

# Military Justice and the Uniform Code of Military Justice

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*Editor's Note: Brigadier General (Retired) John S. Cooke made these remarks at the 1999 Judge Advocate General's Worldwide Continuing Legal Education program on October 8, 1999 at The Judge Advocate General's School in Charlottesville, Virginia. General Cooke's incisive observations about the genesis of the Uniform Code of Military Justice, its present role in military justice, and its future, begin our series of articles celebrating the 50th Anniversary of the Uniform Code of Military Justice.*

Given the theme of the conference, "Proud Traditions, Unlimited Future," it is appropriate to devote this penultimate session to military justice. It is sort of like having the last dance with the date you came with. Military justice is our historical reason for being—it is why William Tudor was appointed the first Judge Advocate on July 29, 1775, and from Tudor to Major General Huffman it has been our core mission. For most of the time it is been our predominant mission and, even today, with so many other missions and tasks for judge advocates, none is more important than military justice. That is because military justice is vital to morale and discipline in the armed forces and to public confidence in the armed forces, and these are essential to winning in war and to success in any mission. And that is not going to change.

Today, I would like to do a couple of things. First, I will discuss some of the history of military justice and why we have the Uniform Code of Military Justice (UCMJ), and how the UCMJ has developed. Then I will talk about some of the issues and challenges ahead.

As we look at the past, it is worth remembering the important role judge advocates have played in the evolution of the system. While Congress, the President, civilians in the execu-

tive branch, and others have played pivotal roles, judge advocates can be proud of the role we have played in the development of the system. Judge advocates have sometimes been the identifiers and initiators of needed change. At other times they have resisted suggested changes. More often they have refined and revised proposed changes and made them more workable. But always, they have been the implementers of change, whatever the source, and the faithful stewards of the system prescribed by the people's representatives. With rare exceptions, they have served that role with distinction.

The 225-year history of military justice can be divided into two parts. For the first 175-plus years, from June 30, 1775, when they were adopted by the Second Continental Congress, until May 31, 1951, when the UCMJ went into effect, the system operated under the Articles of War. The Navy, during this period, operated under the Articles for the Government of the Navy. For the last fifty years, almost, the system has operated under the UCMJ.

For the first 175 years, under the Articles of War military justice was a command-dominated system. The system was designed to secure obedience to the commander, and to serve the commander's will. Courts-martial were not viewed as independent, but as tools to serve the commander. They did a for of justice, but it was a different justice than that afforded in civilian criminal trials. Military justice had few of the procedures and protections of civilian criminal justice, and protecting the rights of the individual was not a primary purpose of the system.<sup>1</sup> Although some changes were made through the years, adding limited forms of review and some rules analogous to those in civilian proceedings, even as we entered World War II, the system remained a command-dominated one. Up until that time, few seemed particularly concerned about these differences, but that would soon change.

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1. See THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 87-8. Quoting General William T. Sherman:

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.

*Id.* See also WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1920).

Over sixteen million men and women served in the armed forces during World War II—nearly one in eight Americans. There were over two million courts-martial,<sup>2</sup> so many people were exposed to the military justice system, and many did not like what they saw. The system appeared harsh, arbitrary, with too few protections for the individual and too much power for the commander. To Americans who were drafted or who enlisted to defend their own freedoms and protect those of others around the world, this was unacceptable and complaints and criticisms became widespread. Even before the war was over, the Secretary of War and the Secretary of the Navy each commissioned studies of the system, and those studies recommended significant, if not fundamental change.<sup>3</sup>

After the war, interest in reforming the system continued, and Congress became involved. In 1948, it passed Elston Act,<sup>4</sup> amending the Articles of War. These amendments were based on studies and recommendations made by the Army and foreshadowed some of the changes that would be contained in the UCMJ, including an increased role for lawyers in courts-martial. However, other dynamics led immediately to efforts for further change.

By 1948, it was clear the United States would have to play the role as guardian of freedom in the world, and that the peacetime size and roles of the armed forces would be unprecedented. The defense infrastructure itself had just been reorganized, with the creation of a separate Air Force, and the establishment of the Department of Defense. This led to a perceived need for greater protections for men and women who would serve in the armed forces, and to a desire for a common system for all the services.

Thus, no sooner had the Elston Act been enacted than Secretary of Defense Forrestal appointed a committee, in the summer of 1948, to draft a uniform code of military justice. As chair of the committee, Secretary Forrestal appointed Harvard Law professor, Edmund Morgan. Professor Morgan had served as a major in the Army's Judge Advocate General's Corps in World War I. He served on the staff of the Assistant Judge Advocate General, Major General Samuel Ansell. Major General Ansell saw many of the problems that would resurface in World War II and recommended major changes in the military justice system. Unfortunately for Ansell, his boss, The Judge Advocate General, Major General Enoch Crowder, did not agree with him and most of Ansell's proposals were shelved. Now, in 1948, Major General Ansell's protégé, Professor Morgan, would dust off many of those proposals.

The other three members of the committee were the Under or Assistant Secretaries of the three services. They were assisted by a working group of military and civilian attorneys in the Office of the Secretary of Defense. This group considered the various reports that had been prepared by the services and other groups as it worked. It is interesting, however, in light of modern-day discussions about how open the process of proposing changes should be, that the Morgan committee worked in almost complete secrecy. Its drafts were not circulated outside the Defense Department (with the exception of some consultation with key congressional staff) before the final package was presented to Congress in early 1949. There were, of course disagreements during the drafting process, and not all the services, or all the Judge Advocates General, supported every provision in the final package. Secretary of Defense Forrestal resolved disputes.<sup>5</sup>

The House of Representatives held about three weeks of hearings in the spring of 1949. These included an article by article review of the proposed code. The Senate held a more perfunctory three days of hearings a few weeks later. These hearings form the basis for one of the best and most informative pieces of legislative history anywhere. Congress ultimately passed the proposal with relatively few changes, and President Truman signed it on May 5, 1950.<sup>6</sup> It was to take effect on May 31, 1951. No one knew it when the President signed it, of course, but that meant that the sweeping changes made by the new code would be implemented during the height of the Korean War—a formidable task for the judge advocates of the day.

The UCMJ marked a distinct break with the past—most significantly in its acceptance of the idea that discipline cannot be maintained without justice, and that justice requires, in large measure, the adoption of civilian procedures. The new system retained many features of the old, including considerable authority for the commander, but attempted to balance the commander's authority with a system of somewhat independent courts and expanded rights for service members. The creation of the Court of Military Appeals was designed to protect the independence of the courts and the rights of individuals. Judge advocates were to play a bigger part in the process. The role of The Judge Advocate General was expanded, including broader responsibility to oversee the system under Article 6. The staff judge advocate had increased responsibilities in advising convening authorities and assisting in the review of cases. The position of law officer—the forerunner to the military judge—was established to act in general courts-martial. The accused was afforded the right to be represented by a qualified attorney—a

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2. Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972).

3. See JONATHAN LURIE, *ARMING MILITARY JUSTICE, THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS 1775-1950* 130-149 (1992).

4. Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948).

5. See *id.* at 150-192.

6. Pub. L. No. 81-506, 64 Stat. 108 (1950).

judge advocate—in general courts-martial. A parallel right would not be recognized in civilian criminal trials until the Supreme Court decide *Gideon v. Wainwright*<sup>7</sup> some twelve years later. Similarly, the new code provided protections against self-incrimination that predated the Supreme Court's decision in *Miranda v. Arizona*<sup>8</sup> by over fifteen years. Thus, the new code was a distinct break with the past, combining features of the old system with concepts and rules from the civilian justice model.

The history of military justice under the UCMJ can be divided into three periods. In the first, from 1950 to 1969, the system went through a period of “feeling out” and early growth. During this period, the Court of Military Appeals grafted some civilian principles of justice onto the system, it restricted some of the commander's powers, and it labored to enhance the independence of courts-martial. It was somewhat hampered in this by the limitations of the Code itself. Nevertheless, by the early 1960s the Judge Advocates General were sufficiently dissatisfied with the court that they declined to collaborate on the annual report that is required by the code, and there were even some calls from the services to abolish or radically alter the court.<sup>9</sup>

The services were not always resistant to change, however. In November 1958, The Judge Advocate General of the Army, Major General Hickman, secured approval to create the U.S. Army Field Judiciary. Under this order, Army law officers, judges, were assigned directly to The Judge Advocate General, rather than to local commanders as had been the case. This major step toward increased judicial independence occurred more than ten years before Congress required such independence in Article 26.

Although military justice under the UCMJ seemed much improved during this period, it remained significantly different from civilian criminal justice, and was still seen as vastly different—and inferior. This was nowhere better highlighted than in the Supreme Court's decision in *O'Callahan v. Parker*<sup>10</sup> in 1969. There the Court limited the jurisdiction of courts-martial over service members by requiring that offenses be “service connected” to be subject to court-martial jurisdiction. Moreover, the Court roundly criticized courts-martial, saying “courts-martial are singularly inept in dealing with the nice subtleties of constitutional law.”<sup>11</sup> *O'Callahan* reflected that,

despite many advances, military justice still had far to go if it was to be perceived as a true system of justice.

*O'Callahan* was decided on June 2, 1969, and brings to a close this first period under the UCMJ. Ironically, the military justice system was already primed to undergo major changes that would do much to dispel such criticisms. The Military Justice Act of 1968,<sup>12</sup> was scheduled to go into effect on August 1, 1969. This began the second period I have identified, from 1969 to 1987. This period was a period of turbulence a growth, culminating in the coming of age of the system.

The Military Justice Act of 1968 was even more sweeping in many respects than the UCMJ itself, and no one was more responsible for securing Department of Defense backing and Congress' approval of the Act than Army The Judge Advocate General Major General Kenneth Hodson. The act provided the foundation for the system of relatively independent courts that we take for granted today. Among other things, the Act made the boards of review “courts” of review and gave them powers to act like true appellate courts. It changed the name of the law officer to military judge and extended more judicial authority to the position. It provided for military judges to preside in special as well as general courts-martial. It provided for trial by military judge alone on request by the accused. And it provided for the Article 39(a) session at which the judge could hear and decide issues outside the presence of the members. Finally, it required that all judges be assigned and directly responsible to the Judge Advocate General or a designee. Thus, the Act provided the framework for judicial authority and independence that we take for granted today.

It is worth noting that the Military Justice Act of 1968 and the new *Manual for Courts-Martial* that accompanied it became effective while the war in Vietnam was intense. Once again, judge advocates faced and met great challenges in implementing new procedures in a combat environment.

In the 1970s, the services and the military justice system went through a difficult period. The war in Vietnam ended unsuccessfully, the services were drawn down, the draft was terminated, and reductions in force implemented. Morale suffered and the quality of the force was poor; court-martial rates were astronomical by today's standards. As you know, in the late 1970s and early 1980s, the services initiated a number of efforts to improve recruiting, quality of life, morale, and disci-

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7. 372 U.S. 335 (1963).

8. 384 U.S. 436 (1966).

9. See JONATHAN LURIE, PURSUING MILITARY JUSTICE, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, 154-156 (1998) [hereinafter LURIE].

10. 395 U.S. 258 (1969).

11. *Id.* at 265.

12. Pub. L. No. 90-632, 53 Stat. 1335 (1968).

pline—the success of these was demonstrated in Operations Desert Shield and Desert Storm in 1990-91. Military justice went through a parallel development as it coped with these broader problems and addressed issues of its own.

From 1975 to 1978, the Court of Military Appeals engaged in what was sometimes called the “COMA revolution.” It issued a number of controversial and often criticized decisions that limited the jurisdiction of courts-martial, limited the powers of commanders, expanded individual rights, extended the court’s own authority, and broadened the authority and responsibility of the military judge. Some of the more problematic of the court’s initiatives were later reversed, either by Congress or by the court itself.<sup>13</sup> Nevertheless, the court left two lasting legacies. First, its decisions enhancing judicial powers have remained effective and have ensured that the goals of judicial authority and independence in the Military Justice Act of 1968 would be realized. Second, the court helped serve as the catalyst for judge advocates and others to examine critically the system and to consider ways to improve it. This led to several important steps.

In 1977, the services began a process that culminated in 1980 in the adoption of the Military Rules of Evidence—a slightly modified version of the Federal Rules of Evidence. This was largely the initiative of Army Colonel Wayne Alley at the time the Chief of the Criminal Law Division in the Office of The Judge Advocate General. In 1979-81, The Judge Advocate Generals Wilton Persons and Alton Harvey tested a adopted an independent defense organization, the Trial Defense Service (TDS). This was quite controversial at the time, but for twenty years TDS has done vital work, serving soldiers and the credibility of the military system superbly. The Military Justice Act of 1983<sup>14</sup> streamlined pretrial and post-trial processing, among other changes. Most importantly, it extended the jurisdiction to the Supreme Court to direct review of Court of Military Appeals decisions on certiorari. The *Manual for Courts-Martial, 1984*, tied much of this together and still today provides the rules the system operates under.

This period concludes with the Supreme Court’s decision in 1987 in *Solorio v. United States*.<sup>15</sup> There the Court overturned *O’Callahan* and held that courts-martial may exercise jurisdiction over service members without the service connection test. The majority opinion did not rely on the many changes in military justice under the UCMJ as a basis for the decision, citing rather to history and Congress’ constitutional powers. Nevertheless, it is likely that the changes in military justice under the UCMJ made it easier for the majority to reach its result, and

they surely made it easier for Congress and the public to accept the result in *Solorio*.

From 1987 to the present, the military justice system has enjoyed a period of stability and incremental change. This is good because the armed forces have undergone their own turbulence during this period following the end of the Cold War. Congress has engaged only in minor changes—requiring the imposition of forfeitures in most instances<sup>16</sup> and the cosmetic changes of the names of our appellate courts.<sup>17</sup> The Court of Appeals for the Armed Forces has not undertaken radical redefinition, but has rather engaged in error-correction and in dealing with novel questions facing many courts, such as issues of scientific evidence. One significant change occurred in 1998, when, almost exactly forty years after Major General Hickman established the U.S. Army Field Judiciary, Major General Huffman took the important step of recognizing tenure for Army trial and appellate judges under *Army Regulation 27-10*.

In sum, the forty-nine plus years under the UCMJ have marked a continuation of balancing the role of the commander with an increasingly independent and sophisticated judicial system.

What is next? I do not think we are likely to see radical change any time soon—the system is working reasonably well. That is not to say that there are not issues that warrant examination. Indeed, a “bad” case or two in the press could generate interest in broader changes. Absent that, I think the system will continue the course it has followed under the UCMJ: maintaining certain core responsibilities for the commander, while continuing trend to closer adherence to civilian principles and practices that make courts-martial independent and effective judicial bodies.

Rather than suggest my own prescriptions for change, I want to address with you where I think some of the biggest problems or concerns may lie. These are areas that I think are more likely to be the subject of attention and criticism and in which close scrutiny may give rise to proposals for greater change. It behooves those who care about the system to consider these issues carefully so that changes are made wisely.

The first area is one that is well known to you. The large reduction in the numbers of courts-martial in recent years has resulted in fewer opportunities for judge advocates to be exposed to and learn about the system. This is often discussed in terms of the lack of advocacy skills young judge advocates are able to develop. This is a problem, but underlying it is a

13. See generally LURIE, *supra* note 9, at 230-271.

14. Pub. L. No. 98-209, 97 Stat. 1393 (1983).

15. 483 U.S. 435 (1987).

16. Pub. L. No. 104-106, Div. A, Title XI, §1121(a), 110 Stat. 462, 463 (1996).

17. Pub. L. No. 103-337, Div. A, Title IX, §924(c), 108 Stat. 2831, 2832 (1994).

more serious problem. The shortcomings in advocacy skills reflect a lack of attention by the staff judge advocate (SJA) and other supervisors of these counsel.

When I was Chief Judge, I reviewed many records. Usually the advocacy on both sides was good, in some cases very good. But, too often, there were problems, and almost always on the government side. Regional defense counsel and military judges have responsibilities here too, but my remarks are aimed primarily at SJAs. When I saw weakness in the trial counsel's performance, invariably that weakness could be traced to the chain of supervision. Poorly drafted charges, overcharging, or mischarging, having no clear theory of the case, not knowing which issues are important and which are not—and therefore which to contest and which to concede—all these things start with the SJA. I submit that there are five things every SJA should do. None of these will be huge revelations to most of you, but problems arise when they are not done.

First, you must be a mentor and trainer. Ensure that counsel not only know the mechanics and techniques of trying cases, but that they understand the history and purpose of the system.

Second, you must be sufficiently familiar with each case to ensure that the charges make sense and can be proved, and that the disposition level is appropriate; this is not a task you can delegate.

Third, you must ensure that trial counsel is properly prepared—that he has a theory of the case, knows and understands the evidence he will present, and knows what issues are important and what are not.

Fourth, treat the defense with fairness and respect and make sure it is given what it is entitled to. This includes both general administrative support for TDS and making sure it receives proper notice and discovery and reasonable access to witnesses and commanders. Remember, no one wins when a soldier is not well represented in a court-martial.

Fifth, always remember that you represent the system and that no one case is bigger than the system. Set the example and act with fairness and integrity. Always take the high road. Sometimes it is harder and takes a little longer, but it usually gets you where you need to be, and you can look yourself in the mirror—and not have to clean up as much—when you arrive.

I know most of you know and do these things, but even an infrequent lapse is costly to individuals—accused, victim, or otherwise—and to the credibility of the system. If we fail to manage the system well, and to train those who follow, we risk losing the confidence of the public, commanders, and soldiers. This could lead to significant change in our own role in the process.

The role of the commander as convening authority is another area subject to examination. It is probably the part of the system most different from civilian criminal justice systems, and

therefore the least understood by the public. In most of the high-profile cases of the 1990s, the commander's powers, in other words, prosecutorial discretion, have been the focus of attention even if that has not been clearly articulated. From Tailhook to the Italian cable car tragedy, from Lieutenant Flinn to Sergeant Major McKinney, and in several other cases, attention has not focussed on whether someone can get a fair trial in a court-martial. Rather, it has been on whether someone was being tried when others in similar circumstances were not. We need to look closely at who makes these decisions and how they are made to see if the system still makes sense, and, if so, how to defend it or, if not, how it should be changed. Your role in advising commanders is very important in this process, but it is the structure that defines who makes the decision that may be at issue.

Our system lends itself to different treatment of apparently similar offenders, because prosecutorial discretion is exercised at the lowest levels of command, and prohibitions on unlawful command influence preclude limits on that discretion. The rationale for command discretion is that the commander is responsible for performance of the unit and therefore discipline in the unit, so therefore the commander must exercise this authority. That is a very strong argument that most of us would agree with, but we must recognize that there are some cogent counter-arguments.

First, given the nature of today's caseloads, many offenses have impact far beyond the unit or even the Army. Child molestation is but one of many examples. A civilian may reasonably ask whether a commander whose focus is on the unit—and, incidentally, whose budget for training and unit welfare is affected by the expense of prosecutions—adequately considers the impact on the public when deciding whether or not to prosecute. I think most commanders do consider these things, and it is incumbent on you SJAs to ensure they do, but that remains a legitimate question for civilians to ask.

Second, more often than we like to think, authority to convene courts and refer cases to them is divorced from the operational commander. This occurs with installation command jurisdiction over tenant units, and with area jurisdiction overseas. Also, on occasion, we have assigned jurisdiction to a specific commander, such as in the Tailhook cases where the Navy and Marines assigned all the cases to a particular commander in each service. Moreover, in today's world of operations conducted by ad hoc organizations consisting of units from multiple parent commands, we frequently leave UCMJ jurisdiction with the original commanders, not the operational commander. This is especially true in joint operations, where court-martial jurisdiction typically runs along service lines and not to the joint commander.

There are very good reasons why we do all these things, but we need to recognize that they run counter to the fundamental rationale for giving commanders the power to convene courts and refer cases to them.

This raises some questions: should we more rigorously follow operational lines in determining court-martial jurisdiction. Should we abandon such lines in favor of (presumably fewer) court-martial commands—which might have the benefit of increased “detachment” from the problem, especially in high profile cases, and also of increased uniformity. Should we leave referral decisions to lawyers? Are there ways to guide prosecutorial discretion without running afoul of rules against unlawful command influence or the policies they stand for? These are things that should be studied now.

Another area warranting examination is judicial independence. This is an issue in our society now. This year the American Bar Association has made a point of expressing its concern about judicial independence and has sponsored several studies and symposia about judicial independence and public trust and confidence in the judiciary. Despite the tremendous strides the military justice system has taken, including the huge step Major General Huffman recently took in adopting tenure for Army judges under *AR 27-10*, we should not take this area for granted. It is important not only that the system provides assurance to judges that they can decide cases without apprehension of adverse personal consequences, but that they be perceived as so acting. It is also important that the judiciary be so structured as to attract the very best to the bench. Given the diminishing pool of judge advocates with extensive military justice experience, this will be even more important in the years to come.

The lack of criminal jurisdiction over civilians accompanying the armed forces overseas is another problem. We have lived with this issue for many years, but today it is potentially more serious because of our increasing reliance on civilian employees and contractors to perform critical missions in combat and other contingencies. This is a disaster waiting to happen. Before long, a civilian employee or contractor in a key overseas operation is going to commit, or be credibly accused of committing, a serious offense against a local national or a member of an allied force, and we will be powerless to try the individual. Our inability to prosecute someone may not be a benefit to the suspect or accused, as he then may fall prey to the justice system of a foreign government or possibly even some international tribunal. Moreover, this jurisdictional void might result in more than an injustice in a single case; it could seriously damage the prospects for success in the mission and the

United States’ security interests. Legislation has been introduced that would extend the jurisdiction of U.S. federal courts to try such cases and which would also provide for court-martial jurisdiction in limited circumstances. I hope Congress will have the foresight to fix this problem.

In conclusion, George Washington said: “Discipline is the soul of an Army.”<sup>18</sup> You have heard Major General Huffman say it and some of you have heard me say it: by discipline, we do not mean simply fear of punishment for doing something wrong, but faith in the value of doing something right. True discipline is doing the right thing even when the right thing is very hard to do and no one else is looking. That discipline is the product of a military system of training and education, standards and customs, ethics and values. Military justice is central to that system. Military justice inculcates and reinforces morale and discipline. It does so by consistent adherence to two principles: each person, regardless of rank, is responsible and accountable for his actions; and, each person, regardless of circumstance, is entitled to be treated fairly and with dignity and respect.

You have a serious responsibility and a glorious opportunity. You inherit a proud tradition of service in the cause of freedom and justice. You inherit a fine system built and cared for by your predecessors. And you now have responsibility to carry the military justice system into a new century and the UCMJ into its second fifty years. Beyond those artificial milestones, you have the responsibility to manage and to mold the system so that it serves the needs and expectations of the American people and their sons and daughters in the armed forces.

I urge you to understand and appreciate the system’s past, to administer it in the present with fairness and integrity, and to consider its future with wisdom and an open mind.

I would like to close on a personal note. Each of you joined the army and the Judge Advocate General’s Corps for your own reasons, and there are many different ones. But I know, from my own experience, that you all stayed not just so you could make a living, but so you could make a difference. That is why it is such a privilege for me to be with you today.

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18. D. S. FREEMAN, WASHINGTON 116 (1968).