# Why did Congress Amend the Articles of War after World War II?

☆

Fred L. Borch

Abstract

In 1948 and again in 1950, Congress made significant changes to the military criminal legal system in the U.S. armed forces. It abolished the army's Articles of War (and the navy's counterpart) and created a new criminal code that was uniformly applicable to all the services, including the newly created air force. This article examines the social and cultural factors that were the impetus for congressional reform and demonstrates that there was a definite link between the post-World War II changes to military criminal law and earlier reform efforts that occurred after World War I.

## Introduction

Between 1939 and 1945, the U.S. Army expanded more than forty-fold, from 190,000 to more than eight million soldiers.[1] The number of courts-martial during these years also increased dramatically to 1.7 million cases, which amounted to an unprecedented one-third of all criminal cases tried in the United States during this period.[2] While most of these trials were for minor offenses, there were some

1. I. C. B. Dear, ed., *The Oxford Companion to the Second World War* (New York: Oxford University Press, 1995), 1190, 1192. The army included the Army Air Force, which consisted of some 1.8 million personnel.

2. Jonathan Lurie, *Military Justice in America* (Lawrence: University Press of Kansas, 2001), 77.

**Fred L. Borch** served twenty-five years as an active-duty army lawyer and recently retired as the Professor of Legal History and Leadership at The Judge Advocate General's Legal Center and School, and the Regimental Historian and Archivist for the army's Judge Advocate General's Corps. He was a Fulbright Scholar to the Netherlands (2012) and a Fulbright Specialist to Mongolia (2024). His book *Military Trials of War Criminals in the Netherlands East Indies 1946–1949* was published by Oxford University Press (2017).

*The Journal of Military History* **88 (October 2024): 1002–1027.**

eighty thousand felony-level proceedings at general courts-martial—an average of nearly sixty convictions by the highest-level military court every day of the war.[3] These courts-martial were prosecuted and defended in accordance with the Articles of War, which had been in existence since 1775 and, with "some slight changes," were still the basis for all criminal law practice and procedure in the army during World War II.[4]

At the end of hostilities, the War Department and uniformed lawyers in The Judge Advocate General's Department undoubtedly believed that the court-martial process had functioned well during the war and that the Articles of War would remain in place for the foreseeable future. Congress amended the Articles of War in 1948 and again in 1950, however, ushering in revolutionary changes that dramatically altered the army's military criminal legal system.

Why did Congress amend the Articles of War after World War II, changing the court-martial system that had been in place with only minor modifications since 1775 and that, at least from the army's perspective, had functioned well enough between 1941 and 1945? This article argues that Congress enacted legislation that changed the Articles of War for two reasons. First, Congress was responding to complaints by soldiers returning to civilian life that courts-martial conducted during World War II were unfair and unjust, especially in the treatment of enlisted personnel. Second, Congress recognized that the new post-1945 peacetime army—a force that was five times larger than the pre-World War II army and consisted largely of civilian draftees rather than volunteers—required a criminal court system with similar due process rights to those enjoyed by American citizens in civilian criminal prosecutions.

This article further argues that the content of the 1948 and 1950 amendments was shaped chiefly by reform proposals first suggested between 1917 and 1920. Two advisory bodies, the so-called Doolittle Board and the Vanderbilt Committee (both appointed by the secretary of war in 1946), recommended changes to courts-martial akin to reform ideas initially proposed by Brigadier General Samuel Ansell, the acting judge advocate general during World War I. The key player in the resurrection of Ansell's reform efforts was Professor Edmund Morgan of Harvard Law School. Morgan had served as an army judge advocate in World War I, had worked for Ansell, and had supported Ansell's earlier reform efforts. When James Forrestal, the new secretary of defense, appointed Morgan as the chairman of a third committee, which Forrestal had created and tasked with drafting the amendments to the Articles of War, Morgan ensured that many of Ansell's proposals were part of the final legislative package enacted by Congress in 1950. Morgan and Ansell were in close contact while Morgan and his committee were writing what would become

3. William T. Generous, Jr., *Swords and Scales: The Development of the Uniform Code of Military Justice* (Port Washington, NY: Kennikat Press, 1973), 14.

4. Arthur John Keeffe, "Universal Military Training with or without Reform of Courts-Martial," *Cornell Law Quarterly* 33, no. 4 (June 1948): 467.

the Uniform Code of Military Justice (UCMJ), and Morgan "dusted off" many of Ansell's reform ideas and inserted them into the UCMJ. Why and how Congress amended the Articles of War is best explained as the result of social-cultural factors, but the content of those changes was shaped primarily by two individuals.

**Social and Cultural Factors as Agents of Change**

Soldiers returning to civilian life—mostly those who had served as enlisted men, but some officers—complained bitterly to their members of Congress about the unfairness of courts-martial. While some complaints focused on the arbitrary and capricious nature of trials or the lack of legally qualified counsel for a defendant, the chief complaint was that a commander had too much power in the system. The commander determined who should be tried by court-martial, and he appointed both the prosecutor to try the case and the defense counsel tasked with representing the accused. This same commander also selected the officers who would serve as judge and jury—all of whom were his subordinates and who looked to him for pay, promotion, and living quarters. At the end of the trial, the commander decided whether to approve the verdict and the sentence. More than a few returning veterans believed that it was too easy for a commander to dominate, or manipulate, the court-martial process. They viewed this as unfair and wanted Congress to reduce, if not eliminate entirely, the power of the commander in the court-martial process.[5]

While many of these ex-soldiers voiced their complaints about courts-martial directly to their congressmen and senators, many veterans also made their opinions known to the army.[6] Complaints about military justice—and the command control of it—were part of a larger public outcry about a lack of democracy in the army and incompetent leadership among the officer ranks. These citizens-turned-soldiers, most of whom had served in the enlisted ranks, were most upset with an army culture that insisted that officers were special and merited privileges in the form of officer-only restaurants, nightclubs, hotels, bars, and even latrines. Officers also wore different, and arguably better, uniforms than enlisted soldiers.[7]

Stung by the "rising clamor of public criticism of the Army,"[8] which reached a peak in the spring of 1946, Secretary of War Robert P. Patterson selected four officers and two enlisted men as members of a "Board on Officer/Enlisted Man

5. Arthur E. Farmer and Richard H. Wells, "Command Control—Or Military Justice," *New York University Law Quarterly* 24, no. 2 (April 1949): 263–82. See also Luther C. West, "A History of Command Influence in the Military Judicial System," *UCLA Law Review* 18, no. 1 (November 1970): 73–79.

6. Harold F. McNiece and John V. Thornton, "Military Law from Pearl Harbor to Korea," *Fordham Law Review* 22, no. 2 (1953): 157–58.

7. Kevin P. Anastas, "Demobilization and Democratizing Discipline: The Doolittle Board and the Post World War II Response to Criticism of the United States Army" (master's thesis, Duke University, 1983), 66–67. See also G. Dearborn Spindler, "The Doolittle Board and Coöptation in the Army," *Social Forces* 29, no. 3 (March 1951): 307–8.

8. Anastas, "Demobilization and Democratizing Discipline," 48.

Relationships."[9] Then–Lieutenant General James H. "Jimmy" Doolittle, who famously led the Doolittle raid on Tokyo in 1942, was the chairman of the board. Patterson's intent was for Doolittle and his fellow board members to investigate complaints of abuse and ill-treatment of enlisted soldiers at the hands of officers and provide recommendations for how officer-enlisted relationships in the army might be improved.[10] The chief conclusion of the Doolittle Board (or the "Army Gripe Board," as it was sometimes called in the media) was that officer-enlisted relationships were too regimented and reflected "an old-world type of military caste" rather than America's more egalitarian and democratic society.[11]

In reviewing over one thousand letters and considering prepared statements and recorded witness testimony, as well as newspaper articles and editorial comments, the Doolittle Board also discovered many complaints about the Articles of War. When the *Army Times* newspaper solicited its readers to write letters to the board and "Tell Doolittle About It!," over half the letters denounced the army's court-martial system.[12] Some questioned why only officers were competent to serve on courts-martial. Why should not enlisted personnel also be allowed to serve on military juries? These letter writers also believed it was unfair that enlisted soldiers could be prosecuted at summary, special, and general courts-martial while officers could only be tried in general courts. In the view of these complainers, this inequitable treatment of officers and enlisted personnel was part-and-parcel of a larger undemocratic "old-world type [military] caste system" that needed to be swept away.[13]

While the Doolittle Board had looked at some complaints about the Articles of War, its non-lawyer members were not capable of identifying problems with military justice in the army, much less recommending specific and appropriate changes to the law. Other than calling for "equality of treatment" of officers and enlisted soldiers at courts-martial, the Doolittle Board made only one specific recommendation in regards to the administration of justice: that enlisted men be allowed to sit on courts-martial.[14]

Over the years, a myth has emerged that the Doolittle Board's recommendations resulted in sweeping changes to the Articles of War and that its efforts led directly to the enactment of the UCMJ in 1950.[15] This is untrue. There is no link between

9. *Report of the Secretary of War's Board on Officer-Enlisted Man Relationships*, S. Doc. 196, at 3 (1946) [hereafter Doolittle Board Report].

10. Jerold E. Brown, ed., *Historical Dictionary of the United States Army* (Westport, CT: Greenwood Press, 2001), 154.

11. Doolittle Board Report, 3.

12. "Tell Doolittle About It!" *Army Times*, 6 April 1946, 1; Anastas, "Demobilization and Democratizing Discipline," 73.

13. Doolittle Board Report, 3.

14. Doolittle Board Report, 21.

15. See for example Hamilton H. Howze, "Military Discipline and National Security," *Army* 21 (January 1971): 13, and Charles C. Moskos, *The American Enlisted Man* (New York: Russell Sage Foundations, 1970), 9.

the board and the many legislative changes Congress made to the Articles of War in 1948 and 1950. Jimmy Doolittle and the members of his board did, however, highlight the unhappiness of soldiers with the Articles of War. In his autobiography, Doolittle noted that the "greatest differential" between officers and enlisted men in World War II, "and the one that brought the most criticism, was ... military justice and courts-martial procedures, which permitted inequities and injustices to enlisted personnel."[16]

Because grievances and complaints about courts-martial were not going away, Secretary of War Patterson recognized that the army needed a comprehensive study of the Articles of War that would not only examine the system thoroughly but also make concrete recommendations for improving the court-martial process. Patterson invited Willis Smith, the president of the American Bar Association (ABA), to nominate members for an "Advisory Committee on Military Justice." Smith chose Arthur T. Vanderbilt of New York University's law school as the chairman of the committee and nominated the other eight members of the all-lawyer advisory board, which included five former presidents of the ABA and two federal court judges.[17]

The Vanderbilt Committee was tasked with examining "the administration of military justice within the Army and the Army's court-martial system," and was asked "to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices which the Committee considers necessary or appropriate to improve the administration of justice in the Army."[18] Between 26 March 1946 and 13 December 1946, when the committee delivered its report to Secretary Patterson, Vanderbilt and his lawyer colleagues examined "voluminous statistical and results studies" prepared by The Judge Advocate General's Department and other official documents. At hearings in Washington, D.C., and ten other cities, the committee heard testimony from ex-officers and enlisted men who had served during World War II and returned to civilian life as well as interested members of the public. The result was 2,519 pages of transcripts. The committee also did personal interviews and "digested" more than 300 answers to mimeographed questionnaires from officers of all grades, enlisted men, and civilians."[19]

16. James H. Doolittle, *I Could Never Be So Lucky Again* (New York: Bantam Books, 1991), 475.

17. In addition to Arthur T. Vanderbilt, the Advisory Committee consisted of Justice Alexander Holtzhoff, Walter P. Armstrong, Frederick E. Crane, Joseph W. Henderson, William T. Joyner, Jacob M. Lashly, Morris A. Soper, and Floyd E. Thompson. General Dwight D. Eisenhower, then serving as army chief of staff, signed the memorandum appointing the nine-member committee on 25 March 1946. War Department Memorandum No. 25-46, War Department Advisory Committee on Military Justice, 25 March 1946, para. 1.

18. War Department Memorandum No. 25-46, War Department Advisory Committee on Military Justice, 25 March 1946, para. 2.

19. U.S. Army, *Report of War Department Advisory Committee on Military Justice*, 13 December 1946, 2 [hereafter Vanderbilt Committee Report].

The Vanderbilt Committee concluded that "the Army system of justice in general and as written in the books is a good one" and "that the innocent are almost never convicted and the guilty seldom acquitted." The committee concluded, however, that the court-martial system had two major problems. First, the process did not use "men of legal skill" in the prosecution and defense of soldiers, "so that the courts were frequently staffed with incompetent men." Second, "in many instances" commanders believed "it was the duty of the command to interfere" with courts-martial to maintain order and discipline. Sentences imposed by courts-martial "were frequently severe and sometimes fantastically so."[20] The Vanderbilt Committee learned that a clemency board appointed by the War Department to examine court-martial sentences had reduced excessive sentences in 27,500 court-martial cases. This constituted 85 percent of the total cases reviewed by the board.[21]

In their fifteen-page advisory report on military justice, Arthur Vanderbilt and his fellow committee members focused chiefly on "command control" as the most significant problem with the Articles of War. "The Committee is convinced that in many instances, the commanding officer who selected the members of the court made a deliberate attempt to influence their decisions."[22] While not all commanders adopted this practice, the Vanderbilt Committee learned that "its prevalence was not denied and indeed in some instances was freely admitted."[23]

The advisory report provided several examples of this command influence. Members of a court "were given to understand" that the two-star general who had chosen them for jury duty expected them to impose the maximum punishment when they convicted a defendant, "so that the general, who had no power to increase a sentence, might fix it to suit his own ideas." In another case, a three-star general told the Vanderbilt Committee that he had written a "stinging letter of rebuke" to jury members of a court-martial who had imposed a five-year sentence upon a soldier for desertion. This lieutenant general was "incensed" that the court members had not punished the deserter with twenty-five years in jail.[24]

While the Vanderbilt Committee understood that traditionalists insisted that discipline was a function of command and that there consequently was nothing wrong with command control of courts-martial, the committee informed Secretary Patterson that this view was "completely wrong and subversive of morale." The advisory report insisted that the Articles of War must be changed to make it improper and unlawful for any person to attempt to influence the actions of a court-martial.[25]

20. Vanderbilt Committee Report, 4.

21. U.S. Navy, Office of the Judge Advocate General, *Congressional Floor Debate on The Uniform Code of Military Justice* (Great Lakes, IL: Department of the Navy, 1950), 290 [hereafter Congressional Floor Debate].

22. Vanderbilt Committee Report, 6–7.

23. Vanderbilt Committee Report, 7.

24. Vanderbilt Committee Report, 7.

25. Vanderbilt Committee Report, 8.

While almost half of the Vanderbilt Committee's report focused on command control of courts-martial, the report also made two other specific recommendations. First, it stressed that it be made "mandatory that the defense counsel should always be a lawyer." The committee heard time after time that an accused soldier was unable to get a fair trial at a court-martial when his counsel had no legal training and was incompetent or ill-prepared for trial. Second, Vanderbilt and his colleagues recommended that enlisted men should be permitted to serve on court-martial juries. Their rationale was that if courts-martial existed to perform an absolutely necessary disciplinary function, and good order and discipline mandates fair and just treatment, then permitting "qualified enlisted men" to sit as jurors would improve morale because enlisted soldiers would have an increased knowledge of the court-martial process and have more confidence in its operation.[26]

If Secretary Patterson and other army leaders like General Dwight D. Eisenhower thought that the Doolittle Board and Vanderbilt Committee would calm the public uproar about the Articles of War, they could not have been more wrong. Both the House and the Senate wanted to do their own investigations of military justice in the army, if only because their constituents demanded change. Evidence that command control of the system was a genuine problem continued to pile up. In February 1949, Ernest W. Gibson, then the governor of Vermont, spoke on an American Broadcasting Corporation (ABC) radio program about the propriety of reforming court-martial procedures. Gibson had served "on active duty through the war as an officer" and consequently had firsthand experience with military justice. According to Gibson, there were "occasions ... where commanding generals have told their general courts-martials exactly what they wanted them to find in the nature of a verdict, or what sentences they wanted them to impose."[27] No other participant on the ABC radio show, some of whom argued against radical changes to the Articles of War, denied the truth of Gibson's allegations.[28]

Congress held hearings on the need to amend the Articles of War. The first hearings were in the House, in a subcommittee of the newly created Armed Forces Committee headed by Congressman Charles H. Elston of Ohio.[29] While some suggested that Representative Elston also should examine the Articles for the Government of the Navy—the sea services counterpart to the Articles of War—Elston decided that his House subcommittee should focus exclusively on the army's court-martial system, chiefly because the majority of complaints from the public were about the Articles of War.[30]

26. Vanderbilt Committee Report, 13.

27. Ernest W. Gibson, *On Trial* (radio transcript), American Broadcasting Corporation, 14 February 1949, 10:30 p.m., 11, Morgan Papers, Harvard University (https://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-V-radioscript-ABC.pdf).

28. Gibson, *On Trial,* 11.

29. Fritz B. Wiener, *Uniform Code of Military Justice* (Washington, DC: Combat Forces Press, 1950), 26–27.

30. Generous, *Swords and Scales*, 23.

The court-martial system had its share of defenders. While acknowledging that some changes to the Articles of War would be beneficial, Major General Thomas H. Green, then serving as the army's top uniformed lawyer, insisted that military justice was "a field … which requires not only a thorough familiarity with criminal law, but also experience and training in military matters."[31] Amendments that would make courts-martial more like civilian courts were therefore ill-advised. William Hughes Jr., the president of the Judge Advocates Association, argued that it was a bad idea to make any changes to the Articles of War that would "civilianize a thing that is basically non-civilian in character, namely, the discipline of the Army."[32]

The majority of witnesses, however, denounced the military justice system. Most complaints focused on the power of a commander to control the process. Members of Congress were especially alarmed when they heard the facts and circumstances of *United States v. Shapiro*. The case seemed to be the epitome of the arbitrary and capricious nature of the existing military justice system—command control in the *Shapiro* case had resulted in an unfair and unjust result.[33]

On 27 August 1943, Second Lieutenant Sidney Shapiro, a lawyer by profession serving as an air corps officer, was assigned to defend a Mexican-American soldier accused of assaulting a fifteen-year-old female with the intent to rape her. The major issue at the trial by general court-martial was identity. Shapiro decided to substitute another Latino male for the accused at the proceedings; not only did the female victim identify the imposter as her attacker, but so did other prosecution witnesses. Satisfied that he had destroyed the prosecution's case, Shapiro began presenting evidence for the defendant by revealing his trial tactic, telling the court that it was his theory that the victim and her witnesses would identify any Latino male as the assailant. The president of the general court-martial immediately halted the proceedings; after the real accused was located and brought to trial, he was convicted and sentenced to confinement at hard labor for five years.[34]

Lieutenant Shapiro was tried just one week later at a general court-martial for "conduct ... to the prejudice of good order and discipline" under Article 96 of the Articles of War, a catch-all provision that allowed a court-martial to make criminal "all disorders and neglects to the prejudice of good order and military discipline . . . of which persons subject to military law may be guilty."[35] The government alleged that Shapiro's deception had been "wrongful" and had delayed "the orderly progress of the general court-martial." He was found guilty by a court-martial composed of officers senior to him in rank and sentenced to be dismissed from the army—the officer equivalent of a dishonorable discharge.[36] On appeal, the

31. Lurie, *Military Justice in America*, 139.

32. Lurie, *Military Justice in America*, 138.

33. Congressional Floor Debate, 277–78.

34. United States v. Shapiro, *Army Board of Review* 26 (1943): 107–8.

35. *A Manual for Courts-Martial, U.S. Army, 1928* (Washington, DC: Government Printing Office, 1943), 227.

36. United States v. Shapiro, 108.

army board of review concluded that because Shapiro's actions were dishonest and intended to mislead the court, the verdict and sentence were appropriate. The judge advocate general concurred, and Shapiro's dismissal from the army was confirmed by President Franklin D. Roosevelt in January 1944 (as required under Article 48 of the Articles of War).[37]

In 1947, Shapiro filed a suit in the court of claims. He claimed that his court-martial was without jurisdiction to prosecute him, and he sued for his back pay as a lieutenant. The facts developed by the court of claims show that it was not only enlisted personnel who were victims of command control. Several days after the conviction of Shapiro's client for sexual assault, Shapiro was apprehended. Lieutenant Shapiro was served with charges at 12:40 p.m. and notified that he would be tried by court-martial that same afternoon at 2:00 p.m. Trial was to take place in a courtroom some 35 to 40 miles away. Shapiro was informed that he should obtain his own defense counsel and make his own way to the trial, all within one hour and twenty minutes.[38]

The first person that Shapiro selected to defend him was a lawyer, but his request was denied by the commander who had convened the general court-martial because that person was to serve as the prosecutor in the trial. Shapiro consequently selected two non-lawyers to defend him. The three men then drove to the trial. At the beginning of the proceedings, Shapiro's counsel requested a seven-day delay. This was denied. Shapiro's trial began at 2:00 p.m. He was found guilty and sentenced by 5:30 p.m.[39]

The court of claims was outraged by the *Shapiro* court-martial. It wrote:

> A more flagrant case of military despotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of the judgment of his superior officers on the court—who had, indeed, made them look ridiculous. It was a case of almost complete denial of the plaintiff's constitutional rights. It brings great discredit upon the administration of justice.[40]

Having expressed its opinion, the court of claims held that Shapiro's conviction was void and his dismissal illegal. The court then awarded Shapiro his back pay as a lieutenant.[41]

In addition to *Shapiro*, Congress was told of other military trials in which command involvement deprived the defendant of a fair trial. Many members of Congress and other elected officials knew about this improper command

37. United States v. Shapiro, 113. *A Manual for Courts-Martial, 1928*, 213.
38. Shapiro v. United States, *Federal Supplement* 69 (1947): 205.
39. Shapiro v. United States, 206.
40. Shapiro v. United States, 207.
41. Shapiro v. United States, 207–8.

influence, either because they had seen it first-hand or because their constituents informed them about it.[42]

After lengthy hearings before Elston's subcommittee, H.R. 2575 was reported to the floor of the House in July 1947, and it passed in January 1948. Elston's legislation amended the Articles of War in a number of areas, but three reforms were most important. First, Elston's legislation adopted the Doolittle and Vanderbilt recommendations that enlisted soldiers be permitted to serve on courts-martial; the proposal was that at least one-third of the jury would be enlisted personnel, if requested by the defendant. Second, Elston's reform efforts required that legal qualifications for the defense counsel must be equivalent to those of the prosecutor; there would be no more courts-martial where an attorney represented the government while the accused had counsel with no legal education or training. Third, for the first time in history, Congress established an entirely new appellate tribunal above the boards of beview, which had been handling court-martial appeals since 1920. This new tribunal, called the judicial council, consisted of three judge advocate brigadier generals who would review all cases involving death, life imprisonment, or the dismissal of officers. The council also would review any case sent to it by the Army Judge Advocate General.[43] This new appellate body would be permitted to "weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."[44] The Judicial Council was not restricted to questions of law when examining a trial record.

After Elston's reform legislation passed the House, it languished in the Senate. This was principally because Senator J. Chandler Gurney of South Dakota, who was the Chairman of the Senate Armed Services Committee, was not interested in passing court-martial reform legislation that would only change military justice in the army. Gurney had been heavily involved in the legislation that created a National Military Establishment in 1947 and forced the unification of the army, navy, and air force into one cabinet-level structure headed by a civilian secretary of defense. As far as Senator Gurney was concerned, unification also meant uniformity.[45]

As Gurney saw it, Elston's proposed changes to the Articles of War were a "step away from unification."[46] Gurney's May 1948 letter to Secretary of Defense James Forrestal expressed the view that the Elston legislation "did not provide a uniform system of military justice applicable to all three services [army, navy, air force]." Gurney continued that now was the time "to have an over-all study made, and defense establishment proposals [for a uniform criminal code] ready for the

42. For a comprehensive examination of unlawful command influence, including a discussion of *Shapiro* and *United States v. Hoffman*, see Luther C. West, "A History of Command Influence on the Military Justice System," *UCLA Law Review* 18, no. 1 (1970): 1–156.

43. Generous, *Swords and Scales*, 24–26.

44. *Manual for Courts-Martial, U.S. Army, 1949* (Washington, DC: Government Printing Office, 1949), 288–89.

45. Lurie, *Military Justice in America*, 89.

46. Generous, *Swords and Scales*, 28.

convening of the 81st Congress."[47] As a result of Gurney's letter, Forrestal decided to appoint a "UCMJ committee" that would prepare a code of military justice that was uniformly applicable to all the armed forces.[48]

Though Forrestal's UCMJ Committee would soon be working on a new military criminal code, Elston's legislation did not wither away.[49] In the summer of 1948, when the Senate was about to complete final action on new peacetime conscription legislation, Senator James P. Kem of Missouri attached this much-needed Selective Service legislation to Elston's bill. As a result of Kem's actions, when the Senate enacted a statute creating the Selective Service, it also passed the Elston Act—the first legislative amendments to the Articles of War since 1920.[50] While this was certainly an improvement to the court-martial system, Elston's exclusive focus on the army's Articles of War meant that when President Harry S. Truman signed the legislation, Congress had left untouched the navy's military justice system. The Elston Act reforms might not affect the new air force either, as it was now independent of the army and consequently not bound by any amendments to the army's Articles of War. In short, potentially two-thirds of the armed forces had been left out of military justice reforms.[51]

Spurred by Senator Gurney and others to look for a uniform approach to military criminal law, Congress now began holding hearings on the matter. While the reforms of the Elston Act were driven almost entirely by complaints from veterans about the existing system, new House and Senate hearings that began in 1949 also explored a second reason for making radical changes to courts-martial: the huge peacetime army of draftees that would be "five times the size of the Army before the last war [World War II]."[52] As Senator Tobey put it in his remarks on the legislation that ultimately emerged as the UCMJ, the small, all-volunteer professional army of the past had been swept away. This meant that the old Articles of War must be abolished as well and replaced with a system "reasonably designed to achieve justice."[53] Traditionalists both in and outside the army insisted that the primary goal of the Articles of War was good order and discipline.[54] Members of Congress now believed that the military criminal legal system must also achieve justice. Kenneth C. Royall, an attorney who had served as the first secretary of the army, certainly viewed this as a critical factor in congressional action. The "overhaul" of the court-martial

47. Lurie, *Military Justice in America*, 89.
48. Lurie, *Military Justice in America*, 89–90.
49. Lurie, *Military Justice in America*, 91.
50. Lurie, *Military Justice in America*, 92; Generous, *Swords and Scales*, 29–32.
51. Generous, *Swords and Scales*, 32–33.
52. Congressional Floor Debate, 187.
53. Congressional Floor Debate, 187.
54. Archibald King, "The Army Court-Martial System," *Alabama Lawyer* 3, no. 3 (1942): 281. Terry W. Brown, "The Crowder-Ansell Dispute: The Emergence of Samuel T. Ansell," *Military Law Review* 35 (January 1967): 13.

system resulted, at least in part, from congressional recognition that without reform, "young men and women would stay away from the recruiting station."[55]

Congress amended the Articles of War because of complaints about military justice from the public (chiefly soldiers returning to civilian life) and a desire to give more legal due process at courts-martial to Americans who were going to be conscripts in the large Cold War-era army. There is, however, a third social-cultural factor that explains Congress's decision-making in 1948 and 1950: the remnants of the Progressive Movement of the late nineteenth and early twentieth centuries.

Professor Herbert R. Marguiles, an expert on the Progressive Movement, argued in a 1979 article that efforts to reform the Articles of War during and after World War I must be seen through the lens of the Progressive Movement.[56] Since more than a few representatives and senators serving in Congress immediately after World War II had lived through part of the Progressive Era, it may be argued that these elected officials made changes to the Articles of War because they embraced the Progressive mantra that the government's role in American society should be to make life better and fairer in an increasingly turbulent and industrialized United States. As historian David Kennedy shows, while the Progressive Movement was most influential in the late nineteenth and early twentieth centuries, there were forward-looking Democratic and Republican Party progressives in both the House and Senate in the 1930s, and some of these individuals were still serving in Congress when it took up amending the Articles of War in 1948 and 1950.[57] These elected officials either consciously or unconsciously embraced the belief that the government's role in American society should be to make life better and fairer and so wanted progressive changes in a conservative, tradition-bound military. Adding additional due process to courts-martial reflected a continuation of Progressive Movement ideology.

**Individuals as Agents of Change in Shaping the Content of the Amendments**

It was one thing for members of Congress to decide to amend the Articles of War after World War II but quite another to determine the nature of any legislative changes. The content of the post-World War II amendments was chiefly determined by two individuals: U.S. Army Brigadier General Samuel T. Ansell and Harvard Professor Edmund Morgan. This is not, however, an endorsement of the "Great Man" of history school espoused by the German philosopher Friedrich Hegel or the English historian Thomas Carlyle. While insisting that history was the autobiography of God, Hegel also argued that history was best understood by examining the role of "great men," as evidenced by his famous statement about Napoleon, "I saw the Spirit on his horse." Carlyle also claimed that history was

55. Edward D. Re, "The Uniform Code of Military Justice," *St. John's Law Review* 25, no. 2 (May 1951): 158.

56. Herbert F. Margulies, "The Articles of War, 1920: The History of a Forgotten Reform," *Military Affairs* 43, no. 2 (April 1979): 85.

57. David M. Kennedy, *Freedom from Fear* (New York: Oxford University Press, 1999), 149.

the biography of a few central individuals such as Oliver Cromwell and Frederick the Great, writing that "The history of the world is but the biography of great men."[58] If Ansell and Morgan were not "Great Men" of history, they nonetheless were key agents of change who were principally responsible for the content of the legislation that became the UCMJ.

Born in Coinjock, North Carolina, on New Year's Day 1875, Samuel T. Ansell graduated from the U.S. Military Academy in 1899. He finished thirty-first in a class of seventy-two. After serving as an infantry officer, then-Lieutenant Ansell attended the University of North Carolina School of Law, graduating in 1904. He served in a variety of assignments as an army lawyer prior to World War I, including being a prosecuting attorney for the Province of Moro, Philippines, and teaching law and history at West Point.

In 1917, Ansell was promoted from lieutenant colonel to brigadier general and appointed as the acting judge advocate general of the army because Major General Enoch H. Crowder, the judge advocate general, was serving as provost marshal and did not have the time or energy to devote to both positions.[59] While his background as a West Pointer and southern ancestry and upbringing might have suggested otherwise, Ansell was very progressive in his thinking about the law and its role in the army.

Edmund M. Morgan was born in Ohio in 1878 and graduated from Harvard with an A.B. in 1902 and an LL.B. in 1905. He was a professor of law at Yale University when he was commissioned as a major, Judge Advocate General's Corps Reserve, in September 1917.[60] Ordered to active duty in the Office of the Judge Advocate General, Washington, D.C., Morgan "labored day and night" with Brigadier General Ansell on a variety of legal topics.

When he left active duty as a lieutenant colonel to return to Yale, Morgan was thoroughly familiar with the shortcomings in the Articles of War that had so troubled Ansell. Moreover, Morgan had seen what he described as Ansell's "masterly power in action ... and his energizing influence." As far as Morgan was concerned, Samuel Ansell represented "the best in civil, military and professional life" in America.[61] Morgan spoke publicly in support of Ansell's reform efforts and authored at least one scholarly article in support of the legislation incorporating Ansell's proposed changes to the Articles of War.[62] Morgan's admiration of Ansell

58. Urquhart, "The Different Schools of Historiography: A Reference," LibraryThing, 31 March 2009 (https://www.librarything.com/topic/61376).

59. Edmund M. Morgan, "General Samuel T. Ansell," *Lawyer and Banker Bar Review* 14 (1921): 342 (https://digitalcommons.law.yale.edu/fss_papers/4017/).

60. Questionnaire for Judge Advocates Record of the War, Edmund Morris Morgan, Record Group (RG) 153, entry 45, National Archives and Records Administration, College Park, MD [NARA].

61. Morgan, "General Samuel T. Ansell," 342.

62. Edmund M. Morgan, "The Existing Court-Martial System and the Ansell Army Articles," *Yale Law Journal* 29, no. 1 (1919): 52.

was mutual. Testifying before the Senate in 1919, Ansell spoke in glowing terms about "Colonel Morgan," whom Ansell said was "at the top" of the Judge Advocate General's Department (JAGD, today the Judge Advocate General's Corps) in terms of "ability" and who agreed with his criticisms about the Articles of War.[63]

Many of the reform proposals that grew out of the World War I–era controversy over military justice would later be part of the amendments to the Articles of War enacted by Congress in 1948 and 1950. Both Ansell and Morgan played important roles in this post-World War II event. The impetus for the uproar over the Articles of War—and subsequent calls for their reforms—occurred in 1917, when a court-martial convened to punish African American soldiers who had rioted in Houston, Texas, revealed serious flaws in the Articles of War. Ansell took action as the acting judge advocate general to correct what he believed was a lack of due process for defendants in the army's court-martial process.

On 23 August 1917, after hearing that White police officers in Houston had killed one of their own, about 100 to 150 African American troopers stationed in a nearby camp seized ammunition and firearms and headed for Houston. The rumor was false. No soldier had been killed by the police, but in the violence that followed the inaccurate report, fifteen white civilians were killed and twenty-one were wounded. Four black soldiers were also killed. A subsequent investigation revealed that the "disturbance" was the result of "general dissatisfaction ... on account of the way some of the police have treated them [the African American soldiers]."[64]

Sixty-three African American soldiers were tried by general court-martial for offenses arising out of the Houston riot, including murder. They were defended by a single defense counsel, who was not a lawyer. Fifty-eight were found guilty of one or more of the charges, and the court sentenced thirteen to be hanged. Forty-one of the other convicted soldiers received sentences of a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for life.[65]

Without any notice to the army leadership in Washington, D.C., the general commanding the Southern Department ordered the thirteen soldiers to be hanged. The condemned men learned of their fates on 9 December 1917. They were hanged two days later, without having had any opportunity to request clemency, much less appeal the findings or sentence to a higher authority since there was no appellate process under the Articles of War as they existed in 1917.[66]

63. U.S. Senate, Subcommittee on Military Affairs, Statement of Samuel T. Ansell, Establishment of Military Justice—Proposed Amendments of the Articles of War, 26 August 1919, 162 [hereafter Statement of Ansell].

64. John M. Lindley, *A Soldier is Also a Citizen* (New York: Garland, 1990), 15. For more on the Houston riot, see Garna L. Christian, *Black Soldiers in Jim Crow Texas 1899–1917* (College Station: Texas A&M University Press, 1995), 145–72.

65. Robert V. Haynes, *A Night of Violence: The Houston Riot of 1917* (Baton Rouge: Louisiana State University Press, 1976), 271.

66. Lindley, *A Soldier is Also a Citizen*, 20–22.

Brigadier General Ansell was outraged when informed that the death sentences had been carried out in such haste. Ansell was convinced that the speed, secretiveness, and absence of any review or appeal in the case indicated that the Articles of War were flawed and should be changed to provide more due process for the accused.[67]

Ansell believed that the JAGD must create some sort of appellate structure that would give the judge advocate general the power to "review" and "revise" the findings and sentences in serious court-martial sentences.[68] Despite his absence from day-to-day legal operations in the army, Major General Crowder stepped away from his provost marshal duties to voice opposition to Ansell's proposed changes. In Crowder's view, the authority of the judge advocate general should be advisory only, which meant that the commander in the field could never be bound by the legal opinions of lawyers far removed from military operations.[69]

At its core, the conflict between the two men was that Ansell believed that the rule of law must be part of the army's military judicial system and that soldiers deserved to enjoy at least some of the same rights any civilian would have at a criminal trial. Crowder, however, insisted that while the rule of law was important, good order and discipline required that it give way to the needs of a commander on the field of battle. Crowder was a traditionalist, and he and those who agreed with him were certain that courts-martial were an "instrumentality of the executive power having no relation or connection, in law, with the judicial establishments of the country [United States]."[70] In short, Congress had created courts-martial so that a commander could properly command the soldiers in his unit. They did not exist other than to enforce discipline. As Ansell put it, the orthodox view of courts-martial was that they "are not courts, but simply the right hand of a military commander."[71]

In addition to the Houston riot court-martial, "deplorable" results in other trials convinced Ansell that reforms to the Articles of War were badly needed. In his testimony before the Senate's Subcommittee on Military Affairs in August 1919, Ansell provided two examples involving "boys" under the age of nineteen.[72] Both trials had taken place in the American Expeditionary Forces (AEF), then fighting in France. One man was tried for sleeping while on duty, while the other soldier was prosecuted for disobeying an order to get his equipment and go to drill. Both were sentenced to death. In the trial of the soldier caught sleeping while on duty, a young lieutenant with no legal training (described by Ansell as incompetent) allowed the defendant to plead guilty to a capital offense. To make matters worse for the accused, this lieutenant defense counsel called one witness,

67. Brown, "Crowder-Ansell Dispute," 4–8.

68. Brown, "Crowder-Ansell Dispute," 4; Statement of Ansell, 127.

69. Brown, "Crowder-Ansell Dispute," 5–6.

70. William A. Winthrop, *Military Law and Precedents,* 2nd ed. (Washington, DC: Government Printing Office, 1920), 54. Winthrop's views about courts-martial were considered nearly sacrosanct among army lawyers of the World War I era.

71. Statement of Ansell, 123.

72. Statement of Ansell, 134–50.

the defendant's company commander, and asked him, "What is the military record of my client here?" The reply was, "Bad, very bad. One of the worst in the country." The defendant was sentenced "to be shot to death by musketry."[73]

In the trial of Private Olen Ledoyen, who refused to get his equipment and go to drill, Ansell informed the senators that after Ledoyen told the president of the court-martial that he wanted to plead guilty, the court heard from one witness—the lieutenant who had given the order. First Lieutenant Fred M. Logan stated that Ledoyen had never given any reason for refusing to drill—only that he gave a "positive, flat refusal with no excuses."[74] After the court heard from this lieutenant, the defendant was permitted to make an oral statement. Private Ledoyen said, "Lieut. Logan had us out on the hill the day before and we nearly froze to death, and the next day I was so stiff that I could not drill."[75] Since Ledoyen had refused to drill on a wintery day in December 1917, one would think that this oral defense would have carried some weight with the court. It did not. Ledoyen was sentenced to be shot to death.[76]

It was bad enough that the two courts-martial had imposed the death sentence, but what convinced Ansell that the Articles of War must be changed was that General John J. Pershing, the AEF commander, approved the death sentences and requested President Woodrow Wilson to confirm them so that the men could be executed. When Major General Crowder, albeit with some misgivings, seemed inclined to support Pershing, Ansell protested vigorously, writing that both soldiers had received inadequate representation and that the sentences were unduly harsh. As Ansell put it, executing the two men would be "Draconian" and "destroy justice without which all else in human society is of no worth." While recognizing that "the military mind" would approve of the death penalty both courts-martial, Ansell wrote that this "offends against my well-considered sense of law and justice."[77]

Believing that he needed to go outside official channels if these two men were to be saved, Ansell "leaked word to the press and took the cases, through a congressman, directly to the President," who commuted the death sentences and ultimately restored the men to duty.[78] Ansell later testified that the "the happy effect of clemency" was that one of the soldiers had been killed in action in the Argonne and the other had been twice wounded in action before being honorably discharged.[79] Though the first soldier was dead either way, if he had been shot by

73. Statement of Ansell, 135.

74. Statement of Ansell, 140.

75. Statement of Ansell, 140.

76. Statement of Ansell, 140.

77. Statement of Ansell, 143. In addition to these two death penalty cases, there were other courts-martial results arising out of World War I with arbitrary and capricious results. See Morgan, "Existing Court-Martial System," 54–55.

78. Luther C. West, "A History of Command Influence on the Military Justice System," *UCLA Law Review* 18, no. 1 (1970): 29.

79. Statement of Ansell, 147.

firing squad, this would have been a dishonorable death, the stain of which would have marked his memory forever. By perishing in combat against the enemy, the man arguably had an honorable death.

By mid-August 1918, Ansell had managed to integrate some aspects of military criminal law with civilian legal procedure. Secretary of War Newton Baker, at Ansell's urging, issued orders that prohibited the execution of any death sentence until the court-martial record had been "reviewed in writing" and "its legality determined" by a "board of review" that would "act in a manner similar to an appellate tribunal."[80] While this was a significant development, in that there previously had been no appellate structure for reviewing the legality of courts-martial, Ansell decided that the Articles of War needed additional reform.

Ansell's concern was that courts-martial were not sufficiently judicial and should be more like civilian courts, with attorneys rather than army officer laymen making legal decisions. Lawyers and additional due process meant a corresponding reduction in the authority of commanders in the system, however, and this outcome brought Ansell in direct conflict with both commanders in the army, who were loath to see their powers reduced, and traditionalists generally opposed to changing a legal system with which they were comfortable. Ansell certainly did not win any friends or influence people when he went public with his criticisms and loudly proclaimed "that the existing system of Military Justice is un-American . . . that it is archaic . . . that it is a system arising out of and regulated by the mere power of Military Command rather than Law."[81]

After Ansell obtained the support of Senator George E. Chamberlain of Oregon in December 1918, his reform ideas were converted into legislation and introduced by Chamberlain in January 1919 as Senate Bill 5320, *A Bill to Promote the Administration of Justice*.[82] In the House, Representative Royal Johnson of North Dakota introduced parallel legislation as H.R. 367. In the hearings that followed in both the House and the Senate, Brigadier General Ansell continued his denunciation of the Articles of War as they existed:

> Army officers acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that "courts-martial are the fairest courts in the world." The public has never shared that view . . .
>
> This is not a pleasant duty for me to perform. I realize, if I may be permitted to say it, that I am arraigning the institution [the army] to which I belong—not the institution, but the system and practices under it—an institution which I love and want to serve honorably and faithfully always. Yet an institution has got to be based on justice if it is going to survive, and if it is going to merit the confidence and approval of the American people. Indeed, if

80. War Department, Memorandum, subj: Board of Review, Military Justice Division, Office of the Judge Advocate General, 6 August 1918, reprinted in Statement of Ansell, 156.

81. Samuel T. Ansell, "Military Justice," *Cornell Law Quarterly* 5, no. 1 (November 1919): 1.

82. A Bill to Promote the Administration of Justice, S. 5320, 65th Cong. (1919).

> our Army is going to be efficient, justice has to be done within it, whether in war or in peace.[83]

Although Chamberlain's legislation proposed a variety of changes to the Articles of War, the four most important proposed reforms, all of which were Samuel Ansell's ideas, were that enlisted men of the same rank as the defendant be permitted to serve on courts-martial juries, that an accused have the right to be represented by military counsel of his choice, that a civilian judge appellate court be created to act akin to a "supreme court" to review court-martial convictions, and that a "court judge advocate," a quasi-judicial official given powers similar to a judge in a civilian court, be created.[84]

These were incredibly radical ideas for the time. Allowing enlisted soldiers to determine guilt and impose punishment was a direct attack on command control of courts-martial, given that there was no way to know whether soldiers holding the same rank as the accused would understand, much less accept, the concept that courts-martial were tools of discipline and not courts of justice. Might not such enlisted men also be sympathetic to the defendant and refuse to convict him out of loyalty? Permitting the defendant to choose his own counsel similarly undermined command control. What if the accused requested a judge advocate as his defender? This would inject the law and legal due process into what traditionalists insisted was not a judicial court. As for creating an appellate structure of civilian judges, this was anathema to senior officers in the army. Not only did it threaten command control, but civilians reviewing how courts-martial had been tried would never understand that "the prime object of [any] military organization is Victory, not Justice." Any amendments to the Articles of War that adversely affected this "death struggle" for victory must be opposed. The idea of having a quasi-judicial official at courts-martial fell into this category too; courts-martial were judgeless by design since they did not exist to dispense justice.[85]

While some in Congress supported Ansell's proposals, bitter opposition from the War Department and Judge Advocate General Crowder (who was now back in charge after Ansell's departure) meant that only a few proposals were enacted by Congress when it amended the Articles of War in the Army Reorganization Act of 4 June 1920.[86] While the suggestion that enlisted men be permitted to sit on courts-martial was rejected, the new Articles of War did contain a requirement that a commander choose only those officers who were best qualified "by reason of age, training, experience and judicial temperament."[87] The accused still did not get

83. Statement of Ansell, 129–30.

84. George G. Bogert, "Courts-Martial: Criticisms and Proposed Reforms," *Cornell Law Quarterly* 5 (1919): 28–33.

85. John A. Wigmore before Maryland State Bar Association, speech, 28 June 1919, *Maryland State Bar Association Transactions* 24 (1919): 183.

86. 41 Stat. 787, Chapter II (1920).

87. Article 4, "Who May Serve on Courts-Martial," *A Manual for Courts-Martial, U.S. Army, 1921* (Washington, DC: Government Printing Office, 1921), 494 [hereafter *MCM, 1921*].

to select his own counsel; the commander continued to appoint both prosecutor and defense counsel. The idea of a civilian military appeals court too was rejected.

Ansell's proposals did survive in two areas, however. A new Article 50 ½ required the judge advocate general to create a board of review composed of three or more judge advocates who would review cases involving the death penalty, dismissal of an officer, a dishonorable discharge, or imprisonment in a U.S. penitentiary.[88] Under the Articles of War, a court-martial jury had the option to sentence a defendant to a term of confinement in either "disciplinary barracks" operated by the army or a penitentiary operated by the Bureau of Prisons. According to the *Manual for Courts-Martial*, "the dividing line between offenses legally punishable by penitentiary and those which are not so necessary . . . is more or less arbitrary." The implication was that more serious offenders were not sent to disciplinary barracks. The board of review created by Secretary of War Newton Baker at Ansell's urging had been regulatory only and could be cancelled at any time. Article 50 ½, however, established this appellate tribunal as a matter of law.

While Ansell did not get his "court judge advocate," Congress did create a new quasi-judicial official called the "law member" under Article 8. This provision required that a commander appointing a general court-martial "detail as one of the members" an officer from the JAGD. This so-called "law member" ruled on interlocutory questions and also instructed the court members on the presumption of innocence and the elements of the offense (or offenses) that the prosecution must prove beyond a reasonable doubt. The new law member was limited in his authority to control the proceedings, however, as the jury could overrule any decision by the law member—except as to the admissibility of evidence—by a majority vote.[89]

In March 1919, Brigadier General Ansell was demoted to lieutenant colonel. As the army expanded during World War I, many officers, including Ansell, were given temporary higher ranks. Now, with hostilities at an end and the army demobilizing and downsizing, almost all officers lost their temporary ranks and reverted to their permanent grades. Then-Colonel George C. Marshall, who would reach five-star rank in World War II, reverted from temporary colonel to his permanent rank of captain.[90] Undoubtedly concerned about the optics of Ansell's demotion, Secretary of War Baker announced that this loss of rank "had absolutely nothing to do with [Ansell's] criticism of the existing [court-martial] system."[91] Ansell, however, did not believe this. Some congressmen and senators also thought the demotion was a punishment.[92] Disgusted with what he believed was retaliation against him for his reform efforts, Ansell resigned his officer's commission and joined another lawyer to open a law practice in Washington,

88. "Penitentiary Confinement," *MCM, 1921*, 512–13. *MCM, 1921*, para. 342a.

89. Article 31, "Method of Voting," *MCM, 1921*, 504.

90. Stanley Weintraub, *15 Stars: Eisenhower, MacArthur, Marshall* (New York: Free Press, 2007), 121.

91. Statement of Ansell, 164.

92. Lindley, *A Soldier is Also a Citizen*, 153–55.

D.C. When Congress began examining the Articles of War after World War II, Samuel Ansell was still a "Washington attorney."[93]

Edmund Morgan likewise returned to civilian life after World War I. He left Yale's law school in the 1920s and was a Harvard law professor when Secretary of Defense Forrestal tapped him in 1948 to head the Department of Defense committee tasked with drafting a new "uniform" criminal code for the armed forces.[94] Forrestal's top lawyer, Defense Department General Counsel Max Leva, had been a student of Morgan's at Harvard Law School in 1939, and Leva was "fully aware" of Morgan's "strong support for Ansell in 1918–1919."[95] Leva briefed Forrestal on Morgan's background, including his support for Ansell's radical reform initiatives in the World War I era.[96]

As William T. Generous argues in *Swords and Scales*, "it seems fair to assume that they [Forrestal and his colleagues in the Defense Department] may have hoped that what was soon known as the 'UCMJ Committee' would be heavily influenced by his [Morgan's] ideas and that its results would approximate what Ansell" had wanted to accomplish in his 1917–1920 struggle with Crowder over the future of military justice.[97] There was every reason for Forrestal and his staff to expect collaboration between Morgan and Ansell, as the two men had maintained a close personal relationship for years. "Even after Ansell had gone into private practice in Washington and Morgan into teaching law at Yale, Morgan would visit with Ansell whenever he came to Washington on business."[98] Given their decades-long friendship, it should come as no surprise that Morgan regularly updated Ansell on the UCMJ committee's work. It is reasonable to conclude that these updates constituted a collaboration between Morgan and Ansell in deciding the form that amendments to the Articles of War should take.[99] The theory that there was an Ansell-Morgan partnership in shaping the content of the 1950 amendments is only strengthened by the fact that it "seems certain that no one on the UCMJ committee, except for Morgan, ever met Ansell."[100]

How Ansell and Morgan shaped the content of the reform process is best shown by looking at three key changes made to the Articles of War after World War II: the appellate process, the creation of a law officer who would preside over the proceedings, and enlisted personnel on the court-martial jury. The army, by statute (Article 50 ½), was already using boards of review as a quasi-judicial institution to examine the legality of courts-martial. These boards, however, were advisory only; if the judge advocate general disagreed with the board's opinion, he

93. Gibson, *On Trial*, 1.
94. Generous, *Swords and Scales*, 35.
95. Lurie, *Military Justice in America*, 93.
96. Lurie, *Military Justice in America*, 93.
97. Generous, *Swords and Scales*, 35.
98. Lindley, *A Soldier is Also a Citizen*, 208.
99. Generous, *Swords and Scales*, 35–36.
100. Generous, *Swords and Scales*, 210, n. 5.

had the authority to send the case to the president and request that he overrule the board.[101] Morgan now proposed that these boards be given expanded powers, including the authority to affirm only those findings and sentences that the board found were correct in law and fact. Morgan's proposed legislation also gave the board of review the power to set aside verdicts and sentences. The judge advocate general no longer had the authority to ask the president to overrule the board of review, thus making it more like a judicial body.[102]

Morgan also proposed the creation of an entirely new and higher appellate institution, a three-civilian-judge "judicial council." This civilian court had been on Ansell's "dream list" in 1920 but had not been enacted. Morgan now resurrected it, and the Court of Military Appeals (the name ultimately chosen for the judicial council) was the crown jewel of the reform process.[103] For the first time, an institution outside the army would have oversight over military criminal law. In a memorandum prepared for the Secretary of Defense, Morgan argued that the National Security Act of 1947 suggested that if a uniform system of military justice were to be created, it was both lawful and appropriate for that new system to have "a central tribunal as an appellate court of last resort ... closely resembling a Circuit Court of Appeals of the United States."[104]

General Crowder and his World War I–era traditionalists had vociferously opposed the idea of civilian involvement in courts-martial, so the resurrection of this idea was revolutionary.[105] At hearings before both the House and Senate, the army and air force immediately raised objections to any civilian appellate court. They insisted, as had Crowder and his allies thirty years earlier, that "military justice is a service function and action should be final in the service concerned."[106]

Major General Thomas H. Green, the army's judge advocate general, realized that some type of "judicial council" was going to be implemented in the new UCMJ, if only because the Elston Act passed in 1948 had created such a council, albeit one consisting of army lawyers rather than civilians.[107] He still insisted in his testimony before Congress that there was "no need to change the present system of [appellate] review" and proposed that the new judicial council consist of the

101. Article 50 ½, "Review, Rehearing," *MCM, 1921*, 512.

102. Edmund M. Morgan, "Statement of Edmund M. Morgan, Jr. Before The Committee on Armed Services on The Uniform Code of Military Justice," 7 March 1949, Morgan Papers, Harvard University (https://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-VI-Morgan-statement.pdf).

103. Edmund M. Morgan, "The Background of the Uniform Code of Military Justice," *Military Law Review* 28 (April 1965): 29–31.

104. E. M. Morgan, "Memo on legality of judicial council in appellate system and drafts of letter to Secretary of Defense on points of difference therein, etc.," 2, Morgan Papers, Harvard University (https://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_Morgan-memo.pdf).

105. Brown, "Crowder-Ansell Dispute," 7, 31.

106. Lurie, *Military Justice in America*, 104.

107. William F. Fratcher, "Appellate Review in Military Law," *Missouri Law Review* 14, no. 1 (January 1949): 49–51.

army, navy, and air force judge advocates general.[108] Green saw his proposal as in line with Secretary Forrestal's desire that military justice be uniformly applicable in the services: what better way to promote such uniformity in the court-martial process than having the highest appellate body staffed with the top uniformed lawyers from the army, navy, and air force. Such a council would prevent direct civilian involvement in the military criminal legal system, which traditionalists like Green, and Crowder before him, feared would undermine good order because civilians "are not familiar with problems particular to the maintenance of discipline in the armed services."[109]

The committee drafting the UCMJ, with Morgan as its leader, ultimately prevailed in recommending a three-judge panel of civilians who would sit at the top of the military justice pyramid and have jurisdiction over all serious felony-level courts-martial.[110] As Senator Wayne Morse of Oregon explained in congressional testimony in February 1950, this was "a drastic reallocation of the power to review findings and sentences of military courts . . . and for the first time creates a method whereby injustices and weaknesses in the system may be explored."[111] The Judicial Council was renamed the Court of Military Appeals because Congress decided that the latter name was a better description of the functions of that body.[112]

Morgan wrote in 1953 that he viewed this new civilian appellate court as the culmination of a proposal for a similar court made by General Ansell in 1919.[113] Legislation introduced by Senator Chamberlain in 1919 contained Ansell's proposal for a court consisting of three judges, "each to hold office during good behavior and to have the pay and retirement pay of a circuit judge of the United States." Except for the absence of lifetime appointment for its judges, the Court of Military Appeals created by the UCMJ was in line with Ansell's vision. Morgan acknowledged that the UCMJ legislation did not expressly state that the judges were to be appointed from civilian life, "though that was probably contemplated."[114]

Ansell had not liked the judgeless courts-martial in 1917, but his proposed "court judge advocate" had been rejected in favor of a less powerful "law member."[115] Now thirty years later, Edmund Morgan revived Ansell's idea for a more robust quasi-judicial officer who would have an expanded role at courts-martial.[116] Morgan—like Ansell—believed that the existing law member was inadequate. While the law member ruled on all interlocutory questions, his rulings

108. Congressional Floor Debate, 290–91.

109. Congressional Floor Debate, 290, 292–94.

110. Morgan, "Background of the Uniform Code of Military Justice," 32–33.

111. Congressional Floor Debate, 289.

112. Lurie, *Military Justice in America*, 133.

113. Morgan, "Background of the Uniform Code of Military Justice," 29–32.

114. Morgan, "Background of the Uniform Code of Military Justice," 29.

115. Ansell, "Military Justice," 13; Morgan, "Background of the Uniform Code of Military Justice," 26–27.

116. Morgan, "Background of the Uniform Code of Military Justice," 26.

were final only as to the admissibility of evidence at trial. For all other rulings, such as competency of witnesses, order of presenting evidence, and conduct of counsel, the law member could be overruled by a majority vote of the jury members. This meant that the law member had very limited powers if faced with a line-officer court that was determined to deprive the accused of a full and fair trial as the result of command control or some other influence.

Perhaps a more significant problem with the law member, as legislation introduced in the House of Representatives explained, was that after ruling on evidentiary questions, the law member (who was not required by statute to be a judge advocate, although in practice usually was) "retires, deliberates and votes with the members on findings and sentence."[117] As Morgan explained, this meant that what the law member said while in deliberations was not part of the record:

> The law member, when he retires with the court, may make any kind of statement to them. And it has been stated—I would not say on how good authority—that frequently when he went back there why he said, "Of course the law is this way but you fellows don't have to follow it."[118]

As expected, traditionalists saw nothing wrong with the law member's participation in the verdict and punishment of a defendant. Major General Green insisted that there was no need to alter the function of the law member.[119] He was joined in this opinion by Frederick Wiener, a scholar and army JAGD reservist, who argued that removing the law member from deliberations was a "retrograding step."[120] In Wiener's view, "by taking him out, you take out of the deliberations the one man who can make the most helpful contribution" to them. "I cannot help but think," said Wiener, that the idea of removing the law member "was not the product of any person who ever sat on a court . . . It was only ignorance."[121]

Ansell's 1919 proposal for a court judge advocate would have created a position very much like a civilian trial judge who would instruct the court on the law, the presumption of innocence, and the requirement to prove the defendant guilty beyond a reasonable doubt. He "would perform all the functions of a judge in a civilian criminal trial, including the duty to see to it that the rights of the accused were properly protected, and for that purpose [would have the authority] to call and examine witnesses."[122]

Though still less empowered than Ansell would have liked, the "law officer" that ultimately emerged in Morgan's UCMJ was an important improvement over the law member. By "withholding" from him the "functions of a juror," he was "better able to carry out his judicial functions objectively." All instructions given

117. Congressional Floor Debate, 122. *MCM, 1921*, para. 81.a.
118. Congressional Floor Debate, 123.
119. Congressional Floor Debate, 122–23.
120. Congressional Floor Debate, 124.
121. Lurie, *Military Justice in America*, 129.
122. Morgan, "Background of the Uniform Code of Military Justice," 26.

by the law officer, moreover, "will be on the record and subject to review."[123] This eliminated a significant problem: if the law member gave erroneous instructions during closed-session deliberations, there was no record for the defendant to see or upon which to base an appeal. Senator Leverett A. Saltonstall of Massachusetts's remarks show that Congress also understood that there would be a link between the new law officer and the new Court of Military Appeals:

> The court could always get the legal point of view restated by the lawyer member [sic] if it so desired, and have it placed on the record. It was felt that with the new court of appeals, composed of civilians, up at the top, it would be very much wiser and fairer to have the legal side of the differences of opinion all on the record, than to have the lawyer member saying things in private to the court when they were giving the matter their consideration.[124]

Morgan wrote in 1953 that the law officer was as close to Ansell's original proposal as possible. While this new quasi-judicial officer did not have all the powers that Ansell envisioned in his "court judge advocate," Morgan had managed to implement much of what Ansell had wanted some thirty years earlier.[125] For the first time in legal history, there was a legally qualified officer, separate from the members, who presided at trial.

Ansell had also advocated for allowing enlisted personnel to serve on juries, believing that this would preclude improper command influence. Senator Chamberlain's 1919 legislation would have amended the Articles of War to permit a maximum of eight individuals on a general court-martial and three persons on a special court-martial. When combined with Ansell's proposal that at least one-third of the members on the court-martial jury must be enlisted soldiers if requested by the accused, and the fact that a two-thirds majority vote was required for a conviction, this would have provided veto power to the enlisted members of the panel if voting *en bloc*. Ansell believed that if the enlisted personnel sitting in judgment recognized that the defendant was not guilty but was being unfairly court-martialed by a commander, then these soldiers could prevent any injustice.[126]

Not surprisingly, General Crowder and many lawyers and non-lawyers in the army establishment were bitterly opposed to allowing enlisted personnel to sit on any court-martial.[127] If military tribunals were tools of good order and discipline, only officers should be permitted to sit on the jury. As George Bogert, who had served as a judge advocate in World War I, wrote, "officers are charged with the government of the army . . . [and] because I believe that officers are fair and impartial toward enlisted men coming before them I maintain that the presence of enlisted men on courts-martial, as proposed in the Chamberlain bill, is unnecessary … [and] undesirable."[128]

123. Congressional Floor Debate, 208.
124. Congressional Floor Debate, 211.
125. Morgan, "Existing Court-Martial System," 69–70.
126. Brown, "Crowder-Ansell Dispute," 40–41; Generous, *Swords and Scales*, 8.
127. Brown, "Crowder-Ansell Dispute," 20–21; Lindley, *A Soldier is Also a Citizen*, 159.
128. Bogert, "Courts-Martial Criticisms," 32.

When Morgan was named as the head of the UCMJ committee, he resurrected Ansell's idea of putting enlisted personnel on court-martial panels. Although the 1948 amendments in the so-called Elston Act had provided that an enlisted accused could request enlisted soldiers on his court-martial panel, once it was clear to the army, navy, and air force that the Elston Act would be replaced by an entirely new piece of legislation uniformly applicable to all the services, they renewed their fight against the inclusion of enlisted personnel on courts-martial convened under the UCMJ. Secretary Forrestal, however, overruled this objection and supported Morgan's recommendation.[129] Another of General Ansell's reform proposals had come to fruition some thirty years after being planted.

On 7 March 1949, Morgan appeared before the House of Representative's Committee on Armed Services to testify in support of H.R. 2498, which was the bill that would implement the legislative changes to the Articles of War that Morgan and his committee had drafted. He made it clear that he thought the chief problem in the Articles of War was still command control and that such control had to be diminished. As he put it, "a system of military justice which was only an instrumentality of the commander was . . . abhorrent."[130] In resurrecting Samuel Ansell's proposals and incorporating them into the new UCMJ, Morgan ensured that Ansell's revolutionary ideas came to fruition and did much to reduce the command control that had deprived military criminal law of fairness and justice.

**Conclusion**

Social and cultural factors were the impetus for Congress to make changes to the Articles of War after World War II. Prior to the attack on Pearl Harbor, the army was relatively small and consisted of professional soldiers who, having volunteered for a life in uniform, apparently accepted the military justice system "warts and all." The unprecedented expansion of the army during World War II, however, meant that millions of Americans who had never had the slightest contact with the U.S. armed forces were in uniform, and for more than a few, their experiences with military criminal law convinced them that courts-martial were unfair and unjust. When these 12 million servicemembers returned to civilian life, they complained vociferously about courts-martial, and they expected Congress to act on their complaints. If unprecedented transformations had occurred in American society during and after World War II, there was no reason to think that military criminal law would or should be immune from change.

America after 1945 was a different country than it had been pre-war. Some twenty million women had entered the work force during the war, and two-thirds

129. Walter T. Cox, "The Army, the Courts, and the Constitution: The Evolution of Military Justice," *Military Law Review* 118 (Fall 1987): 14.

130. U.S. House of Representatives, "Statement of Edmond M. Morgan, Jr. Before the Committee on Armed Services, House of Representatives, The Uniform Code of Military Justice," 7 March 1949, 13, Morgan Papers, Harvard University (https://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-VI-Morgan-statement.pdf).

or more of these women continued to work after World War II.[131] Almost seven hundred thousand African-Americans had joined the army and fought for freedom in Africa, Europe, and the Pacific.[132] The vast majority of these African-Americans, who constituted 9.5 percent of the army's enlisted ranks, returned to civilian life after World War II, and they likewise clamored for social change.[133] Their demands for equality and racial justice prompted President Truman to order the desegregation of the military in July 1948.[134] For the millions who had served in the military, there was revolutionary change in the form of educational benefits. The G.I. Bill allowed over two million veterans to attend college and some six million veterans to attend technical and vocational schools. These ex-soldiers, sailors, airmen, marines, and coastguardsmen ushered in tremendous change in American society, chiefly because the skills they acquired "boosted job mobility and incomes."[135]

It follows that Americans wanted changes to an old traditional military justice system that did not fit with the increasingly democratic and egalitarian America that was unfolding in the late 1940s. Gone were the days when a spokesman for the army could say that "the glory of the court-martial system has been its freedom from technicalities" and insist that changing the Articles of War "will give rise not to justice, but to innumerable injustices . . . by affording loopholes and technicalities on which men clearly guilty will escape."[136]

While complaints from returning soldiers about the unfairness of courts-martial and a desire to make the military criminal legal system more palatable in a peacetime army were at the root of congressional action to amend the Articles of War, the shape of those amendments were determined by two individuals: Edmund Morgan and Samuel Ansell. Some historians already have recognized the pivotal role played by Morgan as the chairman of the UCMJ committee in formulating the content of the post-World War II reforms. This paper concludes, however, that Samuel Ansell was equally important to the process, at least in terms of content. Though Ansell has been overlooked as an agent of change, he was practicing law in Washington, D.C., and took an active part in Morgan's efforts to shape the reform proposals that emerged as the UCMJ. Ansell spoke publicly about reforms, and Morgan's writings prove that the two men were in close contact while Morgan was drafting what would become the UCMJ. These two key agents of change were collaborators in shaping the post-World War II amendments to the Articles of War.

131. Doris Weatherford, *American Women and World War II* (New York: Facts on File, 1990), 34.

132. William T. Bowers, William M. Hammond, and George L. MacGarrigle, *Black Soldier/White Army* (Washington, DC: Center of Military History, 1996), 27.

133. Bryan D. Brooker, *African Americans in the United States Army in World War II* (Jefferson, NC: McFarland, 2008), 329–30.

134. Bowers et al., *Black Soldier/White Army*, 237.

135. Brown, *Historical Dictionary of the U.S. Army*, 215.

136. Lurie, *Military Justice in America*, 99.