

Armed for the Attack: Recent Developments in Impeachment Evidence

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“Pretty much all the honest truth telling in the world is done by [children].”¹

I. Introduction

Impeachment is a “complicated but vital part of the trial process”² that is often abused or misunderstood by counsel. The following exchange is adapted from questions reported in *United States v. Harrison* and demonstrates an inartful attempt at impeachment.³

TC: You’re saying they’re going on the stand, swearing an oath to testify to the truth and then lying . . . ?
W: Sir, I’m just saying that I’m telling the truth.
TC: Are the officers dirty cops?
W: Sir, I never said that they were dirty cops.
TC: So I’m in the conspiracy against you, is that right?
W: Well, Sir, you might be . . .
TC: The Government’s witnesses similarly made up the allegations . . . ?
W: Well . . .
TC: So both officers lied . . . ?

On appeal, the reviewing court found that “improper questioning was an organizational theme for the prosecutor’s entire cross-examination.”⁴ However, this prosecutor was not alone in his misunderstanding of permissible methods of attacking a witness’s credibility.⁵ In three recent opinions,

the service courts, the Court of Appeals for the Armed Forces (CAAF), and the Supreme Court have each focused on a different impeachment method that may help prepare counsel for the attack.

The goal of this article is to describe different methods of impeachment using recent developments as an anchor for discussion. Each section begins with a review of the applicable Military Rule of Evidence (MRE), discusses recent developments in that area of impeachment, and concludes with practical tips for practitioners.

Generally, there are four methods of attacking a witness’s credibility. Counsel can show (1) that a witness has a bad character for truthfulness; (2) that a witness has a bias, prejudice, or motive; (3) that a witness made a prior inconsistent statement; or (4) that a witness’s general trustworthiness is defective.⁶ Recently, one of the service courts tackled impeachment by specific instances of untruthfulness under MRE 608(b), while the CAAF focused on impeachment by bias, motive, and prejudice under MRE 608(c). Meanwhile, the Supreme Court addressed impeachment by prior inconsistent statements which fall under MRE 613. However, the courts were not alone in attempting to clarify the impeachment rules for counsel. The drafters of the MREs addressed the recent amendment to MRE 609, impeachment by bad character for truthfulness by evidence of prior convictions. Each method and the accompanying opinions are discussed below.

II. Bad Character for Truthfulness under MRE 608(a) and (b)

A. The Baseline

Military Rule of Evidence 608(a) allows a party to attack a witness’s veracity by offering reputation or opinion testimony of the witness’s character for untruthfulness.⁷

¹ OLIVER WENDELL HOLMES, SR., *THE POET AT THE BREAKFAST-TABLE* (1872), available at <http://www.readbookonline.net/read/7144/19429/> (last visited 10 March 2010).

² James Moody & LeEllen Coacher, *A Primer on Methods of Impeachment*, 45 A.F.L. REV. 161, 162 (1998).

³ *United States v. Harrison*, 585 F.3d 1155, 1158–59 (9th Cir. 2009). The trial counsel’s questions are derived from *Harrison*, and the witness’s responses have been added to provide a sample narrative.

⁴ *Id.* at 1159. While not apparent on the face of any rule regarding impeachment, it is generally impermissible for counsel to attack a witness’s testimony by goading a subsequent witness to testify that a prior witness testified untruthfully. *Id.* Although the court found that the judge erred in allowing the improper questioning, the court denied the defendant relief based on the improper questioning. The defendant had not shown that he was prejudiced by the improper questioning and the judge’s instructions ameliorated any prejudice. *Id.* at 1160. See also *United States v. Boyd*, 54 F.3d 868, 870 (D.C. Cir. 1995) (finding error for the prosecutor to ask the defendant whether two other witnesses were “making this [the allegations against him] up.”).

⁵ See *United States v. Banker*, 15 M.J. 207 (C.M.A. 1983) (noting that the fundamental problem was that the parties failed to understand and distinguish between different methods of impeachment).

⁶ See *id.* at 210. There is one other common method of impeachment not discussed in *Banker*—impeachment by showing problems in capacity. This method involves nothing more than showing the “limits or defects in sensory or mental capacities [which] bear[s] on both the likelihood that a witness accurately perceived the events or occurrences he describes and the accuracy or completeness of his testimony.” CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, *EVIDENCE* § 6.35 (4th ed. 1995). Questioning a witness concerning the amount of alcohol he imbibed on the night in question is an example. *Id.*

⁷ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID.* 608(a) (2008) [hereinafter MCM]. Note that Military Rule of Evidence (MRE) 608(a) also allows a witness’s character for truthfulness to be rehabilitated

Reputation evidence is “the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession.”⁸ In other words, it is “information that a witness knows about an individual from having heard discussion about the individual in a specified community.”⁹ Community is broadly defined and “includes a post, camp, ship, station, or other military organization regardless of size.”¹⁰ Before offering evidence of a witness’s (e.g., Witness #1’s) reputation for untruthfulness, the proponent must establish three elements: (1) that the testifying witness (Witness #2) “is a member of the same ‘community’ as Witness #1”; (2) that “Witness #1 has a reputation for untruthfulness in the community”; and (3) that “Witness #2 knows Witness #1’s reputation for untruthfulness.”¹¹

Opinion testimony is simply a witness’s “personal opinion of an individual’s character.”¹² Before offering evidence of a prior witness’s character for untruthfulness, the proponent must establish (1) that the testifying witness (Witness #2) is personally acquainted with Witness #1”; (2) that “Witness #2 knows Witness #1 well enough to have formed an opinion of Witness #1’s truthfulness”; (3) that “Witness #2 has an opinion of Witness #1’s untruthfulness”; and (4) that “Witness #2 has the opinion that Witness #1 is an untruthful person.”¹³

Assume for a moment that Specialist (SPC) Lyar, the Government’s star witness, testified that he saw the accused strike the alleged victim. During the defense case-in-chief, the defense calls SPC Lyar’s squad leader, Sergeant (SGT) True to testify. The following colloquy is an example of attacking SPC Lyar’s credibility by offering reputation and opinion testimony concerning his bad character for truthfulness.

DC: SGT True, do you know SPC Lyar?

W: Yes.

with reputation or opinion testimony but only after the witness’s character for truthfulness has first been attacked.

⁸ *Id.* MIL. R. EVID. 405(d).

⁹ STEPHEN SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 4-154 (6th ed. 2006).

¹⁰ MCM, *supra* note 7, MIL. R. EVID. 405 (d). *See also* United States v. Reveles, 41 M.J. 388, 395 (1995) (describing the definition of community as inclusive rather than restrictive).

¹¹ DAVID SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS § 5-8[2][b] (2007); *see also* THOMAS A. MAUET, TRIAL TECHNIQUES 154 (2002); LAWRENCE MORRIS ET AL., THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, at E-15-7 (2008).

¹² SALTZBURG ET AL., *supra* note 9, at 4-155.

¹³ SCHLUETER ET AL., *supra* note 11, § 5-8[3][c]; *see also* MAUET, *supra* note 11, at 154; MORRIS ET AL., *supra* note 11, at E-15-6.

DC: How?

W: He’s in my squad. I’m his squad leader.

DC: How long has SPC Lyar been in your squad?

W: For a little over a year.

DC: Have you been his squad leader the whole time?

W: Yes.

DC: How many soldiers do you have in your squad?

W: Seven.

DC: Does SPC Lyar have a reputation in his squad concerning his character for truthfulness?

W: Yes.

DC: What is it?

W: SPC Lyar is known to be an untruthful person.

DC: Now, SGT True, how often do you see SPC Lyar?

W: Every day. He works for me.

DC: Over the year that you’ve known SPC Lyar, have you formed an opinion of his reputation for truthfulness?

W: Yes.

DC: What is that opinion?

W: SPC Lyar is an untruthful person.¹⁴

Attacking a witness’s credibility by offering reputation or opinion evidence is perfectly permissible, but practitioners should understand that this method of attack does not allow panel members to hear the impeaching testimony contemporaneously with the testimony to be impeached.¹⁵ That is, there will be a lag between the time that the witness testifies and the time of the opponent’s attack since the reputation or opinion testimony will likely have to wait until the defense’s case-in-chief or the Government’s rebuttal case.

Often, attacking the witness’s credibility by cross-examining the witness about specific acts related to untruthfulness under MRE 608(b) is more effective.¹⁶ As long as counsel has a good faith basis and the conduct relates to untruthfulness,¹⁷ MRE 608(b) allows counsel to attack a witness’s testimony with specific instances of untruthfulness.¹⁸ However, the specific instances may not be

¹⁴ *See* SCHLUETER ET AL., *supra* note 11, § 5-8[2][b]-[3][c]; *see also* EDWARD IMWINKELREID, EVIDENTIARY FOUNDATIONS 175-77 (1998); MAUET, *supra* note 11, at 56-57; MORRIS ET AL., *supra* note 11, at E-15-14, 19.

¹⁵ SALTZBURG ET AL., *supra* note 9, at 6-49.

¹⁶ *Id.*

¹⁷ Moody & Coacher, *supra* note 2, at 175 (referencing United States v. Robertson, 39 M.J. 211 (C.M.A. 1994)).

¹⁸ Military Rule of Evidence 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s character for truthfulness . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the character of the witness for truthfulness or untruthfulness, or (2) concerning the character for

proven by extrinsic evidence.¹⁹ In other words, counsel is “stuck” with the witness’s answer.²⁰

The CGCCA addressed the issue of impeachment by specific instances of bad character for truthfulness in the recent case of *United States v. Smith*.²¹

B. Recent Developments in Bad Character for Truthfulness: *United States v. Smith*²²

“Beware of the half truth. You may have gotten hold of the wrong half.”²³

“A half truth is a whole lie.”²⁴

In May 2005, Smith and “SR” were cadets in the Coast Guard Academy’s summer program.²⁵ They were assigned to different but neighboring cutters. Smith informed SR that he had heard rumors about her.²⁶ Hoping to garner Smith’s support, SR told Smith only pieces of the entire situation underlying the rumors, which were of a sexual nature, and omitted details that made her look bad.²⁷ Smith promised her that “he would counteract the rumors.”²⁸ A couple of months later, Smith told SR that he continued to hear rumors about her. This time, SR told him the complete story. In doing so, SR admitted to conduct that, at a minimum, violated cadet regulations and possibly the Uniform Code of Military Justice (UCMJ).²⁹

According to SR, once she had told Smith the complete story, Smith explained that he needed motivation to continue to help counteract the rumors. That evening, Smith and SR engaged in sexual acts. SR later claimed that she she engaged in the sexual conduct only because she “was scared

truthfulness or untruthfulness of another witness as to which character of the witness being cross-examined has testified.

¹⁹MCM, *supra* note 7, MIL. R. EVID. 608(b).

²⁰SALTZBURG ET AL., *supra* note 9, at 6-52.

²¹ 66 M.J. 556 (C.G. Ct. Crim. App. 2008), *rev. granted*, 67 M.J. 371 (C.A.A.F. 2009).

²² *Id.*

²³ Author Unknown, *quoted in* Quotations About Honesty, <http://www.quote garden.com/honesty.html> (last visited Oct. 17, 2009).

²⁴ *Id.*

²⁵ *Smith*, 66 M.J. at 556.

²⁶ *Id.* at 558. The opinion does not clearly identify the nature of the rumors.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

to upset him because he had a big secret of mine.”³⁰ SR did not report the incident until February 2006, five months after the alleged incident.³¹ The Government subsequently charged Smith, *inter alia*, with extortion, indecent assault, and sodomy.³²

Pursuant to MRE 412,³³ the defense gave notice of their intent to cross-examine SR regarding the sexual behavior which fueled the rumors. In an Article 39(a) session, the military judge ruled that SR could only be cross-examined regarding her initial lie to Smith, which consisted of her omission of unfavorable details when Smith first approached her about the rumors.³⁴ Citing MRE 412, the military judge refused to allow defense counsel to question SR about the details of the sexual behavior underlying the rumors.³⁵ Contrary to his pleas, the panel convicted Smith of unauthorized absence, failure to go to his appointed place of duty, sodomy, extortion, and indecent assault.³⁶

On appeal to the CGCCA, Smith argued that his Sixth Amendment right to confrontation was violated when the military judge ruled that the evidence that he sought to cross-examine SR on was barred by MRE 412.³⁷ Specifically, Smith alleged that SR had testified falsely (i.e., had alleged that the acts were nonconsensual) to protect herself from discipline and that the military judge’s ruling prevented him from presenting his theory of the case.³⁸

The CGCCA, noting that “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,”³⁹ found that the

³⁰ *Id.*

³¹ *Id.* at 560 n.11.

³² *Id.* at 557. The Government also charged Smith with unauthorized absence and attempted failure to obey a lawful order.

³³ Military Rule of Evidence 412 generally bars evidence of an alleged victim’s sexual behavior or sexual predisposition when the accused is charged with a sexual offense. However, there are three exceptions to this general rule: (1) “evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of the semen, injury, or other physical evidence,” or (2) “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution” or (3) “evidence the exclusion of which would violate the constitutional rights of the accused.” MCM, *supra* note 7, MIL. R. EVID. 412.

³⁴ *Smith*, 66 M.J. at 558.

³⁵ *Id.*

³⁶ *Id.* at 557.

³⁷ *Id.* at 558.

³⁸ *Id.*

³⁹ *Id.* at 559.

military judge had not abused his discretion because he had given the defense some latitude in impugning SR's credibility under MRE 608(b) by allowing the defense to cross-examine SR regarding her initial lie to Smith (i.e., a specific instance of untruthfulness).⁴⁰ Nevertheless, the CGCCA recognized that Smith would have had the right to present evidence barred by MRE 412 if the evidence was "constitutionally required."⁴¹ Evidence is constitutionally required when it is relevant,⁴² material,⁴³ and favorable to the defense.⁴⁴ In Smith's case, the CGCCA found that the defense had failed to make an adequate showing that the evidence was constitutionally required.⁴⁵ In a footnote, the CGCCA stated,

In the defense's Notice Pursuant to M.R.E. 412, the argument referred to credibility generally, and went on to argue that the evidence at issue "tends to show the alleged victim as untruthful about her sexual conduct generally and specifically has motive to lie about the specific sexual rumors underlying the charge. However, the "motive to lie" point was not developed.⁴⁶

On 11 March 2009, the CAAF granted review in *Smith* to determine if Smith's constitutional rights had been violated in limiting the defense's cross-examination of SR.⁴⁷ Accordingly, the issue is not yet settled.

⁴⁰ *Id.* at 560.

⁴¹ *Id.* at 559 (quoting MRE 412).

⁴² The standard definition of relevant evidence under MRE 401 applies. "Evidence is relevant if it has 'any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.'" *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004) (quoting MRE 401).

⁴³ "In determining whether evidence is material, the military judge looks at 'the importance of the issue for which the evidence was offered in relation to other the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue.'" *Id.* at 222.

⁴⁴ The CAAF has adopted the Supreme Court's definition for favorable, meaning "vital." *Id.* at 222. The military judge must conduct a balancing test to determine whether the probative value outweighs the danger of unfair prejudice to the victim's privacy. MCM, *supra* note 7, MIL. R. EVID. 412(c)(3). *See also Banker*, 60 M.J. at 222.

⁴⁵ *Smith*, 66 M.J. at 560 (citation omitted).

⁴⁶ *Id.* at 559.

⁴⁷ Review was granted on the following issue: "Whether the military judge violated appellant's constitutional right to confront his accusers by limiting his cross-examination of [SR], the Government's only witness, on three of the five charges." *United States v. Smith*, 67 M.J. 371 (C.A.A.F. 2009).

C. Practical Application for Litigators

Despite the fact that the CAAF has granted review of the case, *Smith* still offers practitioners an important takeaway. While impeachment using specific instances of untruthfulness can be an effective technique, remember that it is not the only method of attack. The importance of understanding the different methods of impeachment and their limitations cannot be overstated. The defense counsel in *Smith* focused on getting evidence of SR's previous sexual behavior admitted under MRE 608(b) as a specific instance of untruthfulness. He failed to adequately explore alternate methods of impeachment, including MRE 608(c), impeachment by bias, motive, or prejudice.⁴⁸ Unfortunately, this defense counsel's mistake mirrors that mistakes so many others have made regarding the different methods of impeachment.⁴⁹ Wise counsel are always prepared to argue alternative theories for the admissibility of impeachment evidence.

III. Impeachment by Bias, Prejudice, Motive to Misrepresent under MRE 608(c)

A. The Baseline

While the CGCCA in *Smith* focused on impeachment with specific instances of bad character for truthfulness, the CAAF in *United States v. Collier*⁵⁰ focused on impeachment with evidence of a witness's bias, prejudice, or motive to misrepresent under MRE 608(c).⁵¹ Unlike impeachment evidence offered under MRE 608(b), evidence offered to prove bias, prejudice, or motive to misrepresent under MRE

⁴⁸ Note that MRE 608(c) does not trump MRE 412's general prohibition precluding admission of SR's prior sexual behavior. The military judge in *Smith* would have still needed to conduct an MRE 412 analysis to determine whether an exception to the general prohibition applied. Evidence of bias, motive, and prejudice, sufficiently articulated and addressed, is "generally constitutionally required to be admitted." *United States v. Banker*, 60 M.J. 216, 224 (C.A.A.F. 2004).

⁴⁹ *Id.* at 207. The defense counsel in *Banker* failed to articulate the evidence was admissible as either impeachment by specific contradiction or impeachment by bias. The Court of Military Appeals found that "[t]he failure . . . to distinguish between these different methods of impeachment led the military judge to bar the testimony . . ." *Id.* *See also* *United States v. Stellon*, 65 M.J. 802 (2007). The defense counsel in *Stellon* relied on MRE 608(b) as his theory of admission and failed to show how the evidence could be admissible as evidence of motive. On appeal, the court found that "We agree that M.R.E. 608(c) could provide a basis for admission . . . However, counsel did not cite or implicate M.R.E. 608(c)." *Id.* at 805.

⁵⁰ 67 M.J. 347 (C.A.A.F. 2009).

⁵¹ Note that there is no Federal Rule of Evidence (FRE) equivalent to MRE 608(c). *See SALTZBURG ET AL.*, *supra* note 9, at 6-56. Nevertheless, federal courts recognize evidence of bias as proper impeachment. *See United States v. Abel*, 469 U.S. 45, 51 (1984) (stating "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.")

608(c) may be established by either “examination of the witness or by evidence *otherwise adduced*.”⁵² In other words, evidence of bias, prejudice, or motive to misrepresent may be proven by extrinsic evidence. Moreover, counsel are “not stuck”⁵³ with a witness’s denial of bias, prejudice, or motive.

An accused’s Sixth Amendment right to expose a witness’s bias is not absolute, however. In *United States v. Carruthers*,⁵⁴ the defense wanted to explore the potential bias of Sergeant First Class (SFC) Rafferty, a Government witness, by exposing the favorable terms of SFC Rafferty’s pretrial agreement (PTA). Sergeant First Class Rafferty’s PTA provided that he would be tried in federal district court where he could not receive a punitive discharge.⁵⁵ The military judge, finding that the evidence was both not relevant and too prejudicial, allowed the defense to only extract evidence that SFC Rafferty was testifying pursuant to a PTA. The defense was precluded from questioning SFC Rafferty about the specifics of his PTA.⁵⁶ In concluding that the military judge did not err, the CAAF reiterated its holding in *United States v. James*⁵⁷ that “once the defendant has been allowed to expose a witness’s motivation in testifying, ‘it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury.’”⁵⁸

B. Recent Development in Bias, Prejudice, Motive to Misrepresent: *United States v. Collier*⁵⁹

“Reality is bad enough. Why should I tell the truth?”⁶⁰

United States v. Collier was a case involving impeachment by motive to misrepresent. Aviation Machinist’s Mate Third Class Collier was a tool custodian for a Helicopter Combat Support Squadron. She and Hospitalman Second Class (HM2) C were good friends, and Collier stayed at HM2 C’s home four to five nights a week. Four months into their relationship, they argued, and HM2 C kicked Collier out of her home. Sometime after the

argument, C claimed she found tools belonging to the command in her home, apparently left by Collier. No one had previously reported the tools missing. The Government charged Collier with larceny, and after she admittedly slashed HM2 C’s tires, the Government subsequently charged Collier with obstructing justice as well.⁶¹

According to Collier, she and HM2 C had had a homosexual relationship. The Government filed a motion in limine requesting that the defense be precluded from cross-examining HM2 C about the alleged homosexual relationship because the issue was not relevant, was too prejudicial, and would be embarrassing to HM2 C. In response, the defense argued that precluding cross-examination on the issue would violate Collier’s Sixth Amendment right to confrontation and that the evidence was admissible under MRE 608(c) to show HM2 C’s motive to lie about the alleged larceny. Additionally, the defense argued that evidence of the homosexual relationship was admissible to show Collier slashed HM2 C’s tires out of anger over their failed relationship, and that she had no intent to influence HM2 C’s testimony as the Government alleged in its obstruction of justice charge. The military judge, finding that evidence of a sexual relationship would not be sufficiently relevant, granted the Government’s motion. However, the military judge did allow the defense to cross-examine HM2 C about her close friendship with Collier.⁶²

The panel convicted Collier of both larceny and obstructing justice. The convening authority approved the adjudged sentence to a bad-conduct discharge, six months confinement, and reduction to E-1.⁶³ The Navy-Marine Court of Criminal Appeals (NMCCA) affirmed the findings and the sentence.⁶⁴ On appeal to the CAAF, Collier alleged that the military judge abused his discretion in prohibiting the defense from cross-examining the Government’s main witness, HM2 C, regarding her alleged homosexual relationship with Collier and from introducing any evidence of the alleged relationship in violation of Collier’s Sixth Amendment right to confrontation.⁶⁵

The CAAF, acknowledging that “the accused’s confrontation right does not give, for example, free license to cross-examine a witness to such an extent as would ‘hammer th[e] point home to the jury,’”⁶⁶ nevertheless

⁵² MCM, *supra* note 7, MIL. R. EVID. 608(c) (emphasis added).

⁵³ This is coined after Saltzburg’s description of impeachment evidence under MRE 608(b). See *supra* note 20.

⁵⁴ 64 M.J. 340 (C.A.A.F. 2007).

⁵⁵ *Id.* at 343.

⁵⁶ *Id.*

⁵⁷ 63 M.J. 217 (C.A.A.F. 2006).

⁵⁸ *Carruthers*, 64 M.J. at 344 (quoting *United States v. Nelson*, 39 F.3d 705, 708 (7th Cir. 1994)).

⁵⁹ 67 M.J. 347 (C.A.A.F. 2009).

⁶⁰ Patrick Sky, *quoted in* Quotations About Honesty, *supra* note 23.

⁶¹ 67 M.J. 347.

⁶² *Id.* at 350–52.

⁶³ *Id.* at 350.

⁶⁴ *Id.*

⁶⁵ *Id.* at 349.

⁶⁶ *Id.* at 352 (quoting *United States v. James*, 61 M.J. 132,135 (C.A.A.F. 2005)).

concluded that the military judge had in fact erred.⁶⁷ Had the members known of the sexual relationship, the members might have had a significantly different impression of HM2 C's credibility.⁶⁸ Furthermore, the record was devoid of any evidence that HM2 C would suffer undue harassment or that the evidence would be a waste of time or confuse the issues or that there was a danger of unfair prejudice.⁶⁹

After finding that the military judge had committed constitutional error, the CAAF tested to see whether the error was harmless beyond a reasonable doubt. The CAAF noted that the defense's main strategy was to impeach HM2 C's credibility through bias and motive to lie⁷⁰ and that there is a qualitative difference between a failed friendship and a failed romantic relationship.⁷¹ The CAAF concluded that the error was not harmless beyond a reasonable doubt and reversed the NMCCA's decision.⁷²

C. Practical Application for Litigators

Collier serves as a good reminder to Government counsel of their obligation to protect the record for appellate review. Although not unique to cases covered under MRE 608(c), in cases where the military judge decides favorably for the Government on MRE 403 grounds, Government counsel must be certain that the military judge puts his findings on the record. Much of the CAAF's analysis in *Collier* is spent detailing what the record lacks: the military judge "made no findings . . . that HM2 C would suffer from undue embarrassment"; the military judge "made no factual findings about any delay or confusion"; and the military judge's ruling "lacked an articulated or supportable legal basis."⁷³ Consequently, the court found that "the limitation on cross-examination and related bias evidence was a violation of Appellant's Sixth Amendment confrontation rights."⁷⁴ The time that the CAAF devoted to the factual findings intimates that the result could have been different had the Government encouraged the military judge to properly articulate his findings on the record.

⁶⁷ *Id.*

⁶⁸ The test is "whether '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *Id.*

⁶⁹ *Id.* at 353–55 (applying the MRE 403 balancing test).

⁷⁰ *Id.* at 357.

⁷¹ *Id.* at 352 ("[I]t is intuitively obvious that there is a qualitative difference between the breakup of a friendship and a badly ended romantic relationship, whether that romantic relationship was sexual or not.")

⁷² *Id.* at 357.

⁷³ *Id.* at 353–55.

⁷⁴ *Id.* at 355.

Collier also serves as a reminder to defense counsel to be sure to connect the dots for the military judge when attempting to offer evidence under MRE 608(c). The CAAF noted that the military judge's ruling "did not allow Appellant to expose the alleged nefarious motivation behind HM2 C's allegations and testimony."⁷⁵ A good proffer will show how the defense theory of the case is directly impacted by the admission of the evidence of bias, prejudice, or motive to misrepresent.⁷⁶

II. Impeachment by Prior Inconsistent Statements

A. Baseline: Prior Inconsistent Statements

In *Kansas v. Ventris*,⁷⁷ the Supreme Court focused on impeachment by a prior inconsistent statement. Under MRE 613, once a witness testifies inconsistently with a prior written or oral statement, he may be impeached with that statement.⁷⁸ Probably the more typical and more effective approach to impeaching a witness with a prior inconsistent statement is during cross-examination where counsel commits the witness to his testimony, validates the circumstances of the making of the prior statements (with indicators of reliability), and then confronts the witness with the prior statement.⁷⁹ If the witness admits to making the statement, then impeachment is complete.⁸⁰ However, if the witness denies the statement, then MRE 613 allows counsel

⁷⁵ *Id.* at 352.

⁷⁶ *Collier* is also a good reminder to all of what is not discussed. Despite discussions of HM2 C's sexual behavior and predisposition, notice that MRE 412 is not implicated. Military Rule of Evidence 412 only bars evidence of an alleged victim's sexual predisposition or behavior in cases involving an alleged sexual offense. See MCM, *supra* note 7, MIL. R. EVID. 412 ("The following evidence is not admissible in any proceeding involving alleged sexual misconduct . . ."). *Collier* was charged with larceny and obstruction of justice. Consequently, although the government ultimately lost before the CAAF, it made the closest argument to MRE 412 that it could—that the evidence of their homosexual relationship was not legally relevant under MRE 403.

⁷⁷ 129 S. Ct. 1841 (2009). Although the Court never specifically cites Federal Rule of Evidence (FRE) 613 (the civilian counterpart to MRE 613), discussed below, its analysis is not inconsistent with the provisions of FRE 613.

⁷⁸ Note the difference between a prior inconsistent statement offered under MRE 613 and a prior inconsistent statement offered under MRE 801(d)(1). A prior inconsistent statement offered under MRE 613 can only be used for impeachment purposes. (Counsel should request a limiting instruction from the military judge.) If a witness testifies inconsistently with a prior statement and the prior statement was made under oath subject to penalty of perjury and was made at a trial, hearing, other proceeding, or a deposition, then the statement may be offered under MRE 801(d)(1). Because of the extra protections (subject to perjury at a formal proceeding, etc.) statements offered under MRE 801(d)(1) can be used for substantive purposes. See MCM, *supra* note 7, MIL. R. EVID. 613 & 801(d)(1).

⁷⁹ STEVEN LUBET, MODERN TRIAL ADVOCACY 160–77 (1997); see also MORRIS ET AL., *supra* note, 11, at D-4-3–4.

⁸⁰ SCHLUETER ET AL., *supra* note 11, § 5-10[3][b].

to “prove up” the statement by offering extrinsic evidence.⁸¹ Similar to MRE 608(c), counsel are “not stuck” with a witness’s response.

Alternatively, instead of confronting the witness with the prior statement during cross-examination, counsel can wait and offer the prior statement through another witness. Military Rule of Evidence 613 only mandates that before the testimony is admitted, the “witness [who made the statement] is afforded an opportunity to explain or deny”⁸² The rule does not require that the witness be afforded the opportunity to explain or deny the statement before it is *offered*. Therefore, when electing to impeach a witness’s testimony through this means, counsel must be careful to only temporarily excuse the witness so that he can be recalled to explain or deny the statement.⁸³

B. Recent Development in Prior Inconsistent Statements: *Kansas v. Ventris*⁸⁴

“When you stretch the truth, watch out for the snapback.”⁸⁵

Ventris and his female companion, Theel, allegedly went to investigate allegations that Hicks had been abusing children. According to Ventris, their visit had nothing to do with the fact that both he and Theel were drug users and that it was rumored that Hicks carried a lot of money.⁸⁶ During their visit, however, things went awry. Either Ventris or Theel—or both—shot and killed Hicks, took \$300 and Hicks’s cell phone, and drove away in Hicks’s truck.⁸⁷ The police later arrested Theel and Ventris after receiving a tip. Both Theel and Hicks were charged, *inter alia*, with murder and aggravated robbery. The State agreed to dismiss the murder charges against Theel in exchange for her pleading guilty to robbery and testifying against Ventris as the shooter.⁸⁸

While Ventris was in pretrial confinement, police officers planted an informant in his cell and instructed the informant to “keep [his] ear open and listen” for inculpatory

statements.⁸⁹ Prompted by a question from the informant, Ventris admitted that “[h]e’d shot this man in the head and his chest” and taken “his keys, his wallet, about \$350.00, and . . . a vehicle.”⁹⁰

At trial, Ventris took the stand in his defense and completely blamed Theel for the robbery and the murder. In its rebuttal case, the State called the informant to testify concerning Ventris’s jail-cell admission. The defense objected. The State conceded that the statement was taken in violation of Ventris’s Sixth Amendment right to counsel but argued that Ventris’s statements could still be used to impeach Ventris’s testimony. The trial judge overruled the objection and allowed the informant’s testimony.⁹¹ The jury eventually convicted Ventris of aggravated robbery and aggravated burglary but acquitted him of the murder and misdemeanor theft. The Kansas Supreme Court reversed Ventris’s conviction, finding that the judge erred in allowing evidence taken in violation of Ventris’s Sixth Amendment rights to be used in any manner.⁹² The Supreme Court granted the State’s petition for review and considered whether a defendant’s statements, taken in violation of a defendant’s Sixth Amendment rights, could be used to impeach his in-court testimony.

The Supreme Court found that the Kansas Supreme Court had erred and reversed the Kansas Supreme Court’s decision. The Court’s holding that Ventris’s statements could be used to impeach Ventris’s in-court testimony turned on the nature of the constitutional violation. “Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes it explicitly mandates exclusion from trial, and sometimes it does not.”⁹³ In Ventris’s case, Ventris was denied his right to counsel under the Sixth Amendment. The Supreme Court noted that the Sixth Amendment rule is a prophylactic rule intended to deter certain police conduct.⁹⁴ The Sixth Amendment, similar to the Fourth Amendment, does not mandate the automatic exclusion of unlawfully obtained evidence. Instead, courts must apply the exclusionary rule balancing test to such evidence.⁹⁵ In conducting its own balancing test, the Supreme Court concluded that it would be unfair for the defendant, having testified, to be shielded from his lies. “It is one thing to say that the Government cannot

⁸¹ MCM, *supra* note 7, MIL. R. EVID. 613 (stating that extrinsic evidence is admissible if “the witness is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require.”).

⁸² *Id.* MIL. R. EVID. 613.

⁸³ See SALTZBURG ET AL., *supra* note 9, at 6-150-52.

⁸⁴ 129 S. Ct. 1841 (2009).

⁸⁵ Bill Copeland, *quoted in* Quotations About Honesty, *supra* note 23.

⁸⁶ *Ventris*, 129 S. Ct. at 1844.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1845.

⁹⁴ *Id.*

⁹⁵ *Id.*

make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his untruths.”⁹⁶ The Court also found that the exclusion of the testimony would do little to deter police misconduct.⁹⁷ On balance, the Court ultimately found that the statements were admissible for impeachment purposes.⁹⁸

C. Practical Application for Litigators

Military practitioners can glean at least two important nuggets from *Kansas v. Ventris*. First, the case provides a starting point for determining whether a statement unlawfully obtained may be used to impeach the in-court testimony of an accused. Practitioners must first determine what right has been violated.⁹⁹ In *Ventris*’s case, his Sixth Amendment right to counsel had been violated. The statement, albeit illegally obtained in violation of his right to counsel, was still admissible to impeach his in-court testimony because the Sixth Amendment does not mandate exclusion of the statement. In contrast, the outcome would have been different had the statements been coerced in violation of *Ventris*’s Fifth Amendment rights. The Fifth Amendment provides that no person “shall be compelled to in any criminal case to be a witness against himself.”¹⁰⁰ Consequently, had the statement been a coerced statement taken in violation of *Ventris*’s Fifth Amendment rights, the statement could not have been used against *Ventris* “whether by way of impeachment or otherwise.”¹⁰¹

Alternatively, consider this scenario. *Ventris* is now Specialist (SPC) *Ventris*. His first sergeant, suspecting him of robbery, asks SPC *Ventris* “what happened?” without reading him his Article 31 rights.¹⁰² Specialist *Ventris* confesses to robbery to the first sergeant. At trial, SPC *Ventris* blames Theel. Assuming that only SPC *Ventris*’s Article 31 rights had been violated, the statement may be used to impeach his in-court testimony. Military Rule of Evidence 304(b)(1)¹⁰³ provides a specific exception for

statements taken in noncompliance with Article 31. Hence, SPC *Ventris* statements made to his first sergeant would be admissible under MRE 304(b)(1) and MRE 613 to impeach his in-court testimony.

The second important lesson from *Ventris* derives from the way the State proved the prior inconsistent statement. The State called the jail-cell informant to the stand to testify about *Ventris*’s statements. Again, *Kansas v. Ventris* reminds us that the beauty of offering prior inconsistent statements under MRE 613 is that extrinsic evidence may be used to prove the inconsistent statements. Counsel are not “stuck” with a witness’s answers and can present testimony or other evidence on point.

IV. Impeachment by Bad Character for Truthfulness by Evidence of Prior Convictions Under MRE 609

A. The Baseline

The drafters of the MREs¹⁰⁴ recently addressed impeachment by prior convictions. Military Rule of Evidence 609 allows counsel to attack a witness’s credibility by presenting certain convictions of the witness. The rule covers two types of convictions: (1) *non-crimen falsi* crimes and (2) *crimen falsi* crimes.¹⁰⁵ *Non-crimen falsi* crimes do not have an element of dishonesty but are punishable by death, dishonorable discharge, or confinement greater than a year.¹⁰⁶ The key to determining whether a conviction is a non-crimen falsi conviction is the maximum potential punishment.¹⁰⁷ For example, counsel could impeach a witness with a special court-martial conviction for an indecent act despite the jurisdictional limits of a special court-martial. The relevant issue is that the maximum possible punishment for an indecent act is a dishonorable discharge, total forfeitures, and five years confinement, not

the in-court testimony of the accused . . . MCM, *supra* note 7, MIL. R. EVID. 304(b)(1).

⁹⁶ *Id.* at 1846.

⁹⁷ *Id.* at 1847.

⁹⁸ *Id.* at 1846–47.

⁹⁹ *See id.* at 1845.

¹⁰⁰ U.S. CONST. amend. V.

¹⁰¹ *Ventris*, 129 U.S. at 1845.

¹⁰² Article 31 provides, *inter alia*, “No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected. UCMJ art. 31 (2008).

¹⁰³ “Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) [Article 31 warnings] . . . , this rule does not prohibit use of the statement to impeach by contradiction

¹⁰⁴ By “drafters of the MREs,” the author is referring to the Joint Service Committee (JSC). The JSC is composed of one representative of The Judge Advocate General (TJAG) of the Army, TJAG of the Navy, TJAG of the Air Force, The Staff Judge Advocate of the Commandant of the Marine Corps, and the Chief Counsel of the Department of Homeland Security, United States Coast Guard. The JSC is responsible for reviewing the Manual for Courts-Martial (MCM) annually and proposing amendments to the MCM when necessary. U.S. DEPT’T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE paras. 3, 4.3 (3 May 2003).

¹⁰⁵ *See SALTZBURG ET AL.*, *supra* note 9, at 6-88.

¹⁰⁶ MCM, *supra* note 7, MIL. R. EVID. 609.

¹⁰⁷ *Id.* (“In determining whether a crimes tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.”).

that maximum available punishment is limited because it is at a special-court martial.¹⁰⁸ In comparison, counsel could not impeach a witness with a general court-martial conviction for a simple failure to be at the appointed place of duty since the maximum possible punishment for that offense is one month confinement and two-thirds forfeiture of pay per month for one month.¹⁰⁹

However, before evidence of a *non-crimen falsi* conviction may be admitted, the military judge must perform a balancing test. Witness convictions, other than convictions of the accused, are analyzed under the standard MRE 403 balancing test—the conviction may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice.¹¹⁰ Meanwhile, a special balancing test must be applied to *non-crimen falsi* convictions of the accused. *Non-crimen falsi* convictions by the accused may only be admitted if their probative value outweighs their prejudicial effect.¹¹¹ “[T]o be excluded, the conviction’s probative value need simply be outweighed by its prejudicial effect upon the defendant.”¹¹² Stated differently, the conviction should only be admitted if it is more probative than prejudicial.

The second type of conviction covered by MRE 609 are *crimen falsi* convictions. The current *MCM* defines a *crimen falsi* crime simply as a crime “involv[ing] dishonesty or false statement.”¹¹³ *Crimen falsi* convictions, unlike *non-crimen falsi* convictions, are not subject to a balancing test and must be admitted.¹¹⁴ In the past, some but not all federal courts were willing to look at the underlying circumstances of a conviction to see if the conviction involved a crime of dishonesty that could be admitted as a *crimen falsi* crime,¹¹⁵ thereby obviating the need to conduct a balancing test. For example, a federal court might find that a particular murder conviction falls within the definition of a *crimen falsi* crime because the witness made a false statement during the commission of the murder; consequently, the court could admit the conviction without regard to unfair prejudice or the need to conduct a balancing test.¹¹⁶

¹⁰⁸ UCMJ art. 120.

¹⁰⁹ *Id.* art. 86.

¹¹⁰ *MCM*, *supra* note 7, MIL. R. EVID. 403.

¹¹¹ *Id.* MIL. R. EVID. 609.

¹¹² SALTZBURG ET AL., *supra* note 9, at 6-92.

¹¹³ *MCM*, *supra* note 7, MIL. R. EVID. 609.

¹¹⁴ “[E]vidence that any witness has been convicted of crime shall be admitted if it involved dishonestly or false statement, regardless of the punishment.” *Id.* Fraud, larceny, and perjury are examples of *crimen falsi* crimes. See *id.* MIL. R. EVID. 609 analysis, at A22-47.

¹¹⁵ SALTZBURG ET AL., *supra* note 9, at 6-95 to -96.

¹¹⁶ See FED. R. EVID. 609, Advisory Committee Notes, at 111 (2008).

B. Recent Developments: Amended MRE 609 Prior Convictions

“[W]itnesses who have violated the law are more likely to lie”¹¹⁷

Federal Rule of Evidence 609 was amended on 1 December 2006 to clarify what convictions constitute *crimen falsi* crimes.¹¹⁸ Under the amendment, a conviction is a *crimen falsi* conviction “if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.”¹¹⁹ According to MRE 1102, any changes to the FRE are incorporated by operation of law eighteen months from the FRE’s effective date unless the President takes action to the contrary.¹²⁰ Consequently, the amended language became applicable to the military on 1 June 2008. Although the amended language does not yet appear in the current *MCM*, military courts-martial are nevertheless bound to follow the amended MRE 609’s “elements test.” Changes are now being made to incorporate the amended language in the next edition of the *MCM*.¹²¹

V. Impeachment by Specific Contradiction

A. The Baseline

Although not the primary focus of any recently published cases, counsel should be aware that impeachment by specific contradiction is another method of attack. Impeachment by specific contradiction is hardly ever used because it is not specifically enumerated in an MRE.¹²² Instead, it is found in common law. “This line of attack involves showing the tribunal the contrary of a witness’ asserted fact, so as to raise an inference of a general defective trustworthiness.”¹²³ Under impeachment by specific contradiction, counsel are permitted to introduce extrinsic evidence so long as the evidence is not collateral.¹²⁴ That is, counsel are “not stuck” with the witness’s answer as

¹¹⁷ *Id.* at 6-87 (“The rationale for admitting this proof is that certain convictions enable the finder of fact being able to assess a witness’s credibility because such convictions demonstrate that the witness has violated the law, and witnesses who have violated the law are more likely to lie than witnesses who have not.”).

¹¹⁸ FED. R. EVID. 609 (2008).

¹¹⁹ *Id.*

¹²⁰ *MCM*, *supra* note 7, MIL. R. EVID. 1102.

¹²¹ Manual for Courts-Martial; Proposed Amendments, 74 Fed. Reg. 47785 (Sept. 17, 2009).

¹²² Moody & Coacher, *supra* note 2, at 182.

¹²³ United States v. Banker, 15 M.J. 207, 210 (C.M.A. 1983).

¹²⁴ *Id.* at 211.

long as the evidence pertains to a matter that counts in the case.¹²⁵ A matter “counts” when the evidence is offered for a purpose other than for the sake of simply contradicting the witness’s testimony.¹²⁶

Although not the focus of any published cases this term, the facts in *Collier* could easily be changed to illustrate this rarely used method of attack. As discussed, the CAAF reversed the NMCCA’s holding in *Collier* and authorized a rehearing. Assume for a moment that upon rehearing, the defense counsel cross-examines HM2 C concerning her homosexual relationship with Collier, and HM2 C denies having a homosexual relationship with Collier. On redirect, the trial counsel asks HM2 C about her sexual orientation, and HM2 C responds that she is strictly heterosexual and has been heterosexual all of her life.¹²⁷ The defense calls HM2 C’s co-worker who testifies she saw HM2 C engaged in homosexual activity with another female. The co-worker’s testimony is not inadmissible as a prior inconsistent statement under MRE 613 because the co-worker’s testimony described only what the co-worker perceived. The co-worker’s testimony would not be admissible as a specific instance of untruthfulness since MRE 608(b) bars extrinsic evidence of the untruthfulness. The defense might try to argue the testimony is evidence of bias, motive, or prejudice under MRE 608(c); however, that approach may be a stretch. Still, the co-worker’s testimony should be readily admissible as impeachment by contradiction.

The trial counsel’s questioning and HM2 C’s response gave the appearance that HM2 C is heterosexual. The defense would be offering the co-worker’s testimony not only to contradict HM2 C’s testimony but also to show that HM2 C has a motive to lie (i.e., anger over a failed romantic relationship). Consequently, the testimony does not constitute a collateral matter and should be allowed to show a general defectiveness in HM2 C’s trustworthiness. Though these revised facts are illustrative only, they are somewhat similar to the facts of *United States v. Montgomery*,¹²⁸ an older Army Court of Criminal Appeals (ACCA) case.

¹²⁵ See MUELLER & KIRKPATRICK, *supra* note 6, § 6.61 (“Counterproof is admissible if it contradicts on a matter that counts in the case, but not otherwise.”); see also BLACK’S LAW DICTIONARY 256 (7th ed. 1999) (defining collateral matter s “[a]ny matter on which evidence could not have been introduced for a relevant purpose.”).

¹²⁶ See MUELLER & KIRKPATRICK, *supra* note 6, § 6.62; *Banker*, 15 M.J. at 212 n.2 (finding that extrinsic evidence of a witness’s drug use was not a collateral matter when offered to both contradict his in-court testimony and to establish his bias and prejudice).

¹²⁷ Note that although this line of questioning pertains to HM2 C’s sexual predisposition, it is not barred by MRE 412. Collier was charged with larceny and obstruction of justice. *United States v. Collier*, 67 M.J. 347, 350 (2009). Military Rule of Evidence 412 only bars evidence of an alleged victim’s sexual predisposition or behavior in cases where the accused is charged with a sexual offense. MCM, *supra* note 7, MIL. R. EVID. 412.

¹²⁸ 56 M.J. 660 (A. Ct. Crim. App. 2001).

In that case, the Government accused Montgomery of cutting his mistress’s wrist and thumb with a knife after he found that she was involved with another man. Montgomery alleged that his mistress was the violent one, that she initiated a struggle, and that she was accidentally cut during that struggle. During redirect, the trial counsel asked the mistress, “[W]hat type of person are you in terms of reacting to events that upset you?”¹²⁹ The mistress replied that she was not the type to make a scene.¹³⁰ The defense wanted to cross-examine the mistress concerning five instances where she had assaulted five different individuals. The military judge refused to let the defense cross-examine the mistress about other incidents. On appeal, the ACCA found that the Government had opened the door to the other incidents by making the mistress appear passive and that the testimony should have been allowed as impeachment by contradiction. Had the defense been allowed to cross-examine the mistress, or been otherwise allowed to present evidence of the other assaults—or both—the evidence would have raised “more than ‘an inference of general defective trustworthiness’” and that evidence may have changed the panel’s view of the evidence.¹³¹

IV. Conclusion

*“Dear General, We have met the enemy and they are ours”*¹³²

A warrior knows what he has in his arsenal. He knows each weapons system. He knows not only the lethality of his weapons systems, but their limitations as well.

For those that conduct battle in the courtroom, the same principles apply. In order to effectively attack a witness’s credibility, counsel must know what he has in his arsenal.

He is keenly aware that he has more than one weapons system available. He is not focused on just one weapons system, just one method of impeachment—not when he has a variety of methods of attack available. He also knows that not all weapons systems are created equal. Some have limitations. Some methods of impeachment allow extrinsic evidence and others do not. The enemy will be yours as well if you understand and apply these principles.

¹²⁹ *Id.* at 668.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Oliver Hazard Perry, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 553 (14th ed. 1968). During the War of 1812, Oliver Perry dispatched the message “Dear General, we have met the enemy, and they are ours” to Major General William Henry Harrison after defeating the British during the Battle of Lake Erie.