working Group Report, in response to the directive that Roche issued following his receipt of Davis's e-mail. In the summary of the report, Walker says her group's mandate was to review cadet complaints, plus the policies, programs, and practices of the academy concerning sexual assaults—as well as specific reports of sexual assault from 1993 to 2002. Walker's 13-member, in-house team produced a 200-page document with 1,000-plus footnotes. The conclusion: that there was "no systemic acceptance of sexual assault at the academy, no institutional avoidance of responsibility, or systemic maltreatment of cadets who report sexual assault."

That finding was blasted in September by Tillie Fowler, a former Republican member of the House Armed Services Committee and a partner at the Washington, D.C., office of Holland & Knight. From June to September, she headed a congressional panel to review misconduct allegations at the academy. Under a special directive signed by the president, U.S. secretary of Defense Donald Rumsfeld appointed the panel, consisting of Fowler and six other private citizens, including Josiah Bunting III, the former superintendent of Virginia

Military Institute.

Not only did the Fowler panel conclude in its report that there was a "failure of leadership" at the academy and Air Force headquarters, but it questioned whether the Working Group Report shaded the truth: "Any credible assessment of sexual misconduct problems over the last ten years must include an examination of the responsibility of both academy and Air Force headquarters leadership. The Working Group Report failed to do that even though the Air Force general counsel had access to considerably more information, resources, and time for study than did the panel. The panel believes that the Air Force general counsel attempted to shield Air Force headquarters from public criticism."

Fowler's report said the Working Group "failed to chronicle . . . significant matters and events" that indicated the Air Force headquarters' prior knowledge about sexual assaults. These included the leadership's knowledge of sexual misconduct at the academy dating back to 1993; warnings over the years about problems posed by the academy's reporting procedures for sexual assaults; a 1996 Air Force surgeon general's report to the Air Force chief of staff of sexual assault problems at the academy; a 2000 Air Force inspector general review of a possible cover-up of that same surgeon general's report; and a 2000-01 investigation by Air Force deputy general counsel W. Kipling At Lee, Jr., into the earlier concerns raised about the academy's assault reporting procedures. These omissions, added the report, ultimately undermined the "credibility and conclusion" of the Working Group report.

The panel also took Walker to task because one of her key staff members, deputy GC At Lee, had a conflict of interest: As a Working Group member, At Lee was reviewing the investigation he had himself conducted in 2000. Even worse, it was a conflict that Walker failed to disclose in the report.

Walker has not been taking this public rebuke lying down. During a Senate Armed Services Committee hearing on September 30 that focused on the allegations in Fowler's report, Walker expressed "shock" at the suggestion that she was protecting leaders. She claimed that she didn't know about the prior warnings of sexual abuse problems-particularly the 1996 warning about abuse problems by the Air Force surgeon general cited in the Fowler report. Had she known, she said, her conclusion might have been different. Senator John McCain called her defense the "my dog ate my homework and it didn't happen on my watch" excuse.

During a scheduled interview at her office in December, Walker was visibly irritated about the possibility that The American Lawyer might focus on her role in the academy scandal. She was exasperated that people keep calling her investigation "the Walker Report."

"It's the Working Group Report!" she retorted.

Although she abruptly ended the interview after only a few moments, she first unleashed her feelings about the scolding she had received from the Fowler commission. She called Fowler's comments "slanderous," adding that the former congresswoman had no basis for her criticisms. Walker also claimed that Fowler herself had backed down from her criticisms during a meeting of the Senate Armed Services Committee. Walker said she is still awaiting an apology.

It might be a long wait. Sitting in her corner office at Holland & Knight, Fowler looks across her desk and says pointedly: "I will not be making any apologies." A neat, sprightly woman, Fowler chooses her words almost to the point of equivocation: "We didn't say that anything in [Walker's] report was incorrect, but there were glaring omissions. That's not slanderous. It's just that when your name is on something, you're responsible for its accuracy-or you're not doing your job."

That sentiment is shared by Fowler's team member Michael Nardotti, Jr., a retired judge advocate general of the Army: "We know it was strong language [about Walker's role]; we didn't use it lightly; we called it as we saw it." Now a partner at Washington's Patton Boggs, Nardotti says he's convinced that Walker's report "intentionally" buried Air Force headquarters' prior knowledge of sexual assault problems. What he found incriminating was "the cumulative effect of not including significant facts over time [from 1993 to 2002]." Nardotti adds, "If it was just one incident, it could have been overlooked."

As for At Lee's involvement, he says, "You don't have to be a lawyer to know that's a conflict of interest. [At Lee] was evaluating work he previously did." Nor is Nardotti convinced by an undated memorandum of law by Air Force deputy counsel Don Fox that cleared At Lee of any legal or ethical conflicts. [Walker's office released the memo on June 19, at the insistent request of The Gazette in Colorado Springs.] Nardotti says Walker should have gone to an independent source to clear the conflict, such as the legal office of the Department of Defense. By allowing the appearance of a conflict, says Nardotti, Walker tainted the credibility of the Air Force at a time when the reputation of that institution is on the line.

At Lee was appointed to the 2000 probe by Walker's predecessor, Jeh Charles Johnson. Now back at New York's Paul, Weiss, Rifkind, Wharton & Garrison, where he is a litigation partner, Johnson declines to comment on the current situation at the Air Force legal office. But he defends At Lee's reputation: "Kip was one of the best deputies. He is a person of terrific integrity."

Beyond the At Lee issue, however, Nardotti also scoffs about Walker finding "no systemic acceptance of sexual assault at the academy [or] institutional avoidance of responsibility." After all, he claims, she deliberately chose not to look at headquarters' role in the scandal. Walker's report might have passed muster, says Nardotti, had she acknowledged "some headquarters involvement." Instead, he says, Walker recommended that the role of Air Force headquarters in the scandal be put off for future study-a recommendation that was buried in a one-line sentence toward the end of the report: "You don't just put [headquarters' role] on a list," he says. His verdict: "If this is supposed to be the definitive report of the Air Force, it falls short." Fowler and Nardotti emphasize that their report's conclusions were unanimous. "There were no egos," says Nardotti. "We all had an equal voice."

Such esprit de corps might have been lacking on Walker's team. According to two sources close to the Working Group, who requested anonymity, members of the GC's investigative group were anything but involved. "The running joke," says one of the observers, "was that it was called the 'working group' [because] we

never saw them doing any work at all." Instead, this source says, Walker ran her own show with deputy At Lee-seldom meeting with team members and almost never with staffers doing the background work.

But this same source also says he doubts Walker intentionally concealed the truth. Rather, he says, she was in over her head and committed errors in haste. He adds, though, that her unapproachable style made it tough for underlings to have frank discussions with her about the report. According to the Air Force public affairs office, the Working Group held "no fewer than four scheduled meetings" plus meetings with "selected members." But the office also said there were no minutes of the meetings.

Walker didn't always have the reputation for high-handedness that her critics now claim. When she was at Brobeck, she "was not active in firm politics" and was "reasonably low-profile," says Todd Anson, the former head of the firm's San Diego office who is now a managing member with Cisterra Partners, a real estate development company in San Diego. Though never a major rainmaker, Walker had a book of business that "kept her busy," says Anson. Former Brobeck partner Faye Russell, now a partner at Clifford Chance in San Diego, remembers her as a "very smart woman" and a "very ethical person." Another Brobeck alum, Tracey DeLange, now an associate at Paul, Hastings, Janofsky & Walker in San Diego, says that Walker was often "authoritative," that she "took a lot of pride in the associates who worked with her," and that she was "extremely respectful of work and life balance." Was Walker the proverbial tough-but-fair boss? "Not always fair," answers DeLange, "[but] I had a relationship with her; if I felt something was fundamentally unfair, I'd tell her." Moreover, says DeLange, "there was a more human, vulnerable side [to Walker]-but most people didn't see that."

Whatever her reputation in the private sector, Walker has recently found herself cast by some as a villain. Is Walker being unfairly vilified? Or are other agendas at work?

Consider this: The Fowler report is protective of Secretary Roche, even though it was under his watch that Walker completed the report. In fact, during her interview Fowler praised Roche for his role in the investigation: "He testified before the [Armed Services] committee when his staff told him not to. . . . We didn't want to hang [fault] on his neck when he's trying to do it right." Though the Fowler report has enjoyed bipartisan support, it's also hard to ignore its political pedigree: Secretary of Defense Rumsfeld, who handpicked Fowler and the commission members, has recommended Roche to be the next secretary of the Army. And since Senator McCain is using the academy scandal to hold up President Bush's nomination of Roche, clearing the nominee of wrongdoing would appear critical to his future.

Fowler and Nardotti, however, insist that their panel was under no political pressure. Fowler says, "We were a very independent panel, and we were given complete freedom [to do our investigation]." It's a point Nardotti echoes, "We all had full-time jobs. . . . No one came in with an agenda." Moreover, he adds, "if there was unfavorable information on Secretary Roche, I would have insisted that it be in the report."

There's still one question that no one in Washington seems able to answer: Just who is Walker allegedly protecting when the Fowler panel charges that the GC "attempted to shield Air Force headquarters from public criticism"? Indeed, why would such a seasoned lawyer cover up the facts in a major investigation? Neither Fowler nor Nardotti would comment on motive, though Nardotti offers this: "She's part of the Air Force leadership; you draw your own conclusions," adding, "There's [sometimes] reluctance to criticize the institution."

A year has passed since Beth Davis, now 23, sat down with the Air Force general counsel. Looking back, Davis today feels that Walker had an hidden agenda in meeting her: "My impression is that it was not genuine concern. . . . She [Walker] was sizing us up, assessing how big a problem we would be."

Walker is now finding that out the hard way. Not only are the cadets standing firm; they've become fixtures on Capitol Hill. Recently, they scored a major victory, when the Senate Armed Services Committee agreed to hold public hearings on the scandal. This is the first time the victims will appear on Capitol Hill in a hearing devoted to their ordeals. Madonia says there's no better way of getting to the truth than to hear the cadets' own stories. He also says he hopes the hearings, as yet unscheduled, will enable his clients to reach a resolution with the Air Force without having to sue.

Resolution would not be bad for the cadets' counsel either, of course. Cox says he was initially hesitant about taking on a matter in which the recovery is dicey. "This is a big-time law firm where everyone collects fees," he says. "I wasn't sure I wanted to get into this [contingency matter]." But he changed his mind once he met the women: "These ladies are only one or two years older than my own daughter. You can't talk to them and turn them away. They're on the side of the angels." As for his partners, he says they are on board: "People at the firm said to me, 'It's not right [the way the academy treated the women]. Go kick their ass. We all have daughters, buddy.'"

For Madonia, this could be the case of a lifetime. "I realized the magnitude of the case, and the magnitude of the wrong [from the beginning]," he says. "I'm spending a majority of my time on this-sometimes up to 15 hours a day." He adds, though, that he's got enough fees from paying clients to keep him afloat for now.

Since taking on the matter last spring, Madonia has landed on the map: He's schmoozed with U.S. senators, appeared on Oprah, and been quoted in scores of articles. But besides basking in the reflected glory and, perhaps, the prospect that a raised profile could help client development, Madonia is also banking that there will be a movie or TV deal about his clients in the future. Though his clients have been approached about book and docudrama deals, he says that the entertainment deals are not the priority at the moment: "It would have been easy for me to sell off the rights [to the cadets' story] at the beginning, but there's more to this cause than that." For now, he says, "we have important work before the Senate." He adds he's picky about the quality of the vehicle: "It should be like a Schindler's List, not a movie of the week." As for their agreement with the seven women, Cox says they are working on contingency, which includes any recovery from the military and proceeds from future book or movie deals.

o far, the seven women voice no complaints about their lawyers. "Look at the results," says former cadet Kira Mountjoy-Pepka. "We have the Senate giving us hearings; it's incredible what our little group has done." Referring to Cox and Madonia in avuncular terms, the women display respect and affection for the pair. Sharon Fullilove, one of the seven, says, "I trust them. My mom and dad trust them." Adds Mountjoy-Pepka: "Jim and Joe appear to be a blessing from God."

Having your clients tell their woes on Oprah is not a strategy often taught in law school. But Madonia is convinced that it's the right vehicle. "She is the single most influential media vehicle in the nation," he says. "The power of Oprah Winfrey cannot be underestimated."

Playing the Oprah card has already netted results. In fact, it seems to have opened the doors for Madonia last fall to the exclusive chambers of the Senate Armed Services Committee. "I called [the senators] and said, 'I'm Joe Madonia and I'm cocounsel to seven cadets at the Air Force Academy . . . and I want to apprise you of the media that's coming out about my clients.' " He says he sent them a copy of the Vanity Fair article and mentioned their upcoming appearance on Oprah." He says he also told the senators that Winfrey's viewers would be using a form letter linked to her Web site to write Senator John Warren, the armed services chairman, to request hearings. Oprah's site, he added, "gets 1 million hits a day." Next, he told them the site would include the names of senators who supported the hearings, and asked if he could include theirs. The result, says Madonia, is that 16 out of the 25 members of the committee agreed to add their names to the letter on the site. The committee granted the hearings-even before the letter appeared on the site. "Oprah's show," says Madonia, was a "significant contributing factor in getting the hearings granted."

To Steve Saum, whose daughter got a rare favorable settlement from the Air Force-plus an apology-playing the publicity card is the way to go. "The military hates the press," he explains. As a freshman cadet at the academy in 1993, Elizabeth Saum was beaten and stripped during a simulated rape for a survival course that got out of control; a videotape of her ordeal was circulated around campus. Saum sued in federal court. Though Feres made recovery unlikely, says her lawyer, Doris Besikof, the Air Force settled. [The terms are sealed]. The turning point, says Saum, came when his daughter's case was featured in an article in The New York Times. Besikof, who worked on more than 100 cases against the government while practicing in Colorado, agrees: "With few exceptions, the Air Force is not moved [by the victim's plight]," Besikof says, "[so] trying the case in the press means business." If nothing else, she adds, "[the victims] still have their freedom of speech."

The seven women are unlikely to stop talking soon. Walker, though, shows no sign of yielding. [Spokesperson Valerie Burkes said the Air Force would have no comment on the cadets' claims.] Which puzzles Cox, who can't understand why the Air Force has not offered an olive branch. "If this were a major corporation, somebody on top of the heap would have done something by now. . . . These folks in the Air Force and GC office are hardheaded. There's not a lot of reality thinking going on." He pauses and says, "What are they smoking there?"

So is Walker still relevant to them? Very much so. "As GC," says Cox, "she's the linchpin." Cox still imagines a scene where Mary Walker and his clients stand together at a press conference to announce a settlement. "That," he says, "would be a win-win for everybody."

So far, that's only a scene in Cox's script. What's certain is that the general inspector of the Department of Defense will soon issue its report on the scandal, and that more blame will be apportioned. Then the victims will have their day on Capitol Hill and tell their tales of woe. Beyond that, nothing guarantees that the cadets will recover anything tangible. But Madonia and Cox say they feel confident that the hearings will lay the foundation for their clients' recovery. And if the Air Force still refuses to settle, the two lawyers will be ready to bring a lawsuit. Both say they're heartened that some legal scholars say that the Feres doctrine might be overturned in this case. But then Cox peers over his glasses and sighs, "Of course, Beth Davis will be 50 by then."

E-mail: mailto:vchen@amlaw.com.

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Not every law firm seeks out Oprah as a strategic partner. Consider the low-key tactics of Morrison & Foerster and Arnold & Porter, the two firms that have represented cadet Andrea Prasse, a member of the academy's class of 2001 [Bar Talk, "Pro Bono Bailout," July 2003]. Prasse was expelled for an alleged honor code violation just eight days before her graduation in May 2002. A male cadet-whom Prasse claims was harassing her-made the charge.

After the expulsion Prasse tried to get her degree, but the best offer she received was reinstatement to the academy. Finally, just before Christmas 2003, the Air Force agreed to give her the degree, with the proviso that she serve in the reserves. [Her lawyer, Thomas Stoeber, Jr., a partner at A&P's Denver office, is now working to get the usual five-year reserve commitment either reduced or eliminated.]

Prasse was originally represented by MoFo's Denver office. But the family, based partly on their belief that MoFo was being too deferential to the Air Force, asked A&P to take over.

Strategically, however, Mofo and A&P were birds of a feather: Both firms are wary of media. Says MoFo partner Eric Elliff about the publicity surrounding the female cadets represented by James Cox and Joseph Madonia: "That's probably not the MoFo and A&P way." Elliff adds he doesn't think it's generally a good idea to anger adversaries by criticizing them in public.

Did the more decorous tactic work? Stoever thinks so: "It's a complete vindication of Andrea." Instead of seeking press, he says, "our focus was working with folks on Capitol Hill." He adds he made sure Senator Wayne Allard of Colorado and representatives of Prasse's home state of Wisconsin were kept in the loop.

But Carol Prasse believes that her daughter got a free ride from the media barrage surrounding the other cadets. In early 2003, after the scandal had begun to reach a national audience, the Prasses say the Air Force could no longer deny problems at the school. Though Stoever says he endured initial frustrations, he adds that the Air Force gradually became "responsive" to a possible deal. The publicity surrounding the scandal was a boon, says Carol Prasse: "The timing couldn't have been better."

Stoever and the Prasses say they are not ignoring the possibility of monetary damages. Would a staid firm like A&P then join forces with legal cowboys Cox and Madonia? "Well," says Stoever, "I wouldn't rule anything out."

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