One of Many: Martial Law and English Laws
c. 1500 – c. 1700

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A Dissertation presented to the Graduate Faculty
of the University of Virginia in Candidacy for the Degree of
Doctor of Philosophy

Department of History

University of Virginia
August 2013

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Abstract

This dissertation provides the first history of martial law in the early modern period. It seeks to reintegrate martial law in the larger history of English law. It shows how jurisdictional barriers constructed by the makers of the Petition of Right Parliament for martial law unintentionally transformed the concept from a complementary form of criminal law into an all-encompassing jurisdiction imposed by governors and generals during times of crisis.

Martial law in the early modern period was procedure. The Tudor Crown made it in order to terrorize hostile populations into obedience and to avoid potential jury nullification. The usefulness of martial law led Crown deputies in Ireland to adapt martial law procedure to meet the legal challenges specific to their environment. By the end of the sixteenth century, Crown officers used martial law on vagrants, rioters, traitors, soldiers, sailors, and a variety of other wrongs.

Generals, meanwhile, sought to improve the discipline within their forces in order to better compete with their rivals on the European continent. Over the course of the seventeenth century, owing to this desire, they transformed martial law substance, procedure, and administration.

The usefulness of martial law made many worried, and MPs in 1628 sought to restrain martial law to a state of war, defined either as the Courts of Westminster being closed or by the presence of the enemy's army with its standard raised. This restraint worked, at least for a while. But starting in the 1640s, MPs overturned the law of martial law as established by the 1628 Parliament in order to combat mutineers, spies, and royalist conspirators. Further, governors and generals abroad used the concept of a state of war to create a space where they could use martial law to commandeer property during emergencies. Martial law was used far more often in the eighteenth century than in the seventeenth, and is an important if controversial inheritance that the English legal tradition has bequeathed to the modern world.

"We are very apprehensive that we shall not be able to report in any way satisfactory…Indeed, the time as has been employed in the endeavor to procure information which we have not attained, and with respect to that which we shall state, if we could have foreseen that our researches would have been so unsuccessful, the following opinion might certainly have been communicated in much less time."[1]

Spencer Perceval (attorney general) to Charles York, 23 Jan., 1804 on the law of martial law

[1] BL, Add. Ms. 38240, f. 117v.

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Acknowledgements

In one of my first classes as a masters student at the University of Cambridge, my professor, in a discussion on the usability of the *Calendars of State Papers* series, ended by stating (according to my memory), "that at some point, if we can't trust other historians to do their jobs, we are never going to get anywhere." By trusting the work of other historians, I have gone so many places. The depth and breadth of English historiography, and of the historiography of its dominions, is second to none. Its quality has allowed such a junior and foolish historian as me to travel from the middle ages through the end of the seventeenth century, through political, social, economic, religious, legal, and military history, across half the globe, and engage with the historiographies of the European continent. It is only through trust – a trust, I am afraid, that most within my field do not possess – of the talents of other historians that I have been able to accomplish anything. So often during my reckless wanderings, they have provided strong safety nets which have saved me from falling into an abyss.

This dissertation was made possible by the generous funding of multiple institutional bodies. I would first and foremost like to thank the University of Virginia, and in particular the Corcoran Department of History, for funding me during the five years I have been a graduate student at the University. The department has, along with teaching assistant opportunities, given me funding for two summer research trips to London, and provided a completion fellowship during my last year so that I could concentrate on finishing the dissertation without distraction. The Dumas Malone/Albert Gallatin Fellowship generously provided me with enough funds for two months' study in London. The Lilly Library at Indiana University provided me with a fellowship, where I was able to examine their manuscript collection. The Henry E. Huntington Library likewise generously provided me with a fellowship, where I was able to both research

and write in one of the most beautiful environments imaginable. The Kanner Fellowship at the William Andrews Clark Library at UCLA allowed me to research and write over the course of the summer of 2012. Likewise, the Colonial Williamsburg Foundation generously provided me with a wonderful work place for two months in the fall of 2011. Finally, the North American Council for British Studies' Dissertation Year Fellowship in 2010 provided me with the funding I needed to conduct my manuscript research in England. Without these bodies, I would not have been able to conduct the manuscript research that is the foundation of this dissertation.

Numerous scholars have provided thoughtful assistance that have made this dissertation so much better. Parts of this dissertation have been presented at the University of Virginia History Department's Graduate Student Conference in 2010, at two meetings of the Mid-Atlantic Conference for British Studies in 2011 and in 2012 in Abington, PA, the North American Conference for British Studies in Montreal in 2012, the Southern Conference for British Studies in Baltimore in 2011, the Sixteenth Century Studies Conference in Fort Worth, TX in 2011, the Tudor-Stuart Seminar at the Institute for Historical Research in London in 2011, and the University of Virginia Law School's Legal History seminar in 2012. Many thanks go to the participants of all these meetings. I am also very appreciative to those scholars who have read parts of this manuscript, and provided me with comments. These are Joel Halcomb, Caitlin Morris, Mark Kishlansky, Christopher Brooks, Jason Peacey, John Morrill, Rebecca Green, and David L. Smith.

Many have also been very generous with their time and resources, which have helped my project immensely. Thanks go to Krista Kesselring for providing me with advice on the 1569 rebellion, to Paul Griffiths, who was enormously helpful in explaining London records for me and even providing me with his notes, to Robert Tittler, who provided help with Chester City

records, and to Simon Healy, who guided me through the collections at the National Archives. Most importantly, thanks go to Melissa Mitchem, who was always supportive of me during this project.

Five scholars in particular deserve thanks in helping me complete this project. The first is John Morrill, my MPHIL advisor, who gave me a chance to prove myself as a historian, has always been more than generous with his time, and has always provided me with encouragement. Sophia Rosenfeld and Joe Miller, who both read through this entire manuscript, provided thoughtful, helpful, and encouraging comments on the work. I have had the pleasure to TA for both, and I have learned so much about teaching from their examples. John Harrison, of the UVA law school, has been a supporter of this project. I am very grateful to him for taking time out of his busy schedule to read this work, and for providing thoughtful feedback.

This work could not have been completed without the support of Paul Halliday. Anyone aware of his work will know how much I am indebted to it. Every time I thought I had come up with a great idea, I subsequently realized, to my chagrin, that mine was often a half-baked imitation of a much better idea found in his work, *Habeas Corpus*. Professor Halliday, better than anyone I know, balances encouragement with criticism. His guidance has made this work so much better than what it would have been. This work is dedicated to him.

Introduction

In 1575, the learned lawyer and recorder of London William Fleetwood had a perhaps fictional discussion with the poet and administrator Thomas Sackville, Lord Buckhurst, and Queen Elizabeth's favorite, Robert Dudley, the Earl of Leicester.[1] The topic of the conversation was of grave importance. Could a queen apply England's penal laws given that the statutes which legalized them specifically used the word king?[2] The answer was ultimately yes. Fleetwood proved that Elizabeth could apply the laws of England because the Crown was not simply a personal living body, but also an immortal corporate one. Its rights and privileges withstood any mortal deviation in gender. Thus, the concept of the "king's two bodies" allowed a female king.[3] But before Fleetwood could prove this seeming contradiction, the lawyer first needed to establish what comprised the laws of England. Ever the systematic thinker, Fleetwood listed all of the laws that the king could use to cast "doome and judgment" on his subjects.

It began with God's laws written into the Old and New Testament. Then Fleetwood moved on to the canons of the Church of England. Third were matters of marine causes heard and determined by the procedures of the Roman Civil Law. Fifth was the king's forest laws; sixth were the laws relating to merchants. Then Fleetwood listed the laws of wardonry, which had jurisdiction in the marches of Scotland. The cities and boroughs had their own laws; so too

[1] William Fleetwood, "*Itinerarium ad Windsor*," BL, Harley Ms. 168, fos. 4v; For Fleetwood see Christopher W. Brooks, "Fleetwood, William," in *ODNB*.

[2] By penal laws, Fleetwood was referring to any statute or custom that authorized the Crown to punish wrongs by information. J.G. Bellamy, *Criminal Law and Society in Late Medieval and Tudor England* (New York: St. Martin's Press, 1984), 90-114.

[3] Cynthia Herrup, "The King's Two Genders" *Journal of British Studies* 45 no. 3 (July, 2006): 493-510.The classic book on this concept is Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957).

did the king's itinerant court. Tenth on his list was the "highe corte of parliament," which heard and determined cases as well as made law for the realm. Eleventh was the common law. Twelfth was the secret law of the Crown, which heard special cases. Fleetwood named martial law fourth in a list that also included common law and statute law. It was one of many laws.

Except God's laws, legal power came from one place: the king. Yet that power was divided and channeled, creating a complex network of jurisdictions. Each was circumscribed by typological, geographical, and temporal boundaries. The king used forest laws to handle legal problems relating venison and "vert," presumably those legal cases related to the trees in the forest. He used spiritual laws to address legal business relating to testaments and tithes. He used merchant's law to resolve disputes relating to "assurances," or insurance. His other courts had both temporal and topical boundaries. The Lord Warden punished Lymers (rogues or scoundrels), but only in the Marches of Scotland. Finally the king used martial law in his camps for offences relating to war.

Fleetwood's analysis of the laws of England was not unusual.[4] Almost all common lawyers in the late sixteenth and early seventeenth centuries, even those who supported the expansion of the jurisdiction of King's Bench, recognized jurisdictional plurality within England. Indeed, they were disturbed by it.[5] Many sought to narrow the cognizance of martial law by

[4] A more famous, if less comprehensive, list of English laws can be found in Christopher St. German's *Doctor and Student* ed. T.F.T. Plucknett and J.L. Barton (London: Selden Society, 1974). Also see Paul Halliday's analysis of Sir Francis Ashley's 1616 list of English laws. Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Belknap Press, 2010), 145-6.

[5] David Smith, "Violence and the Law: The Making of Sir Edward Coke's Jurisprudence, 1578-1616" (unpublished PhD Dissertation, Harvard University, 2007); Christopher Brooks, *Law, Politics and Society* (Cambridge: Cambridge University Press, 2008), esp. 93-124; Louis Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press, 1977); Halliday, *Habeas Corpus*. For English jurisdictional pluralism in its imperial context see Ken MacMillan, *Sovereignty and Possession in the English New World* (Cambridge: Cambridge University Press, 2006). For jurisdictional plurality in its global contexts, see Lauren Benton, "Introduction" in the American Historical Review's "Law and Empire in Global Perspective" forum, 117:4 (Oct., 2012): 1092-1100; Benton, "The Legal Regime of the South Atlantic World, 1400-

constructing temporal and geographical boundaries. Most nevertheless agreed that martial law was one of the king's laws.

Fleetwood's understanding of English laws was vastly different from the "English law" of constitutional scholarship, and from common perceptions within the scholarly community about the inheritances the English legal tradition has given to the modern world. The "rule of law" – an idea that suggests abstract rules bind the will of the powerful – had no place in Fleetwood's understanding of English laws. Instead, there were many options available to the king where he could channel his power in order to discipline his subjects. Laws were tools, not constraints. English migrants eventually took these laws with them as they settled all over the world in the seventeenth century. One of the many legal ideas they took with them was martial law. Just as much as common law, martial law – as a form of law – is one of the most important set of practices the English legal tradition has bequeathed the modern world.

II.

Yet this fairly intuitive idea – that the name of a concept reflected its nature – has fallen away. We now think of martial law as those states of time when the military takes over the civilian legal apparatus. Due to this definition, scholars have argued that "martial rule" was a better description of martial law's nature.[6] To all of these scholars, martial law was everything that law was not. The key difference was the supposed absence of constraint at martial law. The rules that guided lawyers and judges, and that constrained them, were absent in the arbitrary

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1750: Jurisdictional Complexity as Institutional Order" Journal of World History 11 no. 1 (Spring, 2000): 27-56; Benton, "Historical Perspectives on Legal Pluralism" *Hague Journal on the Rule of Law* 3, no. 1 (2011): 57-69.

[6] Charles Fairman, "The Law of Martial Rule" *The American Political Science Review* 22:3 (Aug., 1928): 591-616; *idem*, "The Law of Martial Rule and the National Emergency" *Harvard Law Review* 55:8 (Jun., 1942): 1253-1302. H.M. Bowman, "Martial Law and the English Constitution" *Michigan Law Review* 15 (1917): 93-126.

martial law regimes. Because it was not a form of law but a form of military power, martial law was also conceptually distinct from military law: a complementary jurisdiction to common law that governed Crown forces according to the rules and restrictions prescribed by the annually passed Mutiny Acts. Martial law is not, according to this scholarship, part of the English legal tradition.

This process of disavowal from the field of law began in the latter half of the seventeenth century. Sir Matthew Hale, the most important legal scholar of the period, argued that martial law was "not a law at all...but something rather indulged than allowed as a law."[7] For Hale, martial law was acceptable due to the necessity of disciplining soldiers. In a state of war, which Hale conceived of as only being when the Courts of Westminster were closed, English commanders could discipline their soldiers at martial law. English legal scholars of the eighteenth century took their cue from Hale, including the century's most famous jurist, Sir William Blackstone.[8]

Some less noteworthy but better informed historians in the eighteenth and early nineteenth centuries vigorously protested this view. Both Stephen Payne Adye and A.F. Tytler, two judge advocates general in the British army, argued for martial law's place within the English legal universe.[9] Both claimed that it derived from the medieval court of the Constable and the Marshal. And both stated that martial law had all of those components that together

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[7] Sir Matthew Hale, *The History of the Common Law of England* ed. Charles M. Gray (Chicago: University of Chicago Press, 1971), 27.

[8] William Blackstone, *The Commentaries on the Laws of England of Sir William Blackstone* (London: J. Murray, 1876), i. 381; William Maitland, *The Constitutional History of England* (London: 1913), 267.

[9] Stephen Payne Adye, *A Treatise on Courts Martial: Containing I. Remarks on Martial Law, and Courts-Martial in General II. The Manner of Proceeding against Offenders* (London, 1778); A.F. Tytler, *An Essay on Military Law* (Edinburgh: Murray and Cochrane, 1800), 1-29. For another similar treatise see Sir Richard Sullivan, *Thoughts on Martial Law, and on the proceedings of general courts martial* (London, 1779); and E. Samuel, *An Historical Account of the British Army: and the law military as declared by ancient and modern statutes* (London, 1816).

comprised law.[10] But they focused the vast majority of their attention on eighteenth century martial law. Tytler agreed with Hale that prior to Parliament's legalization of martial law for soldiers in the 1689 Mutiny Act, it was true that the jurisdiction was arbitrary and tyrannical. For Tytler, "the martial law in former periods of our history (when the prerogative of the Crown seemed to have no determined limit) deserved all those characters of tyranny which have been assigned to it by Hale and Coke."[11]

These commentators had interest only in defending martial law as authorized by Parliament. In 1689, many within the armed forces of the newly crowned king and queen, William III and Mary II, mutinied due to continued loyalism towards the recently deposed king, James II.[12] Parliament passed the first Mutiny Act in March, which legalized the punishment of soldiers at martial law for mutiny, desertion, and sedition.[13] Over the course of the eighteenth century, Parliament expanded the Mutiny Act to include most of the articles of war that generals had traditionally employed to discipline their soldiers. Tytler, expressing a fairly standard nineteenth- century Whig view of law, thought that this complementary jurisdiction authorized by Parliament had "progressed" from its chaotic and tyrannical ancestors of the sixteenth and seventeenth centuries to the "moderate" and Parliamentary approved martial law of the eighteenth century.[14] Martial law as approved by the Mutiny Act was lawful, but that which had not been approved by Parliament was arbitrary, tyrannical, and not a law at all.

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[10] Tytler thought law to be comprised of rules combined with due process. An *Essay on Military Law*, 1-10.

[11] Tytler, *An Essay on Military Law*, 23.

[12] The best work on the 1689 Mutiny Act is John Childs' short discussion of it in his work on William III's army. John Childs, *The British Army of William III, 1688-1702* (Manchester: Manchester University Press, 1987), 86-7.

[13] 1 Wil. & Mar. c. 5.

[14] Tytler, *An Essay on Military Law*, 31-2. For the idea of Whig history, see Herbert Butterfield, *The Whig Interpretation of History* (New York: AMS Press, 1978).

Eventually, through the Mutiny Act, lawyers and scholars began making an explicit distinction between what was now called "military law" and martial law. One of the first scholars to make this division was John McArthur, a former naval legal officer who had written a tract on courts martial in the early nineteenth century.[15] McArthur used an opinion given in Trinity term 1793 by the Earl of Rosslyn, the Chief Justice of Common Pleas.[16] Military law in Rosslyn's reading was "exercised by the authority of parliament, and the mutiny act annually passed, together with the articles of war framed by his Majesty," while martial law "prevails generally or partially in a kingdom for a limited time."[17] Under this regime, all legal matters relating to the military came before a court martial. Military law was complementary and supervised while martial law had an absolute jurisdiction.[18]

By the middle of the nineteenth century, scholars had separated the two concepts completely.[19] Between 1848 and 1866, English governors abroad had employed martial law twice to put down rebellions. Their legal strategies stirred up controversy among members of Parliament.[20] On both occasions, but especially in 1865-6, members of Parliament, the press,

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[15] John McArthur, *Principles and Practice of Naval and Military Courts-Martial with an Appendix illustrative of the subject* (London: A. Strahan, 1813).

[16] McArthur reprinted the opinion in full. Ibid., 35-8.

[17] Ibid., 33; McArthur's specific example of martial law was the use of the jurisdiction in Ireland at the turn of the nineteenth century in the aftermath of the 1798 rebellion.

[18] Ibid., 35-8. This distinction is consistent with that made by Thomas Frederick Simmons, in *The Constitution and Practice of Courts Martial: with a Summary of the Law of Evidence as Connected Therewith* (London: J. Murray, 1875), 15, And R.B. Scott, *The military law of England (with all the principal authorities) adapted to the general use of the army, in its various duties and relations, and the practice of courts martial* (London, 1810).

[19] In terms of military history, the most famous work to make this division was C. M. Clode's *The Administration of Justice under Military and Martial Law* (London: J. Murray, 1872).

[20] R.W. Kostal, "The Jurisprudence of Power: Martial Law and the Ceylon Controversy of 1848-51" *Journal of Imperial and Commonwealth History* 28 (2000): 1-34; Kostal. *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005). Charles Townshend, "Martial Law and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940" *Historical Journal*, 25:1 (1982), 167-95.

and the English legal community debated what martial law was and if and when it was legal to use. These accounts differed, often drastically, in terms of their historicity, coherence, and conclusions. But they all agreed on one thing: martial law and military law were completely different both in terms of procedure and in terms of the people over whom each had cognizance.

Generally, these nineteenth-century commentators made one of two claims. First, martial law was unknown to England, unless one wanted to define martial law as the means by which common law principles were employed during an invasion or insurrection. In other words, statesmen during an invasion could employ common law's substance, but ignore its procedure.[21] In contrast, those who agreed with the use of martial law in the empire argued that English governors had always used martial law to punish rebellion. The most famous scholar to espouse this view was F.W. Finlason, who argued that military commanders and governors could upon urgent necessity use martial law. To Finlason, martial law had no formal rules except those that framed the conscience of the commanding officer.[22]

This discourse eventually attracted the attention of the famed political theorist Carl Schmitt, who, in the early twentieth century, found the supposed lawlessness of martial law

[21] This argument was put forth by Edwin James and Fitzjames Stephen, the two lawyers hired by the Jamaica Committee to investigate Governor Eyre's use of martial law. Kostal, *Jurisprudence of Power*, 40-55. The argument has been reprinted in William Forsyth, *Cases and Opinions on Constitutional Law: and Various Points of English Jurisprudence, Collected and Digested from Official Documents and Other Sources; with notes* (London: Stevens and Haynes, 1869), 551. For those who have taken up this view see, F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1920), 492. Maitland made similar but more extensive arguments in his lectures on constitutional history. See CUL Add. Ms. 7002, f. 105 and CUL Add. Ms. 6998, fos. 212-17. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1924), 288. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), 142. Even Holdsworth at times adopts this view, which led him to think that the arguments made in the Ship Money Case of 1637 involved the idea of martial law. William Searle Holdsworth, "Martial Law Historically Considered" *Law and Quarterly Review* xviii (1902): 117-33.

[22] Finlason's treatises are by far the most learned, although still not that accurate, but they have with one exception been ignored by the English legal community until the work of Kostal. *Jurisprudence of Power*, 228-45. F.W. Finlason, *Commentaries upon Martial Law with Comments on the Charge of the Lord Chief Justice* (London: Stevens and Sons, 1867); Finlason, *A Treatise on Martial Law as Allowed by the Law of England in Time of Rebellion: With Illustrations Drawn from the Official Documents in the Jamaica Case, and Comments Constitutional and Legal* (London: Stevens and Sons, 1866).

useful for his own purposes. For Schmitt, martial law represented the English manifestation of the "state of exception," the decider of which was sovereign.[23] According to this theory, war, emergency, and economic crises allowed the sovereign to exercise a state of exception that stood beyond the boundary of the juridical order which the sovereign used to save the people from their enemies.[24] Martial law, in this understanding, also could not be a form of law. Instead, Schmitt declared that "despite the name it bears, martial law is neither a right nor a law in this sense but rather a proceeding essentially guided by the necessity of achieving a certain end."[25] Giorgio Agamben, the most recent theorist of the state of exception, has followed Schmitt's claims. Like English historians, Schmitt and Agamben have separated martial law from military law.[26]

Nineteenth- and twentieth-century scholars have haunted the early modern histories of martial law. Those who have examined martial law in the sixteenth and seventeenth century generally have been military historians. Many of these works are excellent. But all, at least implicitly, adopt the nineteenth-century division between martial and military law.[27] Others have

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[23] Carl Schmitt, *Political Theology*: *Four Chapters on the Concept of Sovereignty* trans. George Schwab (Cambridge, MA: MIT Press, 1985).

[24] Ibid., 5-7.

[25] Quoted in Giorgio Agamben, *State of Exception* trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 18.

[26] GiorgioAgamben, *State of Exception*, 18-19; Nassar Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), 106-18; David Dyzenhaus, "The Puzzle of Martial Law" *University of Toronto Law Journal* 59 no. 1 (2009): 1-64.

[27] Micheál Ó Siochrú, "Atrocity, Codes of Conduct and the Irish in the British Civil Wars, 1641-53" *Past and Present* 195 (May, 2007), 56-8; C.G. Cruikshank, *Elizabeth's Army* (2nd ed. Oxford: Oxford University Press, 1968), 159-73; Cruikshank, *Army Royal: Henry VIII's Invasion of France, 1513* (Oxford: Clarendon Press, 1969), 94-105; C.H. Firth, *Cromwell's Army* (3rd ed. London: Metheun & Co. 1921), 278-313; Barbara Donagan, *War in England, 1642-49* (Oxford: Oxford University Press, 2008), 134-96; John Childs, *The Army of Charles II* (London: Routledge & K. Paul, 1976), 75-90 *idem.*, *The Army, James II, and the Glorious Revolution* (Manchester: Manchester University Press, 1980), 92-3; *idem*, *The British Army of William III 1689-1702,* 86-7. One of the more careful studies of martial law, albeit for the eighteenth century, has noted that the distinction between martial and military law did not exist in the early modern period. Frederick Bernays Wiener, *Civilians under Military Justice*: *The British*

adopted Finlason's view that courts martial had no set rules or regulations, or Hale's maxim that martial law was not actually a form of law, and have argued that it was "extralegal," and comprised emergency measures used out of necessity.[28]

Legal scholars, by contrast, have not spent a long time examining martial law; few have taken up the topic at all. This avoidance has generally been on purpose. William Maitland, in his magisterial history of the English constitution, declared that "For at times the belief has prevailed that there is some body of rules that the king or his officers could in cases of emergency bring into force by way of proclamation and apply to persons who are not soldiers." But according to Maitland, "If however we ask, where are we to find this body of rules? What is martial law? We shall hardly get an answer to our question."[29] Most, including Maitland, have not wanted to know the answer. Martial law has been an embarrassment to scholars who have taken pride in the history of the common law and trial by jury.

Thus, on the one hand, the history of martial law has been clouded by nineteenth-century divisions. On the other, martial law has been willfully ignored in part based on Sir Matthew Hale's casual dismissal of it as being extra-legal. The product of both these impulses is confusion about the nature of early modern martial law. As R.W. Kostal has noted, the concept of martial

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Practice since 1689, especially in North America (Chicago: University of Chicago Press, 1967). The best works on martial law in the sixteenth and seventeenth centuries remain Lindsay Boynton's now fifty year old articles on martial law. Lindsay Boynton, "Martial Law and the Petition of Right" *English Historical Review* 79:311 (Apr., 1964): 255-84; *idem*. "The Tudor Provost Marshal" *English Historical Review* 77:304 (Jul., 1962): 437-55. Also see Stephen J. Stearns, "Military Disorder and Martial Law in Early Stuart England" in *Law and Authority in Early Modern England: Essays presented to Thomas Garden Barnes* ed. Mark Charles Fissel (Newark: University of Delaware Press, 2007), 106-35.

[28] J.V. Capua, "The Early History of Martial Law" *Cambridge Law Journal* 36:1 (Apr., 1977): 152-73; J.G. Bellamy, *The Tudor Law of Treason: An Introduction* (London: Routledge & K. Paul, 1979), 228-36.

[29] Maitland, *The Constitutional History of England*, 491. Maitland's discussion was informed by the case against governor Eyre in 1865. Ibid., 492.

law in 1865 was "dauntingly complex, perhaps utterly incoherent."[30] Twentieth century scholars have fared little better than their mid-nineteenth century counterparts.[31] The subject has produced confusing statements and anachronistic divisions. Due to them, our understanding of early modern martial law is now far removed from William Fleetwood's conceptualization in *Itinerarium ad Windsor* that was, as one of the many laws the king used to cast doom and judgment upon his people.

III.

This is the first narrative of martial law in the early modern period. It is written in the hopes that scholars reintegrate its history with that of English law. Through this integration, we will have a more sobering history that includes a form of law designed as a procedural alternative to common criminal law for the purposes of avoiding hostile juries and instilling obedience through terror.[32] By including martial law in the history of English law, we must also include justifications for mass executions, capital conviction without formal trial, strategic terror, and the bypassing of due process. The history of English law has often been glossed as the rise of

[30] Kostal, *The Jurisprudence of Power*, 10.

[31] The works that focus on martial law in the early modern period are few. Capua, "Early History of Martial Law;" Boynton, "Tudor Provost Marshal," Boynton, "Martial Law and the Petition of Right," Stearns "Military Disorder and Martial Law in Early Stuart England." For Ireland, see David Edwards, "Beyond reform: martial law & the Tudor Reconquest of Ireland". *History Ireland*, 5:2 (1997): 16-21. Edwards, "Ideology and experience: Spenser's *View* and martial law in Ireland." *In* Morgan, Hiram (ed.), *Political ideology in Ireland, 1541-1641* (Dublin: Four Courts, 1999), 127-57. Edwards, "Two Fools and a Martial Law Commissioner "Two Fools and a Martial Law Commissioner: Cultural Conflict at the Limerick Assize of 1606" in *Regions and Rulers in Ireland, 1100-1650: essays for Kenneth Nicholls* ed. David Edwards (Dublin: Four Courts Press, 2004), 237-265.

[32] Thus one of the key reasons the Crown used martial law was to avoid potential jury nullification. For more on the history of jury nullification, see Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Jury, 1200-1800* (Chicago: University of Chicago Press, 1985).

common law. This is an air-brushed image. This dissertation asks that we paint English legal history warts and all.[33]

In order to accomplish this exercise, this work will examine the ways in which early modern jurists and commanders understood martial law on their own terms.[34] This methodology asks scholars to take seriously those who used nouns like justice, law, and order to describe martial law. Because most early modern jurists and commanders conceived of martial law as a form of law, all of those adjectives we now associate with it – capricious, arbitrary, extralegal, unfair and unjust - are not necessarily accurate for early modern martial law practice. Those who used martial law never understood it in those terms. Instead, practitioners of sixteenth- and seventeenth-century martial law contemplated the rules and procedures they needed to abide by, and the evidence they needed to gather, in order to obtain conviction. This coupling of law and justice with martial law does not exclude martial law jurisdiction from also being a form of power.[35] While civilians and soldiers used the rules of martial law to successfully combat the

[33] I hope that more attention is paid to martial law in the same way that, after years of being ignored by legal historians, the history of crime finally attracted attention. See Cynthia B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1987), 1-10.

[34] By using this approach, I will not provide essential or abstract definitions to concepts, even the concept of law. Quentin Skinner, "Meaning and Understanding in the History of Ideas" reprinted in *Meaning and Context: Quentin Skinner and his Critics* ed. James Tully (Princeton: Princeton University Press, 1988), 29-67. R.G. Collingwood, *Autobiography* (Oxford: Oxford University Press, 1939), 29-44. For the application of Skinner's ideas to the history of religion see *Seeing Things Their Way: Intellectual History and the Return of Religion* ed. Alistair Chapman, John Coffey, and Brad Gregory (South Bend, IN: Notre Dame University Press, 2009). For its application to legal history, see Halliday, *Habeas Corpus*, 2.

[35] Thus as John Fabian Witt has recently noted, the "choice between law and power is a false dichotomy." Witt, "Law and War in American History" *American Historical Review* 115:3 (June, 2010): 770. This idea was originally explored by Pierre Bourdieu in "The Force of Law: Toward a Sociology of Knowledge of the Juridical Field" *Hastings Law Journal* 38 (1987): 805-53.

interests of the Crown, much more often than not, they served the ends of those who granted martial law jurisdiction.[36]

In order to bring these rules to light, this work will examine English martial legal culture and lawmaking in the hopes that scholars re-evaluate previous claims about early modern English legal culture. Since John Pocock's seminal work *The Ancient Constitution and the Feudal Law*, we have been told – over and over again – that English legal thinking in the seventeenth century was conservative, unimaginative, and insulated from continental legal developments.[37] This tendency to view jurists as reactionary has been reinforced by some

[36] The law of martial law, to parrot Robert Gordon, constituted and was constituted by the power of the Crown, and later, the Crown in Parliament. Robert Gordon, "Critical Legal Histories" *Stanford Law Review* 36 (1984): 57-125. For civilians co-opting the legal strategies of the state, see Brian Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2008), and Steve Hindle, *The State and Social Change in Early Modern England, c. 1550-1640* (Basingstoke: Macmillan Press, 2000).

[37] The Ancient Constitution is an anachronism meant to categorize legal discourse which made claims that English law was a collection of customs that had existed time out of mind. I believe it has almost no analytical value, and incorrectly privileges a small sampling of English legal writing, generally that of Sir Edward Coke, over the vast majority of English legal discourse that does not fit into the paradigm. For a review of the concept's place in English legal historiography by someone who thinks the concept is useful, see Gordon Schochet, "The "Ancient Constitution" as Necessary Interpretive Trope" in *The Political Imagination in History: Essays Concerning J.G.A. Pocock* ed D.N. DeLuna and assisted by Perry Anderson and Glenn Burgess (Baltimore: Owlworks, 2006), 1-26. John Pocock, *The Ancient Constitution and the Feudal Law*: *A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987); J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore: Johns Hopkins University Press, 2000); J.P. Sommerville, *Royalists and Patriots: Politics and Ideology in England, 1603-1640* (London: Longman, 1999), 81-104; Sommerville, "The Ancient Constitution Reassessed: The Common Law, the Court and the Languages of Politics in Early Modern England," in *The Stuart Court and Europe: Essays in Politics and Political Culture* (Cambridge: Cambridge University Press, 1996), 39-64; Glenn Burgess, *The Politics of the Ancient Constitution: an Introduction to English Political Thought, 1603-1642* (Basingstoke: Macmillan, 1992), 1-105; Janelle Greenberg, *The Radical Face of the Ancient Constitution* (Cambridge: Cambridge University Press, 2001); Alan Cromartie, "The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England" *Past and Present* 163 (May, 1999): 76-120; Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge: Cambridge University Press, 2006), esp. 376-490. The blows to the Ancient Constitution have come from several historians working in different sub-fields, but unfortunately it just won't die. See D.R. Wolfe, *The Idea of History in Early Stuart England* (Toronto: University of Toronto Press, 1990), 26. Christopher Brooks has provided the most cogent and balanced criticism in his study of English legal culture. Brooks, *Law, Politics and Society*. Hans Pawlisch has uncovered the continental influences that shaped the thinking of the supposed "ancient constitutionalist" Sir John Davies. Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge: Cambridge University Press, 1985), 161-75. Likewise, although he continues to use the phrase, Paul Christianson has recognized that Selden's legal thought does not fit into the Ancient Constitutionalist paradigm. Christianson, "Young John Selden and the Ancient Constitution, 1610-1618" *Proceedings of the American Philosophical Society* 128 (1984): 271-315. For an examination of why Coke used the idea of immutable custom, see Smith, "Violence and the Law," 585-683.

scholars of legal reception, who have claimed that jurists were so unimaginative in their thinking that they blindly copied laws from other cultures even if those laws failed to meet the needs of their own polities.[38] It has also been reinforced by recent legal theory, which has posited that the function of the judiciary was not to make law but to kill off novel legal narratives generated outside the courtroom.[39] Thus, when scholars now search for legal creativity, they often look to law as practiced by "common people" outside the halls of the courts.[40]

In contrast, this work argues that those who generated, adapted, and restrained martial law were creative thinkers who utilized a dizzying variety of sources. Their creativity, however, lay not in the invention of new concepts but in the fusion of pre-existing ideas. Adaptation and selection of past laws were the ways in which jurists made and re-made martial law. In order to do so, they drew on Roman law and history, English history, European summary courts, Spanish, Danish, French, and Swedish articles of war, English commissions of *oyer* and *terminer* – the normative way in which the Crown delegated powers to its itinerant judges – just to name a few sources. This creativity was not restricted to the Roman law trained lawyers of the army or to Crown authorities. Common lawyers also looked to, selected from, and combined a variety of legal sources to delimit or adapt martial law. Nor was this creative process confined

[38] This school of thought is associated with the prolific Roman law scholar Alan Watson. Watson, *Society and Legal Change* (Philadelphia: Temple University Press, 2001); Watson, *Failures of the Legal Imagination* (Philadelphia: University of Pennsylvania Press, 1988); Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974). For a discussion of Watson's ideas in relation to North American slave law, see Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies" *The American Journal of Legal History* 38, 1 (Jan., 1994): 38-54.

[39] Robert Cover, "The Supreme Court 1982 Term: Nomos and Narrative" *The Harvard Law Review* 97:1 (Nov., 1983): 4-68; Cover, "Violence and the Word" *Yale Law Journal* 95 (1985-86): 1601-29. For a response to Cover, see Robert C. Post, "Who is Afraid of Jurispathic Courts? Violence and Reason in Nomos and Narrative" *Yale Journal of Law and the Humanities* 17 (2005): 9-16. For an analysis of martial law in "Coverian" terms, see Dyzenhaus, "The Puzzle of Martial Law."

[40] See for example, Steven Wilf, *Laws Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (New York: Cambridge University Press, 2010).

geographically. Ideas looped through Europe, England, Ireland, and British dominions in Africa, Asia, and North America, where governors and colonists used, adapted, and discarded legal ideas and refashioned martial law in the process. There is much creativity in combinations.

By examining martial legal culture, this work also asks legal scholars to think more about states of time: in particular the concept of a "state of war" and of its history. When this work refers to a state of war, it does not mean the declaration of war by one monarch or head of state against another. Instead, it refers to the idea of the state of war that is now most commonly associated with Hobbes: a space of chaos, violence, and illegality, where the structures of civilian government are either non-existent or have temporarily fallen away. Hobbes' understanding of the state of war – while used in new creative ways – was not new. He instead derived it from English legal sources like Bracton.[41]

Because a state of war has so often been defined as a state of lawlessness, historians have in general ignored its discursive tradition within English legal scholarship. Much recent legal scholarship has explored how geography informed jurisdiction.[42] But scholars insist that time was not a boundary that informed jurisdictional difference, but instead as that which demarcated the realm of law from that which is not law. This idea can be traced to Roman times, and it certainly had its proponents in early modern England. But its most famous proponent was Carl Schmitt. The famed German political theorist argued that the sovereign was the interpreter of time. Through his or her mystical powers, for Schmitt, the sovereign could detect a state of emergency or crisis which demanded the suspension of the rule of law. During such moments,

[41] For more on Bracton, see the prologue.

[42] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010); Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010).

sovereignty, which had been divided through a written constitution, returned to an undivided state into the hands of the executive who could now save the people from their enemies.[43] Schmitt imagined, due to his reading of Hobbes, that this temporal shift gave the sovereign powers that all sovereigns had once possessed, irrespective of time, in the early modern period.[44] Giorgio Agamben has recently re-stated Schmitt's claims, and has provided a historical narrative of the concept of the state of exception during the Roman period.[45] Using the Roman idea of *iustitium*, or vacancy, Agamben claimed that the Roman Republic declared a state of exception, through which the legal order suspended itself. During this period, magistrates, according to Agamben possessed unlimited discretion to do what was necessary to defend the polity.[46] While he made little effort to trace his claims about Rome into medieval, early modern or modern Europe, his implication is clear: Western sovereignty has always been defined by the ability to declare the temporal exception.

This work asks that scholars examine historically the claims that Schmitt and Agamben have made in order to better understand the relationship between jurisdiction, states of exception or of war, and of how the sovereign has, or does not have, discretion over the temporal boundaries that demarcate ordinary from extraordinary time. Jurists in seventeenth-century England often thought about the relationship between sovereignty and time in the context of

[43] Schmitt, *Political Theology*, 5-15.

[44] For Schmitt's take on Hobbes, see Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* trans. George Schwab and Erna Hilfstein (Westport, CT: Greenwood Press, 1996). Hobbes had no conception of a "state of exception" although he was interested in the sovereign having all the tools he desired at his disposal for the defense of the commonwealth against its enemies. Hobbes, *Leviathan*, pt. 2, ch. 18.

[45] Agamben, *State of Exception*, 41-51.

[46] Ibid., 41. Agamben has used a monograph on *iustitium* by Adolph Nissen, *Das Iustitium. Eine Studie aus der romischen Rechtsgeschichte* (Leipzig: Gebhart, 1877). I cannot read German, therefore I have relied on Gregory Kung Golden, "Emergency Measures: Crisis and Response in the Roman Republic (From the Gallic Sack to the Tumultus of 43 BC)" (Unpublished PhD Dissertation, Rutgers University, 2008). Also see A.W. Lintott, *The Constitution of the Roman Republic* (Oxford: Clarendon Press, 1999).

jurisdictional politics.[47] But they often arrived at radically different conclusions than those offered by Schmitt or Agamben. Many common lawyers wanted time to operate as a jurisdictional boundary between common law – which, to most, had no cognizance in times of war – and martial law. Some came up with the idea that the sovereign should no longer be able to interpret time. Instead, he who declared the exception would be the enemy, not the sovereign. Others wanted the Courts of Westminster, by being open, to be the badge of peace. In either case, those who contemplated time did so to constrain the sovereign. But even in states of war, and even when the courts were closed, rules of martial law still applied. The fight was often over jurisdiction, not over when discretion could supplant law. Just like geography, time variegated law.[48] The history of martial law does not necessarily confirm Agamben or Schmitt's views that states of exception are controlled by the sovereign. Nor does it confirm that once in a state of exception, the sovereign possesses unlimited discretion.

IV.

This dissertation traces the transformation of martial law from a form of law designed to complement common criminal law into one designed to provide an all-encompassing alternative to civilian law during times of crisis. The Crown in the sixteenth century crafted martial law out of medieval strategies to govern the king's hosts and common law commissions to hear and determine cases of felony and treason by procedures that bypassed bills of indictment and petty juries. The increased control over process gave judges the opportunity to try and convict those

[47] For jurisdictional politics, see Lauren Benton, "The Legal Regime of the South Atlantic World, 1400-1700: Jurisdictional Complexity as Institutional Order" *Journal of World History* 11 no. 1 (Spring, 2000): 27-56; Benton, *Law and Colonial Cultures* (Cambridge: Cambridge University Press, 2002); for jurisdictional politics in England, see Brooks, *Law, Politics and Society*, 93-162.

[48] Benton, *A Search for Sovereignty*, 290.

who rose in rebellion against the Crown's often unpopular religious and economic policies in areas where potential juries might have nullified verdicts. Thus in both 1537 and in 1570, and probably in 1549, Crown officers used martial law to execute participants in rebellions without having to resort to extra-judicial violence. It also allowed commanders of Crown forces the discretion to punish soldiers without having to use military juries – who might have been more sympathetic to their comrades – or juries comprised of locals who might have been too harsh on the undesirable intruders to their community. Once made, the Crown found martial law just as useful as a threat as actual practice, and, through royal proclamations, attempted to terrorize those who engaged in religious dissent, piracy, and rioting into stopping their activities.

By the middle of the sixteenth century, delegated authorities in Ireland had adapted martial law process in order to undercut retaining practices by lords and more minor big men who opposed Tudor rule. This new summary form of martial law allowed commissioners to convict those they glossed as vagrants and other poor, masterless men, by their senses. Along with this jurisdiction, martial law commissioners had powers to chase down notorious criminals and convict those who by reputation were known to be felons. These substantial powers led to abuse, and they eventually created an outcry amongst prominent Irish landholders, who feared living under the rule of new martial governors. The English Privy Council generally agreed with this assessment, and circumscribed the delegation of summary martial law jurisdiction. But the Privy Council continued to use summary martial law both in England and more often in Ireland on rioters, rebels, and bandits.

By the end of the sixteenth century, commanders and martial jurists believed that the laws and procedures that governed Crown forces were insufficient. Looking to the practices of continental armies as guides, these men transformed the substance, administration, and

procedures of courts martial. The articles of war expanded rapidly in length. Procedures became more complex, and mandated that discretion be spread across multiple officers of the court. The administration of the army became more specialized, and cared much more about keeping the records of the courts. The courts martial at the end of the seventeenth century, while retaining the same name, contained practices that were quite different from their sixteenth-century predecessors.

Jurists in the seventeenth century attempted through temporal constraints to transform martial law from one of many to one or the other. The king was to use common law exclusively to try by life and limb in peace; in war he was to try by martial law. This all or nothing proposition had unintended consequences. Some discourses successfully restrained martial law jurisdiction. When lawyers advocated that the power of time be given to the enemy, Stuart monarchs begrudgingly listened. But when jurists claimed that martial law could not be used unless the courts were closed, governors in English dominions, and then English generals, saw an opportunity. They closed the courts down to take advantage of the absence of property rules at martial law. Thus, ironically, through discourses that were meant to constrain, delegated officials crafted a form of martial law that was all-encompassing.

Ultimately, Parliament enshrined martial law as one of the many laws of England through statute. In less than three months after the deposition of James II, Parliament overturned those discourses that had restrained the law of martial law in England by passing the Mutiny Act. Through its statutory powers, Parliament ensured that soldiers would be punished at martial law. Due to Parliament, and to the discourses that were initially designed to constrain it, those living in the eighteenth century saw the making of what we now call martial law.

Prologue:
The Medieval Background to Martial Law

There is no straight line from medieval martial jurisdictions to early modern martial law practice. But early modern English jurists found all of the medieval practices – and there were many – relating to martial jurisdiction useful in generating new law. And they often glossed their new creations as "old" or as enshrined in the statutes of the middle ages, and in so doing hid their legal creativity, and obscured the contexts in which the ideas they selected had been made. Let us briefly try to restore this context so that we might contrast medieval martial jurisprudence with early modern martial law practice.

Strict demarcations in terms of personnel, procedure, even substance between civilian and military jurisdictions did not exist in the late thirteenth century. In terms of procedure, personnel, and often in terms of substance, the Crown made no distinction between martial jurisdictions and civilian jurisdictions. Members of the king's household helped the king govern in times of war and peace. Initially they used procedure common to all the king's courts to punish the king's soldiers. Initially, the king's officers punished treason according to the same laws and the same procedures, regardless of the temporal state of time in which the treason had taken place. This interchangeability owes to the fact that what would become English military jurisdictions derived from the same source as those courts that would eventually sit down at Westminster: the *Curia Regis* or the King's Court. The separation and subsequent specialization of these courts, as well as their divergence in procedure, was not determined. Nor were the ultimate divisions rational in an abstract sense. We can only understand the procedures, substantive law, and boundaries of the courts associated with war at the end of the middle ages by understanding the historical contexts in which these forms were made.

Even after the king with his council made the Court of Chivalry in the middle of the fourteenth century to handle the legal business of war arising out of nearly perpetual conflicts with France, jurisdictional boundaries were still far from clear. The Court of Chivalry was not the only court that handled the business of war. Jurists of itinerant courts set up to handle the legal business of the king's hosts had jurisdiction over matters relating to war. MPs bound these courts to temporal states of war, but by the end of the fifteenth century, at least three definitions of a state of war existed. While common law jurists bound the Court of Chivalry geographically and topically, these boundaries still gave the justices of the court a lot of latitude to claim cognizance over a variety of legal business. By the end of the fifteenth century, jurists associated multiple procedural forms under the title of "the customs of the Constable and Marshal." They included three divergent substantive law traditions, including two completely different treason jurisdictions, often grouped together under the "laws of war." This amalgam jurisdiction was a product of the jurisdictional politics of the middle ages. Martial law was not the direct descendant of the Court of Chivalry.

The Household Jurisdiction

Before there were specialized military tribunals, the king governed his host through the court of his steward. Indeed, the most important, yet most understudied, medieval court that informed future martial law debates was the court that governed the king's household.[1] The

[1] Historians have usually focused on the making of King's Bench and Common Pleas in their stories on the making of the Common Law to the neglect of the Court of the Verge. R.V. Turner, *The King and his Courts: The Role of John and Henry III in the Administration of Justice, 1199-1240* (Ithaca, NY: Cornell University Press, 1968); *idem*, "The Origins and Common Pleas and King's Bench" *American Journal of Legal History* 21 (1977), 238-54. S.F.C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 1981).

author of the legal tract "Fleta" dubbed this court in the early fourteenth century "the court of the king's hall." It was known as the "Court of the Steward and the Marshal," "The Court of the Verge," "The Court of the Marshalsea" or the "Palace Court."[2] The Court of the Verge had jurisdiction over all members of the king's household, and over all cases within the "verge" of "wherever the king may be in England."[3] The marshal of the household signified the presence of the king by carrying the king's "wand of peace." Any suit within a twelve mile circumference of the wand of peace could be heard at the Court of the Verge.

Over the course of the middle ages, members of parliament circumscribed the jurisdiction of the Court of the Verge. In general it had jurisdiction over trespass, debt, and detinue.[4] In more important cases, like those involving felony, the court usually deferred to King's Bench. These restrictions were a product of its popularity. The Court of the Verge had a simple bill or plaint process that made it easy for plaintiffs to sue at law in comparison to the cumbersome and rigid writ process required by Common Pleas or King's Bench outside of Middlesex. But before these boundaries were imposed on it, the court would have had cognizance over felony and all sorts of legal actions, even wrongs committed by soldiers.

[2] W.R. Jones, "The Court of the Verge: The Jurisdiction of the Steward and the Marshal of the Household in Later Medieval England" *Journal of British Studies* 10, no. 1 (Nov., 1970), 1-29; Tout, *Chapters in Administrative History*, i. 201-05, ii. 25-6, 251-3; Marjorie McIntosh, "Immediate Royal Justice: The Marshalsea Court in Havering, 1358" *Speculum* 54, no. 4 (Oct., 1979), 727-33. For examinations of the court for later periods, see W. Buckley, *The Jurisdiction and Practice of the Marshalsea & Palace Courts* (London: H. Sweet, 1827) and Douglas Greene, "The Court of the Marshalsea in Late Tudor and Stuart England" *The American Journal of Legal History* 20:4 (Oct., 1976): 267-81.

[3] *Fleta*, ii. 109.

[4] Jones, "The Court of the Verge," 15. Two statutes in the early fourteenth century *Articuli Super cartas* (1301) and the statute of Stamford circumscribed the court's cognizance.

The Court of the Verge had cognizance over the king's host because the king's household administered his war efforts.[5] The clerks of the king's wardrobe, who usually handled the king's finances, turned their attention to the victualing of the army during times of war. The three important judicial officers of the Household, the Steward, the Marshal, and the Constable, adjudicated the king's legal business as it pertained to war. The Steward supervised the king's household, and discharged the powers of the king's office concerning breaches of the peace within the Verge. The Steward usually acted as a judge of law, although sometimes the marshal could fill that role. The court empanelled juries who judged the facts of a case and provided verdicts. The king's marshal supervised all the king's prisoners, and executed all judgments made in the Court of the Verge. The Constable's legal powers are more difficult to determine in the early fourteenth century.[6] But he probably heard and determined cases – with the aid of the marshal – between members of the *familia regis*, and those cases related to the business of war.[7]

All three of these offices were technically "grand sergeanties:" a position that allowed a noble to travel with the king's host.[8] The earls of Norfolk, for example, inherited the office of marshal as a hereditary title in the middle ages. But more often than not, the steward, the constable, and the marshal of the household, or of the king's camps, were delegates of these

[5] Michael Prestwich, *Armies and Warfare in the Middle Ages: The English Experience* (New Have: Yale University Press, 1996), 176. For the role of the household in governance generally, see See T.F. Tout, *Chapters in the Administrative History of Medieval England* 6 vols. (Manchester: Manchester University Press, 1920-33). Jolliffe, *Angevin Kingship*, 189-209: J.H. Johnson, "The King's Wardrobe and Household" in *The English Government at Work, 1327-1336* ed. J.F. Willard and W.A. Morris, 3 vols. (Cambridge, MA: Harvard University Press, 1940-50), i. 206-49. David Starkey, "Introduction" in *The English Court: From the Wars of the Roses to the Civil War* ed. David Starkey, *et. al* (London and New York: Longman, 1987), 1-24.

[6] In general, historians have neglected the office of the constable. See a manuscript history of the office in TNA, WO 93/5.

[7] Fleta, ii. 109. Maurice Keen has found only very small bits of evidence that the constable had military jurisdiction in the thirteenth century. "The Jurisdiction and Origins of the Constable's Court" in *Nobles, Knights and Men-at-Arms in the Middle Ages* ed. Maurice Keen (London: The Hambledon Press, 1996), 144.

[8] Joliffe, *Angevin Government*, 191-2.

greater nobles. Thus, many different marshals and constables operated within the king's dominions at any time. The office of the marshal in particular became associated with all English law courts. In King's Bench, in Exchequer, and in the king's Eyre, the marshal provided services similar to the ones he provided the king's household. He served as a jailor. He executed the judgments of the court. And in itinerant courts, he set up and supervised camp.[9]

The kings of England differentiated members of the household who had been knighted and those who were not expected to fight during states of war. As early as the reign of Henry I, the king set forth different constitutions for his knights and for his other household members.[10] What precisely these substantive differences were it is hard to say. Prior to the fourteenth century, the only survival of ordinances for knights comes from Richard I's Crusade at the end of the twelfth century.[11] This code comprised only four articles, including murder, theft, remonstrating against a fellow soldier, and assault. But it is almost certain that during this time more customary rules relating to discipline in war existed than just the four simple articles ordained by Richard I.

The militarized household helps us better understand the only surviving plea roll of the army – the so-called *placita exercitus* – that dates from Edward I's campaign against Scotland in

[9] Thomas Madox, *The History and Antiquities of the Exchequer of the Kings of England in Two Periods* (London, 1711), 725, 728; Helen Cam, "The Marshalsy of the Eyre" *Cambridge Historical Journal* 1, no. 2 (1924), 133-37; *Select Cases in the Court of King's Bench Under Edward I* ed G.O. Sayles (London: Selden Society, no. 55, 1936), lxxix-xc. In the late sixteenth century, histories of the marshal of England, written at the behest of the 2nd Earl of Essex who had just been named the marshal of England and who wanted to know his rights, outlined the many duties of the medieval marshal. See for example, BL, Cotton Vespasian Ms. C.XIV, fos. 65-68v; BL, Cotton Titus Ms. C I.

[10] J.O. Prestwich, "The Military Household of the Norman Kings" *English Historical Review* 96 (1981): 7-9.

[11] "Charter of Richard, King of England, for the government of those who were about to go by Sea to the Holy Land" (1189) *Journal of the Society for Army Historical Research*, 5 (1926), 202-203. There were other codes from this period, including one from the armies of Frederick of Barbarossa, Jan Willem Wijn, *Het krijgswezen in de tijd van Prins Maurits* (Utrecht, 1934), 108.

1296.[12] The roll, now housed in the Exchequer records at the National Archives, is the only surviving plea roll of the army of the middle ages. Indeed the next surviving courts martial records for soldiers are not until the 1640s during the English Civil War. The fact that the recorder – the deputy marshal of the army, John Lovel – titled it "the army plea roll" signifies they thought it to be distinctive from other plea rolls – the king's pleas for example. And yet, there is no discernible difference in procedure between how soldiers were adjudged on the army plea roll and how a common law court would adjudge ordinary defendants.

For example, David Gam, a soldier on campaign with the king, came before the court on 8 August 1296. Richard of Hale had accused Gam of stealing his "striped supertunic" at "Le Whele." Gam denied Hale's accusation and claimed he had bought the supertunic at a market in Gedeworthe. The jury did not believe Gam and convicted him. They valued the tunic at 10d, thereby saving his life. Only one case on the roll involves substantive law specific to the army. On 10 July, Alelinus de Wheltone came before the king to answer why he had broken the king's proclamation not to advance, on pain of forfeiture, before the banner of the marshal. Wheltone pleaded ignorance, but the court found him guilty and imprisoned him at the king's will. The procedure of the case against Wheltone seems to be the same as the procedures against more common civilian felonies like theft.[13]

The roll does not reveal whether the constable, marshal, or steward sat in judgment, although we can hypothesize that judicial responsibilities upon the banner being raised shifted

[12] TNA, E 39/93/15.The roll has been calendared in *Calendar of Documents to Scotland* ed. Joseph Bain 2 vols. (Edinburgh: General Register House, 1884) ii. no. 822. This plea roll has gone unexamined by those who have argued for a medieval form of martial law. It has been briefly examined by Michael Prestwich. Prestwich, *War, Politics, and Finance under Edward I* (London: Faber and Faber, 1972), 107.

[13] *Calendar of Documents Relating to Scotland,* ii. no. 822.

from the steward to either the constable or the marshal.[14] In either case, the roll certifies that the court of the King's Hall, or Court of the Verge, heard cases against soldiers. While the king provided different substantive law for his knights during campaigns, he seemed to have them tried at the Court of the Verge by a procedure identical to that of King's Bench, Common Pleas, or itinerant common law courts. Further, the officers that tried soldiers also had jurisdiction over civilian pleas. While temporal and even substantive boundaries existed for these martial jurisdictions, the courts of the king's host shared a common inheritance with the king's other courts.

Notoriety and the Case of Thomas of Lancaster

The few historians who have sought the origins of martial law have not looked at the *placita exercitus*, the Court of the Verge, or the commissions that delegated legal powers to English captains who commanded garrisons. Instead, they have looked to treason cases during the reigns of Edward I and Edward II in the first half of the fourteenth century. They have connected those trials with treason trials before the constable and the marshal in the fifteenth century and even martial law trials in the sixteenth century.[15] There are two problems with this approach. One, no concept of martial law existed in the early fourteenth century. Two, this approach fails to take into account the jurisdictional boundaries MPs installed on treason

[14] We know the marshal was hearing and determining cases in this period due to a report of a mutiny in 1295 against the marshal of Gascony, Ralph Gorges, for the brutal sentences he carried out. Prestwich, *War, Politics and Finance under Edward I*, 107.

[15] J.V. Capua, "The Early History of Martial Law" *Cambridge Law Journal* 36:1 (Apr: 1977): 152-73. J.G. Bellamy is much more cautious than Capua, but he does see sixteenth century martial law as the inheritor of the treason by notoriety tradition. *The Law of Treason in England, in the Later Middle Ages* (Cambridge: Cambridge University press, 1970), 212. The best narrative of the fifteenth century trials comes from the work of Maurice Keen. Keen, "Treason Trials under the Law of Arms" in *Nobles, Knights and Men-at-Arms in the Middle Ages* (London: Hambledon Press, 1996), 149-67; Keen., "The Jurisdiction and Origins of the Constable's Court," in *Nobles, Knights and Men-at-Arms*, 135-49.

procedure in the middle of the fourteenth century. Nevertheless, because some of the debates over the legality of these treason trials became famous, jurists in the early modern period looked back to them when they searched for strategies to restrain martial law jurisdiction.

Legal scholars in the late thirteenth and early fourteenth centuries in England understood treason law from Bracton. Treason comprised the betrayal of the king by one or more of his subjects. For Bracton, treasons were the compassing of the king's death, conspiring with the king's enemies, forging the king's great seal, or counterfeiting the king's money. If anyone knew about these crimes, they had to quickly come forward – within two days – or they too were guilty of treason. The later legal writers of the late thirteenth and early fourteenth centuries generally followed Bracton's definitions.[16] The substance of Lese-Majesty regulated the behavior of subjects during war. For Bracton, lese-majesty was when a subject "does something or arranges for something to be done to the betrayal of the lord king or of his army."[17] In order to understand Bracton's inclusion of the army with the person of the king, we need to understand the genealogy of Roman treason law, which had almost certainly influenced Bracton's thinking on lese-majesty. Embedded in the idea of majesty was the older idea of *perduellio,* or "the bad soldier." Crimes related to *perduellio* included conspiring to betray garrisons, deserting the army to that of the enemy, furnishing the enemy with supplies or information, and breaking an exile.[18] The substance of treason law had always been intertwined with war and the army. There was thus no substantive need for a separate military jurisdiction to try Bracton's treason during times of war in the late thirteenth and early fourteenth centuries.

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[16] *De Legibus et Consuetudinibus Angliae* (hereafter *Bracton*) ed. George E. Woodbine, trans. Samuel E. Thorne 4 vols. (Cambridge, MA: Belknap Press, 1968), ii. 334-8; Bellamy, *The Law of Treason in England*, 1-22.

[17] *Bracton*, ii. 334.

[18] Floyd Seyward Lear, *Treason in Roman and Germanic Law: Collected Papers* (Austin: University of Texas Press, 1965), 6-7.

Up until the reign of Edward I, monarchs offered leniency to those who had risen against them. [19] But beginning in the reign of Edward I, English monarchs punished nobles who had waged war against them more harshly. There were two reasons for this change in enforcement. First, since the middle of the thirteenth century, legal theorists, in particular those at the court of French kings, had asserted more aggressively that open resistance was treason. Second, England in the thirteenth century had been a realm engulfed in chaos. Throughout the long and troubled reign of Henry III, nobles engaged in near-constant conspiracies or outright revolts against their king. The idea to start brutally punishing nobles for their plots for the purpose of the maintenance of order probably arose from these chaotic years.[20] Edward I successfully pursued this policy; his less successful son attempted to imitate him. Starting with Welsh and Scottish resistors to Edward I's conquests in the late thirteenth century and ending in English barons conspiring against his son in the 1320s, Edward I and II executed a substantial number of nobles for treason.[21]

But they did not do so at common law. Instead Edward I and his son used two interrelated procedures to punish recalcitrant nobles: conviction upon record and notoriety. Conviction upon record meant that the king could assert, solely by his own knowledge, that one of his subjects was guilty of a crime. Monarchs utilized this concept throughout Western Europe in the fourteenth century, with French kings in particular using it to punish their rebellious nobles.[22] We can trace the idea to the notion that the king was the fountain of justice and had supreme

[19] Bellamy, *The Law of Treason*, 10, 23-4; W. Ullman, "The Development of the Medieval Idea of Sovereignty" *English Historical Review* lxiv (1949): 9.

[20] Bellamy, *The Law of Treason*, 23-4

[21] Ibid., 23-58.

[22] Bellamy, *The Law of Treason*, 23-58. For the French kings' use of this concept, see S.H. Cuttler, *The Law of Treason and Treason Trials in Later Medieval France* (Cambridge: Cambridge University Press, 1981), 55-6, 85-7.

legal authority.[23] For example, in 1306 Edward convicted fifteen Scots and an Englishman solely by his record. That year, after previously capitulating to Edward, Robert Bruce revived Scottish resistance to Edward after he murdered Edward's leading deputy, John Comyn. The Crown caught the sixteen men who had participated in the resistance movement in the aftermath of a battle won by the English forces near Perth and imprisoned them at Newcastle Gaol before several of Edward's justices delivered them. The justices proceeded according to the written orders they had received from their king. The king ordered the Englishman, John de Seton, to be hanged, drawn, and quartered because he had taken a castle for Robert the Bruce and had been present at the murder of John Comyn. He convicted the next man, Bernard Mowat for levying war against the king and for killing the king's valet, and burning his churches. The king convicted the other fourteen for levying war against him. The justices recorded their crimes as being "notorious and manifest."[24]

Monarchs usually used notoriety when they convicted one of their subjects upon their record.[25] Notoriety – a procedure developed by Roman-canon lawyers on the continent – meant that a person's crimes were so well known and the person so infamous, that evidentiary proof like witness testimony or a confession was unnecessary for conviction. In Roman law, jurists and princes used notoriety both to convict suspects and to bring them to trial in lieu of an information or accusation. In England, monarchs primarily used the concept to convict men taken in arms against them of treason. The sixteen men Edward I had executed in 1306 were notorious criminals, it seems, because they had been caught red-handed fighting against the king.

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[23] T.F.T. Plucknett, "The Origins of Impeachment" *Transactions of the Royal Historical Society* 4th ser. 24 (1942): 56-63.

[24] Quoted in Bellamy, *The Law of Treason*, 41.

[25] John L. Barton, *Ius Romanum Dedii Aevi* (Roman Law in England) (Milan: Giuffrè, 1971), 71-2.

Edward II continued to use both notoriety and conviction upon record in his reign. The most famous case involved Thomas, the Second Earl of Lancaster. Thomas had from the beginning of the reign opposed the king's policies and his favored ministers, which included the infamous Despensers who had come to dominate the king's court by 1319. In 1321, Thomas became convinced by other dissenting lords to participate in an armed insurrection that was aimed primarily at attacking the lands of the Despensers. The rebellion was quickly foiled. In 1322, Edward and his armies caught Thomas of Lancaster at Pontrefact Castle. A group of justices convicted him due to the notoriety of his offence, and had him beheaded.[26]

Looking back on these tribunals, historians have been tempted to call them courts martial. They were treason trials "according to the law of arms" or before the "Court of the Constable and Marshal," a military tribunal established later on in the fourteenth century which we will examine shortly.[27] Others have been so bold as to call these proceedings "drumhead courts martial," or "drumhead tribunals," a clear allusion to a nineteenth century name for an ad hoc military tribunal organized during a state of war which he contrasted with courts martial that followed procedures set forth by the Mutiny Act.[28] These claims challenge us to look more closely at the personnel and procedures of these tribunals.

First, there was nothing exclusively military about the personnel that sat on these tribunals. In the trial of the sixteen men taken near Perth in 1306, the justices of the realm pronounced sentence. In the trial of Lancaster, the Despensers pronounced sentence. In the

[26] J.R. Maddicott, "Thomas of Lancaster" in *ODNB.* For an overview of the politics of the reign, see J.R. Maddicott, *Thomas of Lancaster, 1307-1322: A Study in the Reign of Edward II* (London: Oxford University Press, 1970), and Seymour Phillips, *Edward II* (New Haven: Yale University Press, 2010).

[27] Capua, "The Early History of Martial Law."

[28] Capua, "The Early History of Martial Law," 154, 166. For the definition of drumhead tribunals, see R.B. Scott, *The military law of England (with all the principal authorities) adapted to the general use of the army, in its various duties and relations, and the practice of courts martial* (London, 1810), 56-8.

treason case of Andrew de Harclay, the Earl of Carlisle, in 1323 for illegally treating with the King of Scots, the king named "Edmund Earl of Kent, the king's brother, John de Hastynges, the king's kinsman, Ralph Basset, John Pecche, John de Wysham, knights, and Geoffrey le Scrop" to pronounce sentence.[29] The trial of William Wallace likewise featured many of the king's most prominent ministers. The commonality that runs through these cases is that a small number of men closely associated with the king's household pronounced a sentence declared by the king.[30]

In all of these cases, the defendants could not answer the charge laid forth by the king. Instead, the assigned justices read aloud the sentence against the defendant. In the case of Andrew de Harclay, the judges pronounced that he had "as a traitor to thy lord the king" led the men of his county against the king in alliance with the Scots. As a result, the judges ordered de Harclay to be degraded – the losing of one's military titles. Finally, the judges ordered de Harclay to be "hanged and drawn."[31] Even though de Harclay's titles were degraded, there was nothing exclusively military about the tribunal.

We discern a specific military jurisdiction in only one case. In 1322, the king convicted Sir Roger Damory of participating in the same rebellion as Thomas of Lancaster. But instead of having justices of the realm pronounce judgment, Edward instructed his constable and marshal to do it. The record of the proceeding has survived. There is no discernible difference between the procedures of the Damory trial and those of the other treason trials. The constable and marshal read out the sentence of treason and pronounced judgment in the name of the king on the defendant. The claim to jurisdiction, however, was unique. First, the clerk named the record

[29] *CPR*, 1321-24, 260.

[30] Bellamy, *The Law of Treason*, 32-9.

[31] Quoted in Keen, "Treason Trials under the Law of Arms," 152-53.

"*placita exercitus*," just like the army plea roll of Edward I. The name signified a martial jurisdiction. Second, the constable and the marshal justified their jurisdiction due to the the "state of time" in which Damory committed his offences. Damory had committed treasons against his lord the king, with his "banner displayed."[32] The sentence of Damory referenced his having displayed his banner on three occasions. The constable and marshal of the army could proclaim sentence on Damory because he had committed his treasons in a state of war.

With treason law as with the disciplining of soldiers, English jurists understood a temporal boundary between states of war and states of peace. But there was no discernible distinction in procedure between the tribunals of war and those of peace. The personnel overlapped because the king's household ran the courts in both states of time. The boundary between military and civilian jurisdictions would only become discernible in the aftermath of the jurisdictional politics that took place during the reign of Edward III.

In the first year of Edward III's reign, 1327, members of parliament attempted to confine conviction by record to a state of war. Nobles, clearly, would have been interested in constraining this power. They did so by using clause 29 of Magna Charta, the great charter that had been signed by John and his barons in 1215, which stated that no freeman "shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[33] As J.C. Holt has noted, the fourteenth century was the time of the great "mythmaking" of Magna Charta when MPs used its clauses – especially 29 – to attack novel jurisdictions by Edward III or his forbears.

[32] The record of the trial has been printed in L. W. Vernon Harcourt, *His Grace the Steward and Trial by Peers: A Novel Inquiry into a Special Branch of Constitutional Government founded entirely upon original sources of information, and extensively upon hitherto unprinted materials*, (London: Longmans, 1906), 400. The original wording is "baner desplye."

[33] Quoted from the edition of Magna Carta in Anne Pallister, *Magna Carta: The Heritage of Liberty* (Oxford: Oxford University Press, 1971), 117.

They did so by claiming that clause 29 meant that all subjects deserved a trial by jury or by their peers, after an indictment or presentment. Their attacks began with a review of the treason conviction of Thomas of Lancaster.[34]

Members of parliament reversed Lancaster's conviction.[35] According to their theory, Edward II wrongly condemned Lancaster because he had convicted him by his record and not by the laws of the land. And according to clause 29 in Magna Charta, so MPs claimed, no man could be tried by life or limb except by the law of the land and by his peers. But MPs made an exception. Lancaster's trial would have been legal had he been convicted upon record during a state of war. MPs defined a state of war in two ways: first, a state of war existed when the king raised his banner. This definition was not unusual. We have already seen legal writers like Fleta employ this signifier. MPs thus allowed the king, using his discretion, to raise his own banner and to declare a time of war. This state would have been circumscribed to the 12 mile circumference around the king's body.[36]

Second, MPs defined a state of war to be when the Chancery and the king's courts at Westminster were closed. They focused on the Chancery because unlike the Courts of Westminster which went on vacation, Chancery never closed to those wishing to obtain judicial writs. The obtaining of the writ, the action necessary to start the legal process at Common Pleas, signified a state of peace. This claim subsequently became famous in the seventeenth century.

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[34] J.C. Holt, *Magna Charta* (Cambridge: Cambridge University Press, 1992), 1-22. For an overview of the ways in which jurists adapted Magna Charta in the fourteenth century, see Faith Thompson, *Magna Carta: its role in the Making of the English Constitution, 1300-1629* (Minneapolis: University of Minnesota Press, 1948), 68-99.

[35] The reversal can be found in *Rotuli Parliamentorum; ut et Petitiones, et Placita in Parliamento Tempore Edwardi R. III* (Ann Arbor: [authorized facsimile] University Microfilms International, 1984), 3-5. For the background to Edward III's first year in power, see W. Mark Ormrod, *Edward III* (New Haven: Yale University Press, 2011), 57-66.

[36] *Rotuli Parliamentorum*, 5.

But it is difficult to understand where the MPs of 1327 obtained this idea. Seventeenth century scholars, often looked to Bracton in order to understand what constituted a state of war. Unfortunately, Bracton only provided more definitions of what constituted a state of war, and did not definitively align with the later reversal of the conviction of Thomas of Lancaster.

Bracton generally wrote about a state of war while commenting upon the language of "in peace" inscribed in several petty assize commands – orders to convene an enquiry of twelve men to decide judicial issues such as whether someone had been illegally disseized of his land, inheritance claims, and claims to church benefices.[37] For example, the assize of novel disseisin asked that a sheriff upon the complaint of "A" that B" had unjustly disseized him and upon security by A given cause the "same tenement with the chattels to be in peace" until the king's justices arrived to hear judgment.[38] Bracton interpreted "in peace" as a state of lawfulness. In his most extensive discussion on the matter, Bracton believed a state of war to be the unlawful disseizing, through force or extortion, of a tenement or chattels. Therefore, in an assize of Darrein Presentment, which enquired into who had been the last person to present a benefice to a vacant church, if the person had taken the benefice "in a state of war," he could not claim a right to it. A state of war was thus very particular to a given case. It existed due to the illegal actions of one actor.[39]

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[37] The only scholar to address Bracton's definition of a state of war is Karl Güterbock, *Bracton and his Relation to the Roman Law: A Contribution to the History of the Roman Law in the Middle Ages* trans. Brinton Coxe (Philadelphia: J.B. Lippincott, 1866), 42n.

[38] Printed in J.H. Baker, *An Introduction to English Legal History* (London: Butterworths, 2002), 545.

[39] *Bracton,* iii. 57, 213; iv. 171. This definition was cited in numerous medieval law sources. *Bracton's Note book: A Collection of Cases decided in the Reign of Henry the Third* ed. William Maitland 3 vols. (Littleton, CO: F.B. Rothman, 1983), no. 412. *Britton*, 471; Bracton's definition of a state of war was consistent with interpretations of states of war in the early middle ages. See P.J.E. Kershaw, *Peaceful Kings: Peace, Power, and the Early Medieval Political Imagination* (Oxford: Oxford University Press, 2011), 23-9. Hobbes' much more famous "state of war" was generally consistent with these medieval interpretations. Hobbes, *Leviathan* ed. and trans. G.A.J. Rogers and Karl Schuhmann 2 vols. (Bristol: Thoemmes Continuum, 2003), ii. pt. 1 ch. 13.

At the same time, Bracton understood war to be more general than just the simple illegal actions of one man or woman. Therefore, states of war and states of peace could be intertwined: "it may at any time be a time of war and a time of peace, not absolutely but with respect to some."[40] The question then is what defined a state of absolute war for Bracton? Traditionally, the answer has been a state of time when the courts were closed. If this hypothesis is true, Bracton probably formed this idea from the three year period from 1214-1217 when King John had fought a civil war against his barons.[41] At this time, according to one of the leading chroniclers of the period, the Court of Exchequer closed because its judicial officers stopped obeying the king's commands. It is possible but only possible that Bracton understood a state of general war to be when the courts were closed. Scholars of the early modern period looking back on Bracton came up with multiple definitions of what constituted a state of war in part due to this confusion.

As J.G. Bellamy has noted, the case against Lancaster and its subsequent reversal "first connected conviction on the royal record with trial for treason under the law of arms."[42] From this point forward, English jurists increasingly associated treason convictions upon record with the "laws of arms," and with the multiple conceptualizations of a state of war. This transformation took place not simply because of the reversal of Thomas of Lancaster, but also because of the subsequent passing of the great treason statute in 1352. The statute would provide the substantive basis for future common law treasons. The MPs pressed Edward for this statute due to his and his judge's expansion of the substance of treason during the 1340s. But they were also still concerned about treason trials by notoriety. The MPs took two steps to shape treason

[40] *Bracton*, iii. 213.

[41] Bracton referenced the troubles during the reign of John, but did not reference the courts closing. *Bracton*, iv. 171.

[42] Bellamy, *The Law of Treason*, 51.

law. First, Edward agreed that he could not alienate any property except if the defendant had been convicted by the laws of the land and trial by peers. Second, MPs passed a treason statute that set the boundaries for the substance of treason law. In the immediate aftermath of the passing of the treason statute, the king and MPs overturned two convictions made in the 1320s by notoriety.[43]

Through jurisdictional politics, MPs had removed treason trials by notoriety to states of war by claiming that Magna Charta had forbidden the practice. While their historical claims, as J.C. Holt has noted, were selective, their interpretation had a profound impact on the future of treason trials. The king could only utilize trial by record during a state of war. And even in these states of war, the king could not alienate property of those he had convicted upon his record. Thus, when the monarchs of the fifteenth century used conviction upon record, they always justified the maneuver by making a temporal claim to jurisdiction.

The monarchs of the fifteenth century used conviction upon record to destroy their enemies.[44] In 1405, for example, Henry IV brought Henry de Boynton came before the Constable of England, John of Bedford at Berwick. Boynton had participated in a rebellion raised by Henry Percy, the Earl of Northumberland against Henry IV. Lancaster declared that it was notorious that Boynton was guilty of treason. He had ridden in arms against his king and forced him to fire his cannons against one of his own cities. The firing of a gun at a fortress, like the raising of the banner in a field of battle, signaled a state of war. Upon order from the king,

[43] Ibid., 59-101.

[44] For an overview of this tumultuous period, see Christine Carpenter, *The Wars of the Roses* (Cambridge: Cambridge University Press, 1997).

Lancaster convicted Boynton of treason, supposedly by the "laws and usages" of war, and had him hanged, beheaded, and quartered.[45]

In the 1460s, after Edward IV had usurped the Crown, and murdered Henry VI, he sought retribution through the officers of the Constable and the Marshal. The king's enemies labeled Sir John Tiptoft, Edward's constable, the "butcher of England" in the 1460s for punishing Edward's enemies by the "lawe padowe" (law of Padua = Civil Law).[46] However, his acts were consistent with earlier convictions by notoriety. For example in 1464, Tiptoft as constable held court against Sir Ralph Grey, a Lancastrian captain who had resisted Edward IV through arms. At Grey's trial, Tiptoft announced that his treasons were "so evidently against thee that there no need to examine thee of them."[47] Then he ordered Grey to be degraded before being dragged to his site of execution and beheaded. His body was to be "buried in the Friars, thy head where it please the king."[48] When Henry VI briefly regained the throne, his ministers, many of whom had relatives executed by Tiptoft, brought him before the Court of the Constable and the Marshal.[49] The Earl of Oxford, whose father had been convicted of treason at Tiptoft's court, presided as constable in Tiptoft's trial. He convicted the butcher of England of notorious treason. After Edward IV reclaimed the throne, he meted out retribution through his constable –Richard Duke of Gloucester, the future Richard III – who executed the leading followers of Henry VI of

[45] Keen, "Treason Trials," 149-50. By the fifteenth century, there were common "signs of war" used throughout Europe that lawyers could use at the Courts of the Constable and Marshal to either justify or condemn acts of violence. Maurice Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & Kegan Paul, 1965), 101-18.

[46] For Tiptoft, see Linda Clark, "Tiptoft, Sir John," in *ODNB.*

[47] Quoted in Keen, "Treason Trials," 154.

[48] Ibid.

[49] Vernon Harcourt, *His Grace the Steward*, 362-415.

notorious treason. Conviction upon record was still potent, although restricted to war. But as we shall see, it was only influential in the history of martial law because controversies over its jurisdiction produced several claims as to what constituted a state of war.

The Court of Chivalry and the Courts of the Constable and the Marshal

The treason trials that constables and marshals heard and determined were not their sole or even primary judicial responsibility. The courts that had cognizance over acts committed during war did not usually employ the concept of notoriety. Instead, by the middle of the fourteenth century, the king of England and his ministers established a court at Westminster – the Court of the Constable and Marshal or Court of Chivalry – that had cognizance over the business of war which utilized Roman Civil Law procedure. Neither the Crown nor MPS confined this court to a temporal state of war. Alongside this standing court were the itinerant courts of the army, which although also being administered by constables and marshals, differed significantly in procedure from the Court of Chivalry.

The Crown forged the Court of Chivalry during what is now called the Hundred Years War between the kings of England and those of France. The inspiration for the court came from the French Court of the Connétable, which had a permanent jurisdiction over the laws of war in France from the beginning of the fourteenth century.[50] The Crown created it to handle disputes relating to the "military commercialism" of the fourteenth and fifteenth centuries. By the middle of the fourteenth century variants of the Court of Chivalry sat throughout Western Europe.[51]

[50] For the French court, see J.H. Mitchell, *The Court of the Connétablie: A Study of a French Administrative Tribunal during the Reign of Henry IV* (New Haven: Yale University Press, 1947), 7-13.

[51] On the establishment of these courts, see Keen, *The Laws of War*, 7-62.

The courts heard and determined cases based on the complex rules relating to the conduct of war. These rules were generally known as the "laws of war," or the "laws of chivalry:" customary rules related to martial behavior that had been developed in the middle ages. Jurists and military theorists justified the application of these rules by claiming they were part of the *ius gentium* or the "law of nations."[52] Roman Canon law also informed the laws of war. Finally, the laws of war were particular to the profession of soldiers in line with Thomas Aquinas' view that "human law may be divided according to categories of men who perform specific tasks for the common good."[53] Just as merchants, sailors, members of the household, and clerics had specific rules that applied to them, so too did soldiers.

The laws of war were related to but not identical with the idea of chivalry. The leading historian of chivalry has described it as an "ethos in which martial, aristocratic, and Christian elements were fused together."[54] Starting in the eleventh century court writers began making prescriptive literature on ideal knightly behavior for the warrior classes who served in the retinues of great nobles. By the early fourteenth century, the ideal of the chivalric knight was a common trope. The literature stressed that the knight uphold the values of the Church and those of the people they were supposed to protect. It focused on these values in particular: generosity, courtesy, faith, loyalty, prowess, and honor.[55] This common code of behavior was recognized throughout Europe.

Substantive differences between the laws of war and English common and statutory law existed in three of the most pertinent areas of law relating to the soldierly profession. First the

[52] Quoted in Keen, *Laws of War*, 8.

[53] Quoted in Keen, *Laws of War*., 15.

[54] Maurice Keen, *Chivalry* (New Haven: Yale University Press, 1984), 16.

[55] Ibid., 159.

soldiers had a law of treason distinctive from that of English law. For example, in 1418 Henry V heard a case in his court against Jean D'Angennes while invading the north of France. D'Angennes, a subject of the king of France, had surrendered Cherbourg to Henry's army. D'Angennes received a safe-conduct after the surrender and had travelled to Rouen where he was once again captured by English forces after that city fell to Henry's army. D'Angennes was brought before Henry and accused of treason. His crime was that he had abandoned Cherbourg while the garrison in the city still had enough material resources – food and ammunition – to continue fighting. How was this treason? D'Angennes had committed treason not against Henry V, but "rather to his faith and knighthood."[56] A man, who through his actions had aided Henry in his conquest of northern France, nevertheless paid for it with his life at the hands of the very man who he had helped. Henry V convicted him not as king of England but as a fellow member of the order of knighthood.

Along with cases of treason, the law of arms had rules relating to the taking of plunder.[57] Soldiers had a right to plunder the movable property of the enemy. But disputes often arose over whether the property so taken had actually been owned by subjects of an enemy prince. Further, local communities often entered into a contract with garrisoned forces where they would provision the army but save themselves from complete spoliation. Any perceived breaking of these contracts (*raencons du pays,* or *appati*) by either side could lead to litigation.[58] Most disputes involving spoil surrounded competing claims to its division. The King of England, or his surrogate, for example, had claims on one third of all movable property taken by any soldier

[56] Keen, *Laws of War*, 46, 53.

[57] Ibid., 137-54.

[58] Ibid., 251-3.

serving in his army. Commanding officers usually also claimed a portion. By the end of the fourteenth century labyrinthine rules had been constructed for how spoil should be divided. Military courts adjudicated these disputes.

They also adjudicated ransom claims.[59] These disputes usually took two forms: first there was a contest over who actually took the enemy prisoner, and therefore who had a right to the ransom. Second, there were contests over ransom payments once a captor had paroled his prisoner. A right to ransom by the end of the fourteenth century was a form of property and was thus heritable. For example, if someone took a prisoner who was subsequently tried and executed for treason, the captor could sue his prince for compensation at a court of war. Further, while the prisoner of war was technically not a slave to his captor – provided the prisoner was a Christian – he was bound to him. Therefore, if he could not pay, a prisoner of war often ended up serving his captor in some capacity; with the strange twist that some ended up fighting in their captor's armies against their liege lord. Any perceived breach between the agreements made between a captor and his prisoner were adjudicated at military courts.[60]

Finally, the laws of war had complex rules relating to armorial bearings or heraldry.[61] Initially, knights used armorial bearings to identify themselves to others while wearing armor and headgear. By the fourteenth century, heraldry signified family heritage as well as prestige and specific honors granted to the knight by his lord. The knightly class developed rules for making heralds – specific color combinations and specific representations of animals and the like. A professional class of antiquarians, or heralds, kept track of the specific heralds of noble

[59] Ibid., 156-88.

[60] Ibid., 156-163.

[61] G.D. Squibb, *The Court of Chivalry: A Study of the Civil Law in England* (Oxford: Clarendon Press, 1959), 162-90.

families. And disputes often arose over the uses of heralds. Complex litigation by the end of the fourteenth century took place in the Court of Chivalry about heraldic inheritance, the stealing of heraldic symbols, and the improper making of heralds. The substance of heraldic law was customary, not written, and military courts often took evidence from professional heralds when they adjudicated cases.[62]

Like the Court of Admiralty, the Court of Chivalry utilized Roman law procedure. If a plaintiff wanted to pursue an action at the Court he would issue a "libel" or complaint. The court would then command the defendant in the complaint to respond. This process would then be replicated, triplicated, and even quadruplicated. Once the issue had been joined, the court would take witness testimony by commissioning certain members of the court to depose the listed witnesses. The depositions – as typical with Civil Law – were written, not taken live at the confrontation stage of the hearing (*viva voce*). The witnesses both for the plaintiff and for the defendant would answer questions crafted specifically in relation to the libel and to the answer. Ultimately, either the Constable or the Marshal delivered a verdict. They often did so upon the consultation of learned advisors who were usually Roman Civil Lawyers. The Court's jurisdiction was not absolute. If the loser of a case did not like the decision reached at the court, they could appeal the decision to the king through Chancery. The king in turn would issue a commission through Chancery for delegates – usually one or two of them trained in Civil law – to hear the appeal.[63]

[62] Keen, *Laws of War*, 16.

[63] Anon., "The Manner of Judicial Proceedings in the Court of the Constable and Marshal (or Court Military) touching the Use and Bearing of Coats of Arms; observed and collected out of the Records of the Tower of London" in *Collection of Curious Discourses* ed. Thomas Hearne 2 vols. (London, 1775), ii. 243-9.

Cases of treason or murder were often brought in upon an appeal. An appeal began when an appellor made an accusation in court against another. If both the appellor and the defendant were men, the outcome of the trial would be decided by battle. Prior to 1215, if one of the two was exempt from battle, the case would be decided by an ordeal. After the banning of the ordeal by the Fourth Lateran Council, the case would be decided by a jury. An appeal could also be brought by an "approver," a person who had participated in a crime but sought exemption by accusing his companions and proving their guilt through battle. This system ultimately depended on private initiative. If an accuser did not want to bring a case to trial – perhaps instead negotiating with the accused out of court, or perhaps because he did not want to fight – the felony might not be punished. This avoidance was a cause for concern for the Crown, who stood to inherit the felon's lands should they be convicted. Thus by the fourteenth century, due to attempts by successive English kings to curtail appeal of felony, most felonies were brought in before a court through a presenting jury. Probably because the Court of Chivalry could not alienate property, appeal of felony was the most common way in which military crimes were brought before the court.[64]

The Court of Chivalry sat in Westminster. Its popularity among litigants caused concern amongst lawyers and members of the Commons. In 1389 MPs successfully turned these concerns into a statute that sought to circumscribe several courts that threatened Common Pleas. The parliament reasserted that the Court of the Verge could only try cases within the twelve mile space around the king. It asserted that the Courts of Admiralty only have jurisdiction over "a Things done upon the sea" not within the realm. Finally, MPs complained that the Court of

[64] Squibb, *Court of Chivarly*, 22-25. For trial by battle and appeal generally in the later Middle Ages, see J.G. Bellamy, *The Criminal Trial in Later Medieval England* (Toronto: University of Toronto Press, 1998), 19-56.

Chivalry "daily doth incroach upon Contracts, Covenants, Trespasses, Debts, and Detinues and many other Actions pleadable at the Common Law."[65]

The boundaries MPs gave to the Court of Chivalry were topical and geographical. The Court had "cognizance of contracts touching deeds of arms and of war out of the realm, and also things that touch arms and war within the realm which cannot be determined nor discussed by common law."[66] The Court was thus circumscribed to a military cognizance abroad and at home that did not infringe upon common law. If a plaintiff had cause to complain of being subjected to the Court of Chivalry he could obtain a Privy Seal to stop the proceedings until the king and his council decided whether or not the case should be heard in the Court of Chivalry.[67]

The MPs were not concerned with felony or military discipline. Rather, MPs were concerned with civil pleas. As Maurice Keen has noted, some litigants probably tried to shop jurisdictions in cases of debts relating to military contracts.[68] MPs did not ban the disciplining of soldiers by martial jurisdiction, which could be construed as a "thing that touches arms and war within the realm." More importantly, 13 Richard II was vague. While authorities could use the statute in narratives that attempted to either block or expand martial jurisdictions, the statute itself did not create a consensus about the exact scope of the Court of Chivalry's cognizance.

It is also unclear if 13 Richard II was in any way concerned with the itinerant courts that governed the king's armies while his banner was raised. The relationship between these courts and the standing court of Chivalry has provoked scholarly controversy. G.D. Squibb, the leading

[65] 13 Rich. II. st.1 c.2. For background on the statute, see Squibb, *Court of Chivalry*, 18-20; Keen, "Origins of the Constable's Court," 136-7.

[66] 13 Richard II st. 1 c. 2.

[67] Squibb, *Court of Chivalry*, 19.

[68] Keen, "Origins of the Constable's Court," 137.

historian of the Court of Chivalry, claimed there was no relationship, and admonished older scholars like William Holdsworth who believed that the Court of Chivalry derived from the king's itinerant courts that disciplined soldiers during times of war.[69] Unlike courts martial, the Court of Chivalry, according to Squibb, did not have cognizance over cases relating to the disciplining of the king's soldiers. Maurice Keen, in response to Squibb's claims, reasserted a relationship between the Court of Chivalry and the courts that governed the king's hosts.[70] Both had identical officers, the constable and the marshal. Both had cognizance over matters relating to war. For Keen the Courts of the Constable and Marshal that operated in the king's hosts were ephemeral – bound to the existence of the king's host – while the Court of Chivalry had a permanent jurisdiction. Finally, for Keen, the courts that governed hosts had jurisdiction over the laws of war well before the sitting of the Court of Chivalry at Westminster. The Court of Chivalry was thus inspired, at least in part, from the tribunals of the king's armies.

Keen was right that there were few substantive differences between the Court of Chivalry and the courts of the Constable and Marshal. The Courts of the Constable and Marshal also had cognizance over cases relating to treason, ransom, and armorial bearings according to the laws of war. The Court of Chivalry in turn could have disciplined soldiers. Further, in the *Black Book of the Admiralty*, a fourteenth century tract that recorded the rules relating to the jurisdictions of both Admiralty the Court of Chivalry granted the Constable and Marshal two judicial powers. First, the constable and marshal had jurisdiction over,

> The office of the Connestable and Mareschalle in the time of werre is to punish all manner of men that breken the statutes and ordonnaunce by the kyng made to be keped in

[69] Squibb, *Court of Chivalry*, 26-28. Both Holdsworth and Stephen Adye located the origins of martial law in the court of Chivalry. Holdsworth, "Martial Law Historically Considered" *Law and Quarterly Review* xviii (1902): 117-18. Stephen Payne Adye, *A Treatise on Courts Martial: Containing I. Remarks on Martial Law, and Courts-Martial in General II. The Manner of Proceeding against Offenders* (London, 1778), 9-12.

[70] Keen, "Origins of the Constable's Court," 135-48.

> the oost in the said tyme, and to punish the same according to the peynes provided in the said statutes[71]

Second, the Court, which stood in Westminster, had responsibilities over all disputes relating to deeds of arms. The key difference between the itinerant court and the Court of Chivalry was that it was ephemeral.

The constables and marshals of the itinerant courts probably focused most of their attention on enforcing the articles of war, the lengthy written ordinances of war that commanders proclaimed to their soldiers before the beginning of the campaign.[72] Unlike the customary laws of war, which applied to the military caste in general, the articles of war addressed problems and outline rules specific to the king's host. The king with his chief ministers crafted its substance, and upon completion, ordered the promulgation of the martial "constitutions." The king ordered the proclamations to be written and delivered to every captain in the army. These men in turn communicated the ordinances to the common men. Every man in arms had a responsibility to uphold the constitutions.[73] The punishments for transgressions were severe. The king prescribed death for almost half of the ordinances. Non-fatal punishments included fines, loss of wages, imprisonment, and the degradation of knightly honors – the loss of one's armor and horse.

The Crown wrote rules in the constitutions relating to the taking of prisoners, the keeping of prisoners, and the proof required for "ownership" of a prisoner. The ordinances stipulated that

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[71] *Monumenta Juridica: The Black Book of the Admiralty* with an Appendix, 4 vols. (London: Longman, 1871-6), i. 281.

[72] These ordinances are discussed, albeit briefly, in C.G. Cruikshank, *Army Royal: Henry VIII's Invasion of France, 1513* (Oxford: Clarendon Press, 1969), 94-101. The medieval ordinances have been printed in Francis Grose, *The Antiquities of England and Wales* 8 vols. (London, 1783-97), i. 33-51: Grose, *Military Antiquities respecting a History of the English Army from the Conquest to the Present Time* 2 vols. (London: Stockdale, 1812), ii. 63-8. *Black Book of the Admiralty*, i. 282-99.

[73] *Black Book of the Admiralty*, i. 282.

the Crown receive one third of the ransom payments for any prisoner taken. It also threatened fines against any who attempted to take the prisoner of another by threats or force.[74] Along with regulations relating to the taking of prisoners and of ransom, the medieval ordinances of war sought to impose hierarchical discipline and outlined duties for the soldiers of the host. All men in the host had to be obedient to the king, his constable, and his marshal. Further all soldiers had to perform the tasks assigned to them: watch and ward, foraging, and the like. No soldier could advance without leave of his commanding officer. Nor could a soldier cry havoc (which signified a license to pillage) or retreat without leave of his commanding officer. Leaving the host without permission was punishable by death. So too was any attempt to prevent the king's justice from being performed. Along with the maintenance of a hierarchical discipline, the king sought to prevent disorders from arising amongst the soldiery. All past "debates" between soldiers could not be re-opened within camp. The assaulting of another soldier was forbidden: so too was the robbing of a soldier's loot, forage, or goods or of a merchant licensed to provide victuals for the army.[75]

The ordinances of war also addressed outrages committed by soldiers on civilians, but it only focused on offences committed against the Church and those committed against women. Soldiers were forbidden from pillaging a church, or from taking a "man or woman of holy church prisoner," unless they were armed. More importantly, no soldier, unless they were also a priest, could "touch the sacrament of Godes body" or even touch the "vessel" which carried the sacrament.[76] Transgressors of these articles received the worst punishment in the code: they were

[74] Grose, *Antiquities of England*, i. 35, 37-8.

[75] Ibid., i. 33-51.

[76] Ibid., i. 34.

to be hanged, drawn, and quartered. Along with these constitutions that regulated acts against the church, the king declared that no soldier slay or "enforce" any woman upon pain of death.[77]

We only have small hints relating to the procedure of the itinerant courts. The prescriptive commands the king gave to his army commanders stated that one judge – either the Constable, marshal, or a delegated judge – had powers to hear and determine cases relating to discipline. The ordinances of war for the army of Henry V declared that the king, constable, marshal, or another "juge ordinarie" could judge cases involving life or death.[78] In 1417, Thomas Duke of Clarence heard and determined a case against Walter Sydenham and William Broke, the two supposedly having plundered men who had received a safe-conduct from the king. We know little more about the procedures of these trials but it is possible that the judge had advisors who had experience in the laws of war.

In important cases, the constables of the king's hosts often empanelled knights to hear and determine cases. In these tribunals the knights perhaps acted in a similar fashion to a trial jury. Perhaps they acted like a French presidential tribunal, where only a majority was required to convict. In 1425, for example, after the English conquest of Le Mans, the army commander Lord Scales set up a special tribunal – with himself as president – to hear and determine cases relating to ransom.[79] In 1369, the Black Prince empanelled twelve knights to hear a treason case against the French Marshal D'Audreham, who had been captured after the Battle of Najera. In another case in 1373, John of Gaunt, the commander of an English army, empanelled seven knights to hear a dispute relating to armorial bearings. The Black Prince had taken D'Audreham

[77] Grose, *Military Antiquities*, ii. 63.

[78] Grose, *Antiquities of England*, i. 43.

[79] Keen, *Laws of War*, 33.

prisoner once before after the Battle of Poitiers in 1360. D'Audreham promised the Black Prince after paying his ransom that he would not take up arms against him again. Breaking this promise was treason according to the law of arms. On a technical point, the twelve empanelled knights acquitted D'Audreham of all charges.[80] Unlike the treason convictions based on the king's record or on notoriety, the courts of the Constable and Marshal heard evidence, allowed the defendant to speak in court, and could on occasion acquit the defendant of the charges levied against him.

For less important cases, commanders used procedure by information. We have few clues about this elusive procedural form. At least by 1327, an important word was often included in the commission: *querelas*. *Querelas* or *querelae* meant "plaint" or "information."[81] A plaint was an informal accusation, often made by one person, and often in secret, to a magistrate. Whereas in normal proceedings a bill of indictment was offered to a grand jury which either found it true or found it false. But an information was an "untried bill." No jury had inspected it. Thus, procedures by information did not require a presenting jury or a grand jury in order to try a suspect. The magistrate on his own discretion decided the veracity of the plaint. Along with this increased discretion given to the magistrate, the informer did not have to reveal him or herself publicly.[82]

Procedure by information has been most commonly associated with the Inquisition, the tribunals that throughout the middle ages that heard and determine cases against suspected heretics.[83] But the procedure had also been adopted by English kings by at least 1250. Edward I,

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[80] Ibid., 50-3.

[81] *Rotuli Scotiae in Turri Londinensi et in Domo Capitulari Westmonasteriensi asservati* 2 vols. (London: G. Eyre and Strahan, 1814-19), i. 137, 213. Keen, *The Laws of War*, 40.

[82] Bellamy, *Criminal Law and Society*, 90-114.

[83] Gordon Leff, *Heresy in the Later Middle Ages* 2 vols (Manchester: Manchester University Press, 1967), i. 41-5.

who reigned from the end of the thirteenth century, used it for certain misdemeanors. Edward had even attempted to use the information in cases involving the blood sanction, although this plan was soon abandoned. More often, he and his son utilized informations to discipline their legal officers for malfeasance. This desire to punish by information was common for monarchs in Western Europe in this period. Both the kings of France and Castile used it for similar purposes.[84] The kings of England also implemented arraignment by information in their armies. Edward II in 1327, for example, allowed the captain of his forces in the Marches of Scotland to hear all and singular informations.[85] Since the soldiers were officers of the Crown, procedure by information would have made sense. It is likely that these powers included the ability to take life and limb.

The various courts that possessed officers named Constable and Marshal often overlapped in jurisdiction and in substance. But the courts were hardly identical in procedure or in focus. Thus, to say that procedures by the Constable and Marshal were consistent or uniform is to ignore the sheer variety of procedural and substantive forms relating to war that existed in the middle ages.

Conclusion

Indeed by the end of the fifteenth century there was not one clearly defined martial jurisdiction that was bounded, that had one set of substantive laws, and that had one procedure. There was one set of officers – the constable and marshal – but there were many constables and

[84] Bellamy, *Criminal Law and Society*, 90-1. A. Harding, "Plaints and Bills in the History of English Law, 1250-1350" *Legal History Studies* (1972): 65-86. Edward I first used *queralae* to invite his subject to submit complaints in 1289 about his law officers who had governed England during his absence. See T.F. Tout, *State Trials of the Reign of Edward the First, 1289-93* (London: Royal Historical Society, 1906).

[85] *Rotuli Scotiae*, 137, 213.

marshals that operated in different courts. By the end of the fifteenth century, we can locate procedure by information in the courts that operated in the king's hosts. We can also locate conciliar or tribunal procedure within the same courts for cases deemed to be important enough by the commander to merit legal counsel. We can locate classic Civil Law procedure in the standing Court of Chivalry as well as trial by appeal. And finally, the Crown utilized notoriety for convictions upon record for treason. By the end of the fifteenth century, the Crown glossed these convictions to be by the "laws of arms" in no small measure because MPs were successful in the fourteenth century in removing treason by notoriety into the temporal state of war. But treason by the law of arms did not replace, or even become incorporated into, the "laws of war," the customary rules knights followed in business relating to war. Indeed, the treason law of the laws of war, as we have seen, was completely different than the treason of levying war against the king – which by the fifteenth century was enshrined in statute – that English monarchs used in convictions by notoriety. The procedures and substantive laws that operated during war or in business related to war were complex.

The boundaries of what constituted a martial jurisdiction were just as confused. By the end of the fifteenth century, English monarchs or their commanders or MPs had claimed a legal state of war to be anytime someone broke the law, when the Court of Chancery and those of Westminster were closed, when the king raised his banner, when one of the king's enemies or subjects raised their banner in a hostile manner to the king, when the same enemy fired a siege gun at the king's castle, or when the king fired his guns at his own castle, held by enemies or rebels. Further, the Court of Chivalry was exempt from this temporal boundary, and had cognizance over all business relating to war outside of the realm and all business relating to war not cognizable at common law within the realm. Any attempt to draw a straight line between the

Court of Chivalry, treason convictions by notoriety, or even the most recognizable ancestor to martial law, the itinerant courts of the army, is bound to end in failure. Too many ideas were circulating at the end of the middle ages about substance, procedure, and boundaries in relation to martial jurisdictions.

We should instead understand the middle ages as a wellspring of ideas for early modern jurists. Over the course of the next two centuries, the Crown, MPs, commanders, and jurists would look back to all the forms generated in the fourteenth and fifteenth centuries in order to understand how to resolve their own problems relating to the operation of law during times of war. At various points in time we will see all of the procedures, substantive and customary laws, and the discourses relating to time that were generated in the middle ages selectively used. The sheer variety of legal forms and discourses jurists produced during the middle ages allowed for creativity in later periods. It also allowed for conflict, as jurists supporting martial law and those trying to circumscribe it both had many discursive tools that they could utilize in order to advance their cause.

Part One:
Creation: A Jurisprudence of Terror

The courts of the Constables and Marshals within the king's armies used procedure by information in certain instances to hear and determine cases against those in the king's host. By the 1490s, Henry VII delegated these procedures to commissioned officers who had powers to hear and determine cases according to the customs of the Constable and Marshal. In 1521, Henry VIII executed the Duke of Buckingham, the Constable of England, for treason. The tempestuous king did not find a replacement. The customs of the Constable and Marshal became the customs of the Marshal. Soon, Crown officers began referring to these practices as the laws of the marshal. By the 1530s, they used the phrase martial law.

The banality of the creation of the phrase "martial law" belied the innovation in legal strategy. Starting with Henry VII, Tudor monarchs threatened to try subjects by life and limb at martial law when they feared juries might not convict defendants. Fear of jury nullification led the Tudors to experiment with martial law on those who had risen in rebellion against them, those who practiced deviant forms of Christianity, who harbored pirates, vagrants, and rioters. The point was not to suspend law. It was to remove the discretion from juries, and to give it to judges. Through loyal Crown officers, the Tudors cast doom and judgment upon those who opposed them through martial law's short and swift procedures.

Through the terror inspired by martial law, the Tudors hoped for transformation.[1] Rebellious subjects who saw their compatriots executed would obey. Rough recruits would

[1] For the use of fear as a means to bridle the passions, see Ethan Shagan, *The Rule of Moderation: Violence, Religion, and the Politics of Restraint in Early Modern England* (Cambridge: Cambridge University Press, 2011), 48-50. Terror was not exclusive to martial law. As J.S. Cockburn noted in his history of the assizes, "there is much to suggest that for rural society and average litigant alike assizes assumed the awful remoteness of a divine

become disciplined soldiers. Vagrants and masterless men would turn to industry. Religious deviants would conform. Rioters would cease and desist. Pirates would turn to legal commerce. The Irish would become English. The English would remain "civilized." The transformative power of terror, so the Crown believed, would induce obedience.

visitation." J.S. Cockburn, *A History of the English Assizes, 1558-1714* (Cambridge: Cambridge University Press, 1972), 3. Martial law, I suggest, was simply more terrifying.

Chapter One:
Arraignment by Information:
Making Martial Law, 1490-1588

Tudor monarchs created and used martial law to complement common criminal law procedure. In cases involving potential blood sanctions where Crown authorities either did not want the delay of common law procedure, or when they worried that juries might refuse to convict defendants, they opted for procedure by written information instead of an indictment by grand jury where a Crown judge instead of a petty jury heard and determined the case: martial law.[1] Crown authorities recognized that this swift procedure induced more terror amongst subjects than common law procedure. Thus monarchs often threatened to use martial law in the hopes that it would inspire obedience even when it is unlikely they desired to follow through with their claims. While martial law was associated with war, with armed camps, and with states of rebellion, the Crown defined it through its procedure.

Martial law was particularly useful because no firm boundaries existed for its jurisdiction. Over the course of this chapter, we will examine discourses that we have seen in operation in the Middle Ages. These included rules like martial law had to be used within the verge of the banner; those convicted did not forfeit real property at martial law; martial law should only be used in times of war; and martial law should only be used on soldiers and in armed camps. Monarchs

[1] While some scholars have asserted that the jury had virtually no independence from the bench in this period, it is clear that the Crown still feared jury nullification. For the debate over how much discretion juries possessed, see J.S. Cockburn, *Calendar of Assize Records, Home Circuit Indictments, Elizabeth I and James I: Introduction* (London: Her Majesty's Stationary Office, 1985), 110-13. Thomas Green, *Verdict According to Conscience: Perspectives on the Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), 105-52. Cynthia Herrup has asserted that petty juries still possessed some discretion in the sixteenth century. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1987), 131-64. For the low opinion amongst Tudor officials of juries in the sixteenth century, see J.S. Cockburn, "Twelve Silly Men? The Trial Jury at Assizes, 1560-1670" in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* ed. J.S. Cockburn and Thomas A. Green (Princeton: Princeton University Press, 1988), 158-81. For jury nullification or lawlessness in the sixteenth century, see P.G. Lawson, "Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624" in *Twelve Good Men and True*, 117-57.

often used martial law to punish treason, but treason law was shifting rapidly in the sixteenth century, and monarchs used martial law for other purposes as well.[2] Crown officers never applied these rules systematically. Further, no oracle existed in the sixteenth century for martial law. Even Matthew Sutcliffe, who wrote a treatise on all things relating to war in 1593, spent only one page on martial law procedure, and barely touched on its jurisdiction.[3] The fluidity of martial law jurisdiction meant that Crown officers often applied martial law according to their perceptions of its boundaries which were often at variance with previous uses. It also meant the Crown could utilize martial law creatively, and employ rules related to its jurisdiction strategically.

An Age of Tumult: The Tudors and their Laws

The Tudor century, which actually covered the years 1485-1603, was one of turmoil and instability.[4] The Tudors began their dynasty in the midst of the Wars of the Roses, and in the early years Henry VII repeatedly had to thwart Yorkist threats to his authority. In these endeavors, he was successful, and by his death in 1509 had handed his son, Henry VIII, a much more financially secure Crown.[5] However, the order of the early decades of the sixteenth century broke down in the 1530s, when the religious convulsions of the continent were finally

[2] For sixteenth century treason law, see John Bellamy, *The Tudor Law of Treason: An Introduction* (London: Routledge & K. Paul, 1979).

[3] Matthew Sutcliffe, *The Practice, Proceedings, and Lawes of Armes* (London, 1593), 339.

[4] The best overviews of the sixteenth century are John Guy, *Tudor England* (Oxford: Oxford University Press, 1988) and Penry Williams, *The Tudor Regime* (Oxford: Clarendon Press, 1979).

[5] For Henry's policies, see S.B. Chrimes, *Henry VII* (Berkeley: University of California Press, 1972), 175-297. S.J. Gunn, *Early Tudor Government, 1485-1558* (New York: St. Martin's Press, 1995).

felt in England. Rebellions, motivated by religious and economic grievances, destabilized the regimes of Henry, his son, and his two daughters. Wars with the kings of France, Spain, and Scotland, and rebellions in Ireland contributed to the instability.[6] In order to maintain their rule, keep the peace, and terrorize their subjects into obedience, the Tudors used old laws and made new ones. Let us briefly examine them, so that we can better understand how martial law was related to, but also distinctive from, other legal strategies the Tudors had at their disposal.[7]

Legal jurisdictions by the sixteenth century were complex and often highly specialized. At the apex were the king's courts held at Westminster: King's Bench, Common Pleas, and Exchequer. King's Bench held a supervisory role over other courts and heard cases on appeal. It also heard criminal cases and civil disputes brought in on the flexible devices known as trespass and action on the case. Judges of Common Pleas heard private cases relating to land, debt, detinue, and a variety of other legal topics. The judges of the Court of Exchequer heard cases relating to the collection of Crown revenue. The king's Chancellor heard cases according to his equitable jurisdiction, which did not need to follow the rules of common law, but instead relied on the Chancellor's conscience. The king's clerics heard and determined cases involving heresy and sin. Out in the provinces, local manor courts, sheriff courts, and borough courts heard and determined cases which were comparatively insignificant to the cases heard at Westminster.[8] Local officers, Justices of the Peace, held quarter sessions where they heard and determined cases. Usually, JPs only heard cases that did not involve capital cases.

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[6] Anthony Fletcher and Diarmaid MacCulloch, *Tudor Rebellions* (New York: Pearson Longman, 2008); Barrett L. Beer, *Rebellion and Riot: Popular Disorder in England during the reign of Edward VI* (Kent, OH: Kent State University Press, 1982); Roger Manning, *Village Revolts: Social Protest and Popular Disturbances in England, 1509-1640*, (Oxford: Oxford University Press, 1988).

[7] Gunn, *Early Tudor Government*, 72-108.

[8] For an overview of the courts in this period, see J.H. Baker, *The Oxford History of the Laws of England: volume 6: 1483-1558* (Oxford: Oxford University Press, 2003), 117-319.

The Crown as early as the end of the thirteenth century had sent justices on circuit to provide royal justice. By the end of the thirteenth century this itinerant justice had become regularized. The Crown sent justices on six "circuits" each of which comprised a set of English counties.[9] The justices went on circuit twice a year. Usually at the seat of each county, the justices held an "assize" session where they would hear and determine cases and disputes that had arisen since the last assize. These responsibilities included hearing private disputes – between one subject and another – as well public crimes – those which had been committed against the king and thus violated the "common peace" of England. These wrongs included non-capital offences, or misdemeanors. But for our purposes, the most important function of the assize was that its justices could hear and determine cases of felony. A felony, unlike a misdemeanor, required a blood sanction. The justices of the assize could apply the death penalty on those that had been convicted of crimes like murder, theft over a certain value, rape, and treason.[10]

By the sixteenth century, when Crown officers prosecuted suspects for felony, they mostly did so through indictment process.[11] The appeal of felony was still used, especially for cases of murder. But in large measure, trial through indictment by either a grand jury or inquest had become the normative way in which cases came to be heard. An indictment was "an accusation made by twelve or more laymen sworn to inquire in the king's behalf and recorded before a court of record."[12] The most common way to find an indictment in the early modern

[9] Cockburn, *A History of English Assizes*, 15-22.

[10] For felony procedure see Cockburn, *History of the Assizes*, 86-133. J.H. Baker, "Criminal Courts and Procedure at Common Law 1550-1800" in *Crime in England, 1550-1800* ed. J.S. Cockburn (Princeton: Princeton University Press, 1977), 15-48.

[11] Cockburn, *Introduction*, 73-86.

[12] Baker, "Criminal Courts," 18.

period was through the grand jury. In order to do so, twelve men had to find a bill of indictment true. While there is some controversy over who prepared the bill of indictment, it is likely that it was written by the justice of the peace or one of the clerks of the assize. Grand juries could also indict based on their own knowledge of misdeeds. Once an indictment had been found true the case proceeded to trial.

While the indictment by the sixteenth century had become common for felony and treason prosecutions, the Crown, often through statute, utilized more expedient procedures to prosecute the disorderly for lesser offences. JPs often heard and determine cases using processes that did not require an indictment. They could convict suspects for certain offences upon "examination." For wrongs like vagabondage, illegal retaining and wearing of liveries, as well as certain wrongs associated with commerce like the failure of magistrates to inspect weights and measures, courts could bypass the indictment stage of a trial. In lieu of it, they examined the suspect as well as any relevant witnesses, and upon sufficient proof according to their discretion, JPs and other magistrates convicted suspects. These cases often began after the JP or other magistrate received information: an informal complaint made by a subject or a magistrate who suspected someone of having committed a wrong.[13]

Since the thirteenth century, the Crown through parliament required only a plaint or information to be submitted to a magistrate for the commencement of some legal proceedings.[14] The Crown in parliament generally restricted prosecution by information to non-capital offences. The Crown utilized plaints in the sixteenth century to regulate economic activity and to supervise its own officials. It did so through the so-called "penal statutes" that explicitly authorized the

[13] J.G. Bellamy, *Criminal Law and Society in Late Medieval and Tudor England* (New York: St. Martin's Press, 1984), 8-32.

[14] Ibid., 90-112.

procedure for misdemeanor offences. These statutes attempted to regulate imports and exports, and commercial malfeasance.[15] They also set rules for cattle grazing, horse breeding, and other regulations for rural economic life. Other penal statutes regulated the behavior of the clergy and sought to uncover duplicitous public officials, including jurors who had failed to hear and determine cases honestly. Informants had a terrible reputation in the middle ages and in the early modern period. But in the absence of professional investigators and police forces, their role was essential to the Crown's ability to prosecute and enforce regulation.

While these procedural alternatives can be traced back well into the Middle Ages, Henry VII experimented with them in new settings, and created new judicial bodies that heard cases almost solely by information.[16] Two courts were established to hear and determine cases in the Marches of Wales and in the North of England. These conciliar courts did not use juries for non-capital offences. Instead a council heard and determined cases, with verdicts being decided by majority. These courts also did not use indictments for non-capital offences. Instead, only a plaint was necessary.[17] Second, in 1487, Henry through statute created a tribunal that derived from his great council which had cognizance over riot, the malfeasance of officials, and illegal retainers and liveries. By 1496 Henry through parliament enacted a statute that allowed all commissioners of *oyer* and *terminer* and Justices of the Peace to hear and determine cases brought by information against those who committed the so-called "penal statutes" that regulated

[15] Ibid., 92-5.

[16] Baker, "Criminal Procedure," 18-21; Gunn, *Early Tudor Government*, 81-4; Chrimes, *Henry VII*, 179-84.

[17] These provincial courts fell into desuetude in the later years of Henry VII's reign and were subsequently revived in the reign of his son, when they became quite popular. For the council in the north, see R.R. Reid, *The King's Council in the North* (London: Longmans, 1921). For the council in Wales, see Penry Williams, *The Council in the Marches of Wales under Elizabeth I* (Cardiff: University of Wales Press, 1958).

commerce and manufacturing.[18] How rigorously these policies were enforced has provoked debate amongst historians, but Henry VIII executed two ministers who had participated in the enforcement of these statutes in order to appease those discontented with the reign of his father.[19]

Henry VIII continued to use courts that utilized information procedure. Under his great Cardinal Chancellor, Thomas Wolsey, the Court of Star Chamber – a conciliar court derived from the king's great council – heard and determined more and more legal business. The court, like the special tribunals of Henry VII, heard cases involving illegal retaining and livery, and fined those who illegally kept private forces. The court also heard cases against Crown officials for malfeasance, and supervised English legal officials. Due to the accessible procedure of the court, many subjects used Star Chamber to settle private disputes relating to claims to title, chattels, detinue, as well as trade disputes and riot. Indeed, private petitioners used Star Chamber frequently. By the 1520s, Star Chamber had become a popular alternative to the commissions of the peace and of the assizes for those with enough capital to travel to London to seek justice. Star Chamber, while it acquired a notorious reputation in the seventeenth century, was uncontroversial, even popular, in the reign of Henry VIII.[20]

The ecclesiastical courts which also used information procedure, on the other hand, became controversial. Most notoriously, as we have seen, the Papacy had authorized procedure by information for the prosecution of heresy. This decree effectively allowed bishops, with inquisitors, to arraign heretics without being formally denounced by a witness. Instead they

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[18] 11 Hen. VII c. 3.

[19] Chrimes, *Henry VII*, 191-3; J.P. Cooper, "Henry VII's Last Years Reconsidered," *Historical Journal* 2:2 (1959): 103-29; Geoffrey Elton, "Henry VII: A Restatement," *Historical Journal* 4:1 (Mar., 1961): 1-29.

[20] J.A. Guy, *the Cardinal's Court: The Impact of Thomas Wolsey in Star Chamber* (Totowa, NJ: Rowman and Littlefield, 1977).

could arrest those they suspected, either by someone else's information or by their own, due to the powers of their office (*ex officio*). In England, the inquisition as an institution was never prominent. Only a handful of Lollards in the fifteenth century were executed for heresy. The key exception to this rule was after 1529, when many within England began to adopt the Lutheran "heresies." Over the course of the next several years, the English clerical courts increasingly examined heresy cases. Many suspected heretics were brought before the court due to *ex officio* proceedings, where a secret informant had relayed information which the court used to prosecute the suspect. Further, even when the court could not prove the guilt of the suspect, those brought before the court often still had to perform penance upon simple suspicion of guilt. The use of these procedural forms became increasingly controversial in no small part because while Henry VIII remained conservative theologically during his reign, his split with Rome over his desire to divorce his first wife for Ann Boleyn, and thus separate legally from Roman jurisdiction, gave those opposed to ecclesiastical jurisdiction a willing and powerful ally.[21]

The Crown thus had a variety of jurisdictions by which it could punish those who disobeyed it. The procedures of these jurisdictions varied but we can locate two distinctive strands: procedure by indictment which was glossed as "common law" or the "laws and customs of the realm," and other arraignment procedures, most of which involved the taking of information in lieu of an indictment. These alternate procedures had by the 1530s strong advocates on both sides. For in both procedural systems, judicial officers – judges, members of

[21] R.H. Helmholz, *The Oxford History of the Laws of England Volume One: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press), 639-42; J.A. Guy, *The Public Career of Sir Thomas More* (New Haven: Yale University Press, 1980), 141-70. John Guy *et al*. "The Legal Context of the Controversy: the Law of Heresy" in *The Complete Works of Thomas More: Volume Ten* ed. John Guy *et al*. (New Haven: Yale University Press, 1987), xlvii-lxvii.

the grand and petty juries, JPs, etc. – had discretionary powers at every step of the process: arrest, arraignment, and at trial. The question became who should have that discretion.

Two of the greatest jurists of the age debated this very issue in the early 1530s. In it, Sir Thomas More made the first reference we have on record for "martial law."[22] More was engaged in an intense debate over ecclesiastical jurisdiction with the renowned common law jurist Christopher St. German.[23] The debate began when Christopher St. German, anonymously, published a *Treatise Concerning the Division between the Spirituality and Temporality* in either the end of 1532, or in early 1533.[24] In the *Division*, St. German, who had consistently argued for the primacy of human positive law over ecclesiastical jurisdiction, attacked what he conceived to be the failings of the English clergy. Through avarice and worldliness, according to St. German, the clergy had neglected their religious duties and had earned the enmity of the people of England, leading to a division between those of the temporal realm and those of the spiritual. One of the chief complaints of the temporal sphere was clerical abuse of their ecclesiastical jurisdiction, whose procedures allowed for arbitrary convictions. St. German worried about malicious judges abusing their power to proceed by information: "But surely yf the sayde lawes shulde be put into the handelynge of cruell iudges, it myghte happen that they shulde many tymes punyssh innocents as wel as offendours."[25] Building on this argument St. German attacked the arraignment procedure of the ecclesiastical courts where magistrates could "arrest a man for

[22] For the debate see, John Guy, "Thomas More and Christopher St. German: The Battle of the Books" in *Reassessing the Henrician Age: Humanism, Politics, and Reform, 1500-1550* ed. Alistair Fox and John Guy (Oxford: Basil Blackwell, 1986), 95-121.

[23] For Christopher St. German, see J.A. Guy, *Christopher St. German on Chancery and Statute* (London: Selden Society, 1985); Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge: Cambridge University Press, 2006), 33-58.

[24] The work has been printed in *The Complete Works of Thomas More: Volume Nine* ed. J.B. Trapp (New Haven: Yale University Press, 1979), 173-212.

[25] *Complete Works of Thomas More*, ix. 191.

euery light suspection or complaynte of heresye."[26] For St. German prosecutions of heresy should follow the rules of the civil magistrate where suspects could only be arrested if he were openly suspected of heresy with many witnesses openly accusing him. Otherwise the judge had too much power.

In response, More issued in the spring of 1533 the *Apologie of Sir Thomas More*.[27] In this tract More attempted to rebut all of St. German's claims, but let us focus on his defense of ecclesiastical procedure. More claimed that if clerics used the procedures demanded of by St. German, the "stretys were lykely to swarme full of heretykes."[28] Without secret information, which allowed the informant protection against his or her vengeful neighbors, heretics would run free. More also doubted St. German's claims about the protections twelve men of the jury gave to the suspect. Could they not also be malicious? Indeed "[F]or in good faith I neuer saw the day yet, but that I durst as well trust the trouth of one iudge as of two iuryes."[29]

St. German responded to More in a tract entitled *Salem and Bezance*, which was published later that year. St. German noted that juries that convicted maliciously should be punished. But in general, common law process simply made it more difficult for the malice of one man or one group of men to convict an innocent. Even if a grand jury indicted maliciously, this act was not a conviction. Common law procedure thus hardly had the same potential for abuse as *ex officio* proceedings.

In his response to St. German in a 1533 tract entitled *The Debellation of Salem and Bizance* More once again defended *ex officio* procedure as a necessary complement to common

[26] Ibid., 192.

[27] Ibid., 1-172.

[28] Ibid., 130.

[29] Ibid., 133.

law in certain instances. This time he did so using martial law as an example of a proper way of utilizing non-common law procedure. He admitted that procedure by indictment was "better in felony now."[30] But he suggested that an alternative to common law was also perfectly acceptable: "Yet were not the tother waye nought, yf the lawe were so that the iudges myght procede and put felons to answere without endyghtementes/ as in treason is vsed in thys realme by the lawe marshall vppon warre rered."[31] It is not a coincidence that this quote is one of the first times martial law appears in the English language. More used it as an example of a procedural complement to common law, which he believed to be necessary in certain instances. More concluded his thought by stating that though it was good to trust juries, sometimes "myght we truste the iudges as well."[32]

The Crown at various points throughout the sixteenth century agreed with More that sometimes it was better to trust the judges. Sometimes using less formal arraignment procedures ensured that the "streets would not be filled" with traitors and other malcontents. Sometimes the Crown feared that juries might engage in malicious acquittal, what is now known as jury nullification or jury "lawlessness", where a suspect is guilty at law but the jury refuses to convict him or her thereby moderating the penalties of common law. Sometimes in cases of treason or felony, it was better to trust the judges. In these instances, the Tudors opted for martial law.

Making Martial Law

[30] *Complete Works of Thomas More*, x. 136.

[31] Ibid.

[32] Ibid.

Let us examine this new technology more closely. Let us do so through a commission issued to Sir Edward Bellingham, the new lord deputy of Ireland, in 1548.[33] The commission was not unusual for its time. But due to the relative newness of the concept of martial law, the writer of the commission, the clerk of the Crown Office in Chancery, Edmund Martin, outlined in very specific terms what he believed constituted martial law.[34]

The commission, written in Latin, gave Bellingham the power to "hear and determine against any of the retinue there."[35] He had cognizance over treason, felony, rape, theft, or any other misdeed. Near the end of the commission, the Crown ordered Bellingham to "arraign the accused and compel witnesses to give evidence according to the law and custom of the marshalsea hitherto used in that realm, called martial law." Let us look again at the ending of this command in its original language. Bellingham was to arraign the accused and compel witnesses to give evidence according to: "legem et consuetudinem Marescalcie hactenus infra regm nra pdcu vsitat vocat marciall lawe."[36]

How strange! In a commission written in Latin, Martin kept "marcial law" in English. He almost certainly did so because martial law had no classical Latin cognate. In discussing military discipline, Roman and continental sources used the phrase "*de re militari.*" This distinction is important because Roman jurists defined military law more by its substance and by

[33] Mary Ann Lyons, "Bellingham, Sir Edward" in *ODNB*. TNA, C/66/812, m. 1d. A similar commission is calendared in *CPR* Edward VI i. 133. For commissions of martial law similar to this one, see TNA, C/66/802, m. 33d; TNA, C/66/814, m. 2d-5d; TNA, C/66/830, m. 4d; TNA, C/66/831, m. 14d; TNA C/66/837, m.12d; TNA, C. 897, m. 19d; TNA C/66/917, 22.d; TNA C 66/1013, m. 4d-5d. By the early years of Elizabeth's reign, clerks no longer explicitly defined martial law.

[34] For clerks of the Crown Office, see Cockburn, *Introduction*, 15-25. It is almost certain that these commissions came out of the Crown office, but unfortunately it cannot be conclusively proven as the clerk did not put his name on the privy seal warrant. TNA, C/82/879; TNA, C/82/883. The best evidence that the clerks of the Crown Office wrote these commissions is that they can be found in their precedent books. See below.

[35] *Audiend et cognoscend causas querelas contra omnes et singulos armatos in armata*. TNA, C 66/812, m. 1d.

[36] TNA, C 66/812, m. 1d.

its jurisdiction than by its unique procedure.[37] The post classical Latin phrase "*lex martialis*," which probably was martial law translated into Latin, did not catch on amongst English writers. In particular, English clerks never used *lex martialis* in legal documents like commissions that delegated martial legal power to Crown servants. Martial law was new, and it was English.

But just as we can understand the newness of the phrase "martial law" through Bellingham's commission, we can also understand the "oldness" of the phrases that surrounded the two English words. Martin had copied or cut some of the Latin text from other legal documents. For example, the Crown commanded Bellingham to "audiend ac cognoscend" all complaints within the army. This order was similar to Crown commands in commissions of *oyer* and *terminer*, which authorized itinerant common law justices to hear and determine cases at assize courts on their semi-annual circuits throughout England. Further the Crown's command to Bellingham to hear and determine all "treasons, felonies, rape, [and] murder" was similar to the lists of crimes the Crown ordered its itinerant justices to hear and determine in commissions of *oyer* and *terminer*. For example, in a commission of *oyer* and *terminer* in 1622, the Crown ordered Robert Houghton and Ranulf Crewe to inquire into the truth of matters "concerning whatsoever treasons, misprisions of treasons, insurrections, rebellions, murders, felonies, homicides, killings, burglaries, rapes of women" and a host of other misdeeds.[38] It was a longer list than that of the martial law commission, but the general idea was the same.

Other language within the commission can be traced to previous commissions that delegated legal power to military lieutenants. Some of the language can be traced back as far as the fourteenth century. But considering Martin worked in the Crown Office, we can come up

[37] For Roman military law, see *The Digest of Justinian* ed. Theodor Mommsen with the aid of Paul Kreuger trans. Alan Watson 4 vols. (Philadelphia: University of Pennsylvania Press, 1985), iv. bk. 49, ch. 16.

[38] Printed in Cockburn, *Introduction*, 220.

with a more specific guess as to where he obtained his language. He probably found it in the precedent book of one of his predecessors at the Crown office, William Porter, who had copied the commissions of the Earl of Shrewsbury, who had commanded a host against the Scots in 1513, and of Sir Thomas Lovell, who was to act as marshal of England in 1513 in the absence of the marshal of England. The commission of martial law was thus a new thing made from old things.[39]

Knowing where Martin obtained his language allows us to better understand what he believed to be the responsibilities of those empowered with martial law. He had borrowed from commissions of *oyer* and *terminer* in part because he was familiar with them; he had the responsibility of crafting the commissions of *oyer* and *terminer*. But Martin also recognized a similar function between that of Bellingham and of an assize judge. Granted, Martin circumscribed Bellingham's powers in different ways than to a commissioner of *oyer* and *terminer*. Bellingham could only use his martial judicial power on soldiers in the army stationed in Ireland. But he clearly thought the two responsibilities – that of a commissioner of *oyer* and *terminer* and that of a martial law commissioner – to be similar. The Crown commanded Bellingham to be a judge.

Second, Martin defined martial law through its procedure. While Bellingham was compared with common law judges in his responsibilities, he was contrasted with common law judges through the means in which he would execute those responsibilities. Martial law was the laws and customs of the marshal as they related to the arraignment of prisoners and to the deposition of witnesses. Martin made no reference to any substantive difference between martial law and common law. Indeed, as we have seen, he borrowed extensively from the list of wrongs

[39] TNA, C 193/142, fos. 98v-101. The precedent book is briefly discussed in Baker, *Oxford History of the Laws of England*, vi. 218.

written into a commission of *oyer* and *terminer* into the martial law commission. The amalgam of substantive and customary law associated with war – the laws of war, the laws of chivalry, the ordinances of war, and statutory treason – were not on Martin's mind when he wrote the commission. It was the procedure of martial law that was important.

What was the key difference between martial law procedure and that of common law? Once again we find the word *querelas* in the commission.[40] Martial law procedure was to operate by the more informal "plaint," "complaint," or "information," and not by indictment. Martial law should thus be traced to the medieval itinerant courts of the hosts – about which we, unfortunately, known very little. It can also be compared to other courts that used procedure by information. All of these courts did not require either grand or petty juries. The key difference between martial law and those other courts was that commissioners of martial law could utilize information procedure in matters that concerned life and limb.

In this more informal environment, the martial law commissioner was still required to evaluate evidence and give a verdict. Martin made no mention of notoriety. Nor did he mention conviction upon record. The martial law commissioner was thus not an appointee of the Crown sent to proclaim a verdict upon already convicted defendants. Those sent to proclaim guilt based on the king's record did not need to hear and determine cases. They certainly did not need to depose witnesses. The idea that martial law derived from treason by notoriety is a false genealogy.[41]

[40] TNA, C/66/812, m. 12d.

[41] For this view see J.V. Capua, "The Early History of Martial Law" *Cambridge Law Journal* 36:1 (Apr: 1977): 152-73. J.G. Bellamy *The Law of Treason in England, in the Later Middle Ages* (Cambridge: Cambridge University press, 1970), 212.

Martial Law Procedure

The procedure of martial law mirrored in many ways the procedures Thomas More defended. It thus also was similar to procedures by information that the Crown utilized in a number of its courts. It would have horrified Christopher St. German, who would have been incredulous that the Crown prosecuted men and women for blood sanctions without using grand or petty juries. These procedures remained relatively constant throughout the sixteenth century. Unfortunately, few full courts martial records have survived. Therefore we will have to rely on the somewhat scanty prescriptive literature, and a few descriptions of cases that commanders relayed to the Privy Council in correspondence.[42]

The martial law commissioner judged fact and law. In the army, the Crown delegated martial law powers to its lord general and to its high marshal, the second in command. Either the lord general, or more often the marshal – hence the "marshal's court" – exercised due to their office powers to arraign the men and women who fell under their jurisdiction.[43] These two officers also had powers to hear and determine once the case came before the court. Often, but

[42]The manuscript prescriptive literature on martial law in the sixteenth century is as follows: Thomas Audeley, "Art of Warr," BL Add. Ms. 23,972, fos.3-16; Audeley, "An Introduction or ABC to the wars, dedicated to Edward VI" Bodl. Tanner Ms. 103, fos. 45v-7; "A Book directing the choosing and ordering of the Army and making war," BL, Harley Ms. 4191, fos. 74-75v, 112v; "Misc. Papers Temp. Eliz." BL Harley Ms. 168, fos. 123-27v; "Institution and Discipline of a Soldier," BL, Harley Ms. 519, fos. 72v-80v;"Misc. Papers," BL, Harley Ms. 6844, fos. 77-82v; "Historical Papers," BL, Harley Ms. 847, fos. 49v-53; "Pedigrees of Wales," BL, Harley Ms. 6068, fos. 40-53v; "Warrants, Orders, etc." BL, Harley Ms. 703, fos. 25-26; "Martial and Military Lawes," BL, Harley Ms. 5109, fos. 62-5. LPL, Ms. 247, fos. 129-53v. For a review of this literature see Major Evan Fyers, "Notes on Class Catalogue, No. 50 (Military) in the Department of Manuscripts, British Museum," *Journal for the Society of Army Historical Research* iv. (1925): 38-48. Printed sources are: Sutcliffe, *Practice, Proceedings and Lawes of Armes*, 339-42; Barnaby Rich, *A Pathway to Military Practice*, (London, 1587), D4-H; Charles Cruickshank has outlined sixteenth century procedure in his books on the armies of Henry VIII and Elizabeth. Cruikshank, *Army Royal*, 94-104. Cruikshank, *Elizabeth's Army* (Oxford: Oxford University Press, 1966), 41-60, 159-73.

[43] The commission to Edward Bellingham, for example, gave him and his marshal powers of martial law. TNA, C 66/812 m. 12d. Through the sixteenth century, the Ordinance Office was exempt from the court of the Marshal, and the Master of the Ordinance held his own court, about which we know little, that disciplined ordnance office according to the laws of war. Cruikshank, *Army Royal*, 100-01.The rules outlining the Ordnance Office's jurisdiction in the 1590s can be found in BL, Lansdowne Ms. 70/11.

not always, the general or the marshal sub-delegated these powers to assistants. They had the powers to convict and give the death penalty. Only the Lord General had powers of pardon.[44]

The most significant procedural concept at martial law was its informal arraignment procedure. Instead of being forced to write indictments and have them found true by a grand jury, those with martial law commissions could arrest, detain, and then try suspects based on more informal informations or plaints. According to Matthew Sutcliffe, an experienced judge marshal who served both the Earls of Leicester and Essex on campaign in the 1580s and 1590s, those with martial law powers could use "all means of examination, and trial of persons accused dilated, suspected, or defamed."[45] The commissioner of martial law thus had flexibility when it came to the manner in which he brought suspects to trial. Formal accusations by those wronged were allowable, although those acting out of office took over the investigation once made. In the words of John Langbein, "Where the mode of initiation was reduced to a formalism, lacking functional importance to the conduct of the prosecution, it mattered not whether it too was officialized or left in private hands."[46] It is likely, that this same type of process took place at martial law. By virtue of his office, the martial law commissioner could also arraign by suspicion.

The rules of evidence at martial law resembled those at common law. In other words, there were few formal rules of evidence.[47] At common law, because the Crown assumed juries

[44] Commanders were supposed to possess an almost immortal set of virtues. See Cruikshank, *Elizabeth's Army,* 41.

[45] Sutcliffe, *Practice, Proceedings, and Lawes of Arms,* 339.

[46] Ibid., 131.

[47] As John Langbein noted, "to this day an English jury can convict a defendant on less evidence than was required as a mere precondition for interrogation under torture on the Continent." Langbein, *Torture and the Law of Proof* (Chicago: University of Chicago Press, 2006), 78.

were self-informing, it developed few rules relating to proof.[48] This relative laxity contrasted with Roman law, which had "laws of proof" that mandated that the judge obtain either a confession or depose two eyewitnesses to the crime. Due to these stringent requirements, judges resorted to torture if he had obtained a "half proof:" either one eyewitness or a substantial amount of circumstantial evidence that pointed to the suspect's guilt. The suspect could not be convicted based upon his confessions while the judge was supervising their torture. Rather, torture was supposed to produce details of the crime "no innocent person can know."[49]

At martial law, while full proof was not required, proof was required for conviction. Martial law commissioners needed to obtain eye witness testimony or a confession even if they did not have to meet the full proof bar. Suspicion alone, while it could provoke detainment, was not enough to convict. According to Matthew Sutcliffe, a commissioner could use torture, "where presumptions are sufficient, and the matter heinous, by racke or other paine."[50] Sutcliffe was well-trained in ecclesiastical and Roman law. When he used the word "presumption" he was referring to a very specific Canon law form of proof. Presumptions were suppositions allowed as a fact at law, and in certain instances were allowable as substitutions for proof.[51] But presumptions alone were not enough for a martial law commissioner to obtain a conviction. Thus torture was necessary.

The only example we have of martial commissioners using torture comes in 1586 from Dunkirk, a city in what is now France. By 1585, Elizabeth I officially declared war against Spain

[48] For an examination of Common criminal law procedure, see John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, MA: Harvard University Press, 1976), 129-254.

[49] Langbein, *Torture and the Law of Proof*, 4-27 (quotation on 5).

[50] Sutcliffe, *Practice, Proceedings, and Lawes of Arms*, 340.

[51] Helmholz, *Oxford History of the Laws of England: Volume One*, 330-2.

and allied herself with the rebel Protestant Dutch government that had been fighting an ongoing war for independence against Phillip II of Spain since the 1560s. That year, Elizabeth named the Earl of Leicester, her longtime favorite, as the commander of a large English force that set sail for the Low Countries. When he arrived there, Leicester negotiated a deal with the rebel government that gave the English jurisdiction over a number of "cautionary towns," which would be occupied by English garrisons. One of these was Dunkirk.[52]

In 1586, Thomas Wilford, the military governor of the city, uncovered a conspiracy by the mayor and his son to take Dunkirk and deliver it to the Spanish. According to Wilford, the Spanish had promised that the son would "be made a great person."[53] Suspecting the father for some time, Wilford had caught the son with "treasonous" letters written from the Spanish in his belt. Certainly this satisfied the requirement of presumption, if Wilford had been thinking along those lines. He ordered the son to be tortured after he failed to get his father to confess under torture. He made his father watch, presumably to persuade him to confess so that his son might be relieved of his pain. The son finally confessed to his father's participation in the conspiracy. Wilford adjudged the father guilty and sentenced him to death, but due to the importance of the case, relayed his actions back to the Privy Council before he proceeded to the sentence. Wilford's acts are instructive in helping us understand how evidence was taken at martial law. Wilford had not met the standard of half-proof required at Civil Law to interrogate the son, and the son's confession was not even close to amounting to full proof at Civil law for the conviction of the father. Nevertheless, Wilford had refused to convict either the son or the father before he

[52] F.G. Oosterhoff, *Leicester and the Netherlands, 1586-87* (Utrecht: HES, 1988), 40-7.

[53] Thomas Wilford to Leicester, 25 Jan. 1586 *CSPF*, 1586, 321.

had obtained a confession. In other words, martial law commissioners wanted evidence before they gave judgment. They needed proof.

They often had assistants who helped them fulfill this desire. Throughout the sixteenth century, marshals had legal aids dubbed judge marshals. The sixteenth century prescriptive literature rarely described the position, with the exception of a brief reference to it by Matthew Sutcliffe.[54] It is not clear when the position originated. There were Roman civil lawyers who participated in the Court of Chivalry, but it is not clear if the itinerant courts of the constable and marshal always had legal aids. Our first firm record of a judge marshal comes from the English chronicle of the 1547 campaign against the Scots. The chronicler William Patten recounted how he and William Cecil had been appointed judges of the "Marshalsea," and had executed several soldiers for misdeeds.[55] By the 1580s, judge marshals were trained in Roman civil law.[56] Matthew Sutcliffe served as a judge marshal in Leicester's army in the Netherlands, in the camp at Tillbury that awaited the invasion of the Spanish in 1588 and on several campaigns with the Earl of Essex in the 1590s. Bartholomew Clark, another lawyer trained in Civil law, accompanied the Earl of Leicester in his campaign in the Netherlands.[57]

The judge marshal gave legal advice to the general or the lord marshal. He obtained and kept track of plaints, and he deposed witnesses. If they obtained a privy seal warrant from the

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[54] Sutcliffe, *Practice, Proceedings, and Laws of Arms*, 339. Francis Markham was the first author to write extensively on the judge marshal. Markham, *Fiue Decades of Epistles of Warr* (London, 1622), 109-12.

[55] William Patten, *The Expedicion into Scotla[n]de of the most Woorthely Prince Edward* (London, 1548), P. IVr.

[56] For the Civil Law profession in England, see Brian Levack, *The Civil Lawyers in England, 1603-1641: A Political Study* (Oxford: Clarendon Press, 1973).

[57] One of the best ways to track judge marshals is through the accounts of the army. Both Clarke and Sutcliffe accompanied the army on the Leicester expedition: TNA, E 351/240. "The Third Part of the Account [of the army], *CSPF*, 1587, 319. "Officers Serving in the Low Countries," *CSPF*, 1588, 2. Sutcliffe may have been at Tillbury in 1588. TNA E, 351/242. The judge marshal was an ephemeral office in England but had become permanent in Ireland. Adam Loftus held this position. See "Army in Ireland" *HMC Salisbury* ix. 145, and "Memorials for Ireland" TNA, SP 63/216 f. 132.

marshal, the judge marshal could also hold court, and hear and determine cases. By the seventeenth century, the judge marshal may have sat in the lord marshal's court in his stead almost all of the time. Francis Markham, in his prescriptive work on the English military in 1622, described this enhanced position. For Markham the judge marshal was the equivalent to the recorder of a city or to a Roman praetor, in other words the chief judicial officer of the polity, who was responsible for keeping track of its business and in deciding cases. These men, according to Markham, needed to have "haue a conscience like an innocent and spotlesse Virgin, delicate, quicke, and tender, yet fit to receiue no impression or stampe but that of goodnes, for he hath to doe with the bloods and liues of men."[58] Like the lord marshal and lord general, an enormous burden was placed on the judge marshal's ability to judge fact and law.

Other martial officers aided the lord general in his judicial responsibilities. By the late sixteenth century, colonels played important roles in judicial proceedings. The 2nd Earl of Essex, sometime in the 1590s, stipulated that all colonels had to "call together all his Captaynes & shall enquier of all officers in his Regiment and examine ye nature of and qualytye of such officers to prepare causes for a short and easy hearing in the Marshalls Court."[59] This order likely meant that the colonel helped organize depositions of complaints made within his regiment beforehand so the court could hear them quickly. These complaints could take the form either of an accusation by one who had been wronged, or by information, a private deposition by one who simply had knowledge of the case. Captains also at times played a role in advising the marshal on important judicial business.

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[58] Markham, *Fiue Decades of Epistles of Warre*, 110. For the relationship between conscience and the law see Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Farnham, Surrey: Ashgate, 2010).

[59] "Directions both generall and pticular drawen by ye lo: Generall Essex for the better instructing ye govment of ye armye" BL, Harley 703, f.25.

The provost marshal of the army also aided martial law commissioners. The provost marshal became a standard position within the English army by the early sixteenth century. Henry VIII probably incorporated it from seeing a similar position, the *prevot*, which served in French armies.[60] The incorporation also took place at the same time as the demise of the constable. By 1513, the high marshal had replaced the constable as the chief judicial officer, and the Crown introduced the provost marshal to take over responsibilities like jailing and arresting suspects that had previously been within the purview of the marshal. The provost marshal made arrests, kept prisoners, ensured the camp was clean, and kept accounts of victuals.[61] He was also responsible for bringing all prisoners to court and making sure all witnesses were present. Finally, the provost marshal was responsible for making sure ordinances and proclamations made by the king, lord general, or marshal, were posted for all to read. The provost had several assistant provosts. To help the provost marshal, the army employed an executioner, clerks, and several tipstaves, who helped the provost make arrests, and were supposed to ensure that soldiers remained quiet and orderly in camp.[62] On occasion, the marshal commissioned his provost marshal to act in a judicial capacity.

Martial law commissioners used summary procedure. "Summary procedure" has become a sink for English legal historians where all forms of non-common law procedure have been thrown. But when Matthew Sutcliffe declared that cases at martial law were to be heard "summarily," he probably meant that procedures unnecessary to finding the truth in a particular

[60] Lindsay Boynton, "The Tudor Provost Marshal" *English Historical Review* 77 (1962): 437-38. The most complete history of the provost marshal in English armies is the unfortunately un-noted A. Vaughan Lovell-Knight, *The History of the Office of the Provost Marshal and the Corps of Military Police* (Aldershot: Gale and Polden, 1943). Also see, H. Bullock, "The Provost Marshal" *Journal of the Society for Army Historical Research* vii. (1928), 67-9, 129-32.

[61] BL, Harley Ms. 168, fos. 123v-124.

[62] BL, Harley Ms. 847, f. 53.

case did not need to be obeyed. According to Henry Consett, an expert on ecclesiastical law in the late seventeenth century, summary procedure "is said to be that in which no reason of order is kept, but rather all order is deterred, the Truth of the Fact, being only inspected."[63] Martial jurists only needed to follow the procedural regulations that ensured justice. As Consett went on to note for ecclesiastical jurisdictions, summary cases still required charges with answers by the defendant, witnesses, and other proofs.[64] The judge still heard plaints against the accused and decided upon it. Courts martial were no different.

Martial law commissioners also heard private plaints between soldiers. We know less about this procedure. But from the few descriptions of courts martial in armies that we have, the court operated as a great gathering of the army where soldiers could level complaints of all sorts in the hopes of receiving justice.[65] The court martial of the 1513 campaign in France heard causes amongst the soldiers three days a week. It is almost certain that equitable principles guided the marshal or judge marshal in these hearings. There was little substantive law for private complaints at martial law. At the end of the sixteenth century, the army had adopted several rules relating to wills. Soldiers were supposed to make their last wills in the judge marshal's office. If they did not, their moveable goods would go to their next of kin. If unclaimed for a year, the judge marshal would distribute the dead soldier's goods to the poor soldiers of the regiment. But in everything else, the marshal or judge marshal simply had to use his conscience to resolve the particular dispute that came before them.

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[63] Henry Consett, *The Practice of the Spiritual or Ecclesiastical Courts* (London, 1685), part IV, 178; Helmholz, *The Oxford History of the Laws of England*, i. 314.

[64] Consett, *The Practice of Spiritual or Ecclesiastical Courts*, part IV, 180.

[65] Sir Thomas Coningsby, "The Journal of the Siege of Rouen, 1591" ed. John Gough Nichols *Camden Miscellany* 1 (1847): 27.

Very few official court martial records survive but we can piece together how procedure actually worked from correspondence and other accounts. One of the clearest examples of martial law procedure comes from the Low Countries in 1686. In March of that year, several soldiers stationed in Utrecht approached the lord general and demanded back pay.[66] The Earl of Leicester, after conferring with one of his captains, his marshal, and one of his colonels, ordered the leader hanged. Distraught over the verdict, the mutinous soldiers broke their condemned colleague out of jail. Two companies of "welshman" arrived shortly after, and helped the army leadership re-capture the condemned man and nine other chief mutineers. One of the imprisoned soldiers accused another named Roger Greene of participating in the jail break. The commander, John Norreys, ordered Greene arrested, and commanded his legal assistant, Bartholemew Clark, and one of his captains to interrogate Green, and depose other witnesses. Once the information was taken, Norreys commissioned his captain "for the hanging of the three of them in the presence of the other seven, who were released the same day."[67] Here we can see that secret information provided by a convicted man led to the arrest and conviction of a soldier. The bar to arraignment was not high. Nevertheless, the commanders still wanted examinations taken.

One of the most complete records comes from the seventeenth century chronicle of Sir Thomas Gates' voyage to Virginia in 1609.[68] Gates had been appointed by the Virginia Company to be the deputy governor of the recently founded colony at Jamestown. He had also been empowered by the company to use martial law both on the sailors in the ship in which he traveled to the New World, and once he got to Jamestown, on the planters. However, his voyage

[66] "Account of Captain Cripps of the Mutiny that Broke out at Utrecht" 28 March 1586, *CSPF* 1586, 495; Dr. Thomas D'Oyley to Burghley 29 March 1586, *CSPF* 1586, 557.

[67] Ibid.

[68] Samuel Purchas, *Hakluytus Posthumus, or Purchas his Pilgrimes: Contayning a History of the World in Sea Voyages and Lande Travells By Englishmen and Others* 20 vols. (Glasgow: J. McLehose and Sons, 1905-07), xix. 25-41.

got sidetracked when a storm threw the ship off course. He landed in Bermuda, where they stayed for several days to gather supplies and to fix their ships. In the course of their delay, problems of discipline arose amongst the sailors. Two sailors came forward to Gates and informed him that the sailor Stephen Hopkins was plotting a mutiny against him. Gates brought the suspect before him and heard his entreaties: Hopkins claimed that he was innocent. Then he deposed two witnesses who claimed that Hopkins had indeed plotted a mutiny against Gates. Gates in the end decided with the two witnesses, and declared Hopkins guilty of mutiny. He sentenced him to death. But then the other sailors petitioned Gates to grant mercy for the sailor. The commander obliged.

Penalties were designed to terrify soldiers into obedience. Leniency was meant to stay mutiny. Leicester had used decimation, the choosing at random of a small proportion of those convicted of a crime en masse, to achieve this result. According to Machiavelli, commenting upon Livy, decimation was "the which punishment, was in such wise made, that though euery man did not feele it, euerie man notwithstanding feared it."[69] An even more brutal example of decimation came in Ireland in 1599, when the commander of an army sent to track down Irish rebels, the Earl of Essex, held a court martial that convicted a company of cowardice in the face of the enemy. Essex had the officer who was second in command executed, all other officers cashiered and imprisoned, and every tenth soldier executed.[70] Those that had not been convicted were forced to see the penalty enacted and thus also fear it should they commit a like offence. Pardons like that given by Gates to Hopkins reinforced the hierarchy of the host, and also showed the commander's compassion.

[69] *The arte of warre, written in Italian by Nicholas Machiavuel, set forth in English by Peter Withorne* (London, 1588), 84v.

[70] "Proceedings of the Earl of Essex," 22 June-1 July 1599, in *CCM*, 1589-1600, 308-12.

While brutal, martial law procedure was not as arbitrary as one might initially suppose. In all of these cases, the martial law commissioner heard evidence. In most of these cases we can definitively show that the martial law commissioner took advice, sometimes from a legal assistant, sometimes from his soldiers, and sometimes from his subordinate officers. While the procedure looks ad hoc to us now, it should not blind us to the rules generals and others sought to guide their decisions.

Crown Strategies and Martial Law Jurisdiction

Martial law was meant to inspire terror, and through terror, obedience. Monarchs and their council utilized this strategy when it thought it was necessary, and when they thought it was legal. Soldiers in pay were not necessarily subject to martial law jurisdiction in the sixteenth century. Neither were those who engaged in rebellion. The employment of martial law, while it had some patterns, was contingent upon which abstract rules Crown officers selected in order to justify martial law jurisdiction.

1. Crown Garrisons

By the middle of the sixteenth century, the Tudors had standing garrisons of paid soldiers in Berwick-upon-Tweed, a town on the Scottish border, in Calais until 1558, in Ireland (usually in and around Dublin), in the Isle of Wight, and in Plymouth. In these towns, a complex network of jurisdictions supervised soldiers which only sometimes included martial law.[71] The governor

[71] These towns with a garrison have been understudied by historians. The best primary source for understanding the legal relationships between soldiers and town dwellers comes from the letterbook of the marshal of Berwick. TNA, WO 55/ 1939. For secondary literature, see John Scott, *Berwick-upon-Tweed: The History of the Town and Guild* (London, E. Stock, 1888); David Grummitt, *The Calais Garrison: War and Military Service in England, 1436-1558* (Woodbridge: Boydell Press, 2008); Susan Rose, *Calais: An English Town in France, 1347-1558* (Woodbridge: Boydell Press, 2008); R.A. Preston, *Gorges of Plymouth Fort: A Life of Sir Ferdinando Gorges, Captain of*

of the town had both civil and military powers, which were represented by his two respective underlings, the mayor and the marshal. Soldiers would not automatically fall under martial law in these garrisons. Soldiers in Berwick – upon – Tweed, for example, came before city courts in cases of felony. The Crown only employed martial law selectively to discipline its soldiers both in England and abroad. In Ireland, the Crown exempted its soldiers from Irish civilian law only in 1543, when the marshal of the army complained to Henry that he could not punish his own soldiers due to the interference of common law officers.[72] The difference between the two garrisons has less to do with a geographical distinction than between the Crown's distrust of Irish juries.

Indeed, while many jurists in the seventeenth century employed the statute 13 Richard II to claim that martial law should only be used in cases outside of England, in the sixteenth century no such geographical distinction existed. In 1596, for example, the Crown granted the Earl of Essex, who was to lead a raiding expedition to Cadiz, powers of martial law over his host. A record of the regiments of the camp shows that Sir Francis Vere, the marshal of the army, had two men executed, one "a fugitive thother a mutinier."[73] A martial court banished one lieutenant Hammond from the army for corruption, while it detained another and released him from the army for "wordes" against the lord marshal. Soldiers in England in the sixteenth century were not exempt from martial law. Nor were they always subject to it. The Crown, when it felt it expedient, used martial law to discipline soldiers.

Plymouth Fort, Governor of New England, and Lord of the Province of Maine (Toronto: University of Toronto Press, 1953).

[72] Henry VIII to the Deputy and Irish Council, Aug. 1543, TNA SP 60/11 f. 81v. Henry VIII to the Irish Council, Aug. 1546, TNA, SP 60/12, 318. 1550 instructions to Anthony St. Leger declared that soldier had been troubled by too many vexatious lawsuits: therefore they should only be governed by martial law. HEHL El Ms. 1700, f. 5v.
[73] "The Svall Regiments of the Army" Staffordshire Record Office D593/S/4/6/34. Another copy of this manuscript can be found in FSL, Ms. v.b.142, f. 20.

2. Martial Law and Rebellion

The Tudors used martial law to convict and execute the lowly who engaged in rebellion. In doing so, they made a significant departure from medieval precedent, where kings generally only punished nobles. This experiment began, at least at the level of contemplation, in 1497. That June, the commons of Cornwall, rose against Henry VII due to his new taxation policies. The revolt was short-lived. With the leaders of the rebellion, Henry adopted the policy with which we are now familiar. In March 1497, he issued a commission which authorized four men to call before them James Touchet, Lord Audeley, one of the leaders of the rebellion, and to "execute the office of constable and marshal upon him."[74] Audeley, in a trial not inconsistent with medieval treason trials by notoriety, was convicted before the panel according to the laws of arms.

Henry also sent two commissioners to Cornwall to try less important participants in the rising. In July 1497, the king issued a commission for Robert Clyfford and John Digby to "execute the office of constable and marshal of England with respect to the rebels who levied war in Devon and Cornwall."[75] We know very little of what happened to this commission. But it is important because Henry was experimenting with trying the "meaner sort" who had participated in the rebellion, not just the leaders. However, the experiment was not enacted. Instead of trying participants in the rebellion for treason by the constable and marshal, Henry probably imposed fines.

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[74] *CPR*, 1494-1509, 115. For the trial of Audeley, see L.W. Vernon Harcourt, *His Grace the Steward and Trial by Peers: A Novel Inquiry into a Special Branch of Constitutional Government* (London: Longmans, 1907), 397-99. The full patent roll that commissioned the trial of Audeley is printed in Ibid., 414-15.

[75] Ibid.

In 1536-7, Henry VIII engaged in a policy his father had only contemplated. That year large masses rose against his rule began in the north of England, a movement which has subsequently been called the "Pilgrimage of Grace."[76] It began in the autumn of 1536 when rumors circulated around Lincolnshire that Henry intended to consolidate parishes, and appropriate plate and other church goods. These rumors came in the context of the early stages of a Crown mandated reformation, which dissolved all of England's monasteries, separated the kingdom from papal jurisdiction, and announced innovations in religious worship through the King's ten articles.[77] Alongside the religious reforms, northerners had grievances over Henry's tax policy, which they viewed to be onerous, and several agricultural innovations at least indirectly related to the king, like enclosure and increased rents on demesne lands. These issues informed a general understanding that the king was being led by evil councilors. Rumors about the taking of plate were all that was necessary in these conditions to start a serious uprising.[78]

After the rising began in Lincolnshire, the commons in the East Riding in Yorkshire also rose, and they continued their protest long after the rebellion in Lincolnshire had died down. During the months of October and November, the pilgrims became enormously powerful and could claim thousands of men within their ranks.[79] In these months the pilgrims, who were commoners, co-opted many of the gentry in the region to join their ranks and by the end of November, had control of York, Hull, and Pontefract Castle, one of the key strategic Crown

[76] The best overview of the pilgrimage is Richard Hoyle, *The Pilgrimage of Grace and the Politics of the 1530s* (Oxford: Oxford University Press, 2001). For an innovative examination of the politics of the pilgrims, see Ethan Shagan, *Popular Politics and the English Reformation* (Cambridge: Cambridge University Press, 2003), 89-113.

[77] For a general overview of the English reformation of this period, see Richard Rex, *Henry VIII and the English Reformation* (New York: St. Martin's Press, 1993); for a work that argues for the essential conservatism of English religiosity in the 1530s see Eamon Duffy, *The Stripping of the Altars: Traditional Religion in England, c. 1400- c. 1580* (New Haven, CT: Yale University Press, 1992).

[78] Hoyle, *The Pilgrimage of Grace*, 93-135.

[79] Ibid.

castles in the region. By December, Henry granted a general pardon, and promised to convene a parliament to hear the grievances of the pilgrims. However, the uprisings were not at an end. Many of the pilgrims agreed with their pact with the king, but others were unhappy with it, and began to plot smaller uprisings.[80] This fracturing led to several minor uprisings in the early months of 1537. In January and February of 1537, the Duke of Norfolk, now aided by many of the gentry who not long ago had sided with the commons in their complaints about the royal government, advanced with a royal army upon the rebel splinter groups.[81] Norfolk easily put down the risings. He began to prosecute caught pilgrims at York in the middle of February, and then he turned his attention to Carlisle, where a splinter group of rebels had just failed to take the city.

Throughout the rebellion, the Crown had generally desired to prosecute the rebels at common law. In the autumn of 1536, the Lord Chancellor, Thomas Audeley, prepared special commissions of *oyer* and *terminer* for the lord general of Henry's army, the earl of Suffolk. Suffolk never used the commission. In the aftermath of the rebellion, in the spring of 1537, the Crown used common law for most treason cases.[82] But some of the Crown's activities reveal that it was concerned about jury nullification. It should have been, as many of the juries its commissioners empanelled in counties where the rebellion had taken place refused to convict defendants of treason.[83] In order to eliminate this problem, the Crown in certain instances

[80] Shagan, *Popular Politics and the English Reformation*, 89-131.

[81] Madeleine Hope Dodds and Ruth Dodds, *The Pilgrimage of Grace: 1536-7, and the Exeter Conspiracy, 1538* 2 vols. (London: F. Cass, 1971), ii. 99-141.

[82] G.R. Elton, *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge: Cambridge University Press, 1972), 293-326.

[83] Elton, *Policy and Police*, 314-15.

brought caught rebels to London to be tried there instead of in the place of the rebellion. Henry also experimented with trying rebels at martial law.

Henry conceived martial law to be a verge jurisdiction delimited to a 12 mile circumference around it. In October 1536, the king rode with his army to Windsor with his banner raised before it travelled north to fight the pilgrims without him. In that period, according to the prominent and legally trained chronicler Edward Hall, the king heard a report that a butcher expressed support for the pilgrims in the north of England. Further Henry heard reports that a priest declared that the pilgrims were "Goddes people [and] did fight and de-fend Goddes quarrel." According to Hall, the two were only "v. myle of Winsore" well within the verge of the king's banner.[84] Both men were executed for treason at martial law.

In February 1537, the king strategically delegated his idea of a verge jurisdiction to his commander, the Duke of Norfolk. Norfolk had tracked down the remnants of one of the post-pardon rebel armies in the north near Carlisle. After he had entered the city, Norfolk demanded that all those who had participated in the post-pardon revolts submit to his authority. By his count, 6000 men and women came and submitted themselves to him. Writing to the Council on 19 February, Norfolk stated that he had to proceed by martial law. He desired this legal alternative because, according to Norfolk, "were [he] to proceed by indictments many a great offender would be acquitted as having acted against his will."[85] Norfolk was clearly worried that

[84]Edward Hall, *Hall's Chronicle: Containing the History of England…to the end of the Reign of Henry the Eighth* ed. H. Ellis (London: J. Johnson, 1809), 823. The relationship between the banner and martial law jurisdiction has been noticed in passing by Elton, *Policy and Police*, 90, and R.V. Manning, "The Origins of the Doctrine of Sedition" *Albion* 12:2 (Summer, 1980): 107.

[85]Norfolk to Council 19 Feb. 1537, *L&P*, xii no. 468.

the inhabitants of the north were in sympathy with the rebels and would refuse to indict them. Instead of risking jury nullification, Norfolk wanted to use martial law.

Three days later, the king responded to Norfolk, approving of his plan to seek justice through martial law. The king declared that,

> we approve of your proceedings in the displaying of our banner, which being now spread, till it is closed again, the course of our laws must give place to martial law; and before you close it up again you must cause such dreadful execution upon a good number of the inhabitants[86]

Norfolk alone was responsible for the enactment of this verge jurisdiction. On 24 February, he reported back to the king the product of his judicial undertaking. First, he attached the names of those he executed at martial law to his letter. They totaled 74.[87] Again, Norfolk declared how common law procedure would have impeded justice: "And, surely had I proceeded by the trial of 12 men, I think that not the fifth man of these should have suffered for the common saying is here 'I came out of fear for my life' and "I came forth for fear of loss of all my goods…And a small excuse will be well believed here."[88] Norfolk was not stating that he wanted to convict the innocent or convict those without evidence. Instead, he was concerned that a jury might acquit those who had broken the law. By circumventing the jury, Norfolk obtained his convictions, and crowed that "the like number hath not been heard of put to execution at one time."[89]

[86] Henry VIII to Norfolk, 22 Feb. 1537, *L&P*, xii. no. 479.

[87] Norfolk to Henry VIII 24 Feb. 1537, *L&P*, xii no. 498.

[88] Ibid.

[89] Ibid.

We only have a few hints that allow us to understand the procedure Norfolk used. He claimed that he had narrowed the number of men to be tried from the supposed 6000 down to 74 by the advice of his council. His council at this point included Sir Ralph Ellerker and Robert Bowes, both of whom had initially participated in the Pilgrimage of Grace in the autumn and had negotiated with Henry on the Pilgrims' behalf. They had received pardons from the king and had been joined with Norfolk, in part to prove their allegiance, later in the winter. Norfolk, in his relation of the trials to Henry, declared that both Bowes and Ellerker had served in legal capacities during the trials. Norfolk named Ellerker as marshal and Bowes as an "attorney general" to prosecute the suspects. We know little of what this meant precisely. But given what prosecutors and marshals generally did in English courts we can make a good guess as to the responsibilities of Ellerker and Bowes. Ellerker, as marshal, probably was in charge of detaining and supervising the suspects. While Bowes, as attorney general, probably was charged with taking down examinations of the subjects, and probably drafting an informal charge, or information so Norfolk could make a judicial determination as to the guilt of the suspect.

In their magisterial account of the Pilgrimage, Madeleine and Ruth Dodds noted that the forced participation of Ellerker and Bowes "must have been a sufficient humiliation for the Pilgrims' ambassadors to the king."[90] Perhaps this was Norfolk's intention. But perhaps he also wanted men familiar with the rebellion that could provide him with information which would help him in his judicial determinations. In other words, Norfolk had an interest in using law. He wanted rules and evidence before he obtained conviction. He even used mercy. He admitted to Henry that the "number be nothing so great as their deserts did require." All the way up in

[90] Madeleine and Ruth Dodds, *The Pilgrimage of Grace*, ii. 119.

Carlisle, with enormous powers given to him by a vengeful king, Norfolk did not use arbitrary power but instead sought law to guide his actions.

The great religious upheavals of the 1530s would be repeated. In 1549, two years after Henry's death, both the Commons of England in the south-west and in East Anglia rose against the boy king Edward VI and the Protector of England, the Duke of Somerset.[91] Like the Pilgrimage of Grace, a combination of economic and religious grievances stoked the risings. The enclosure of common pasture lands in Norfolk as well as the evangelical religious policies of Edward VI drew intense protests. Like the Pilgrimage of Grace, the rebellions threatened the regime, with rebels in the southwest even laying siege to the city of Exeter. The Edwardian regime survived the rebellions and in the aftermath considered several legal options in their prosecutions. While very little evidence survives, it is probable that magistrates used martial law to execute some of the participants of the rebellion.[92]

The religious upheaval continued after the death of Edward's Catholic sister Mary in 1558 and the succession of her Protestant sister Elizabeth.[93] The return of Protestant religious services was particularly unpopular in the north of England, where traditional religious practices were most strongly maintained. By the fall of 1569, the combination of religious grievances and particular grievances by several of Elizabeth's great northern lords, the Earls of Northumberland and Westmorland, led to what has now become called the "great northern rebellion." Along with

[91] These rebellions have come to be known as Kett's Rebellion in Norfolk and the Prayer Book Rising in the southwest. The most comprehensive treatments of these rebellions can be found in Andy Wood, *The 1549 Rebellions and the Making of Early Modern England* (Cambridge: Cambridge University Press, 2007). M.L. Bush, *The Government Policy of Protector Somerset* (London: Edward Arnold, 1975). For an interpretation that focuses on religious grievances see Duffy, *Stripping of the Altars*, 448-78.

[92] The Privy Council made plans during the rebellion to give local officers powers of martial law. See below.

[93] Although there were rebellions and conspiracies against Mary, she in general did not use martial law to execute traitors. See D.M. Loades, *Two Tudor Conspiracies* (Cambridge: Cambridge University Press, 1965).

trying to restore Catholicism, the Earls probably intended to replace Elizabeth with her Catholic heir, Mary Queen of Scots. On 14 November, the Earls with a small contingent rode into Durham, a county seat of the northern county by the same name, and issued a proclamation that declared their loyalty to the queen and to the traditional faith. They had gathered only against those evil councilors who sought to subvert Catholicism and the nobility.[94]

In response, Elizabeth ordered the organization and deployment of a fairly large force to quash the rebellion. She also ordered her loyal servants in the north to raise forces to fight the rebels and defend the queen's holdings. In a move identical to the one her father made against the Pilgrims, Elizabeth issued a pardon to all of those followers of Westmorland and Northumberland on 19 November for all those who left the rebel camp by the 22 November in an attempt to diminish the numbers of the rebel forces. Northumberland and Westmorland fled into Scotland by December. Those who had followed the earls had to await the justice of the queen. She was not particularly interested in granting them mercy. As the leading historian of the period has noted, "the queen demonstrated recognition that it was the many men who answered the earls' calls…that had made the revolt a danger to her regime."[95]

In January 1570, the leaders of the queen's armies in the north, led by the Earl of Sussex and his knight general of the army, Sir George Bowes, arraigned and executed close to 600 men in the counties of Durham, York, and Northumberland for their participation in the rebellion. We can detect in their plans similar goals to that of Henry VIII in 1537. The Queen and her council wanted to terrorize the inhabitants of these areas through public executions of a select number of

[94] K.J. Kesselring, *The Northern Rebellion of 1569: Faith, Politics, and Protest in Elizabethan England* (Basingstoke: Palgrave Macmillan, 2007), 1-44. Kesselring's narrative is the best work on the rising. Much can still be made out of Cuthbert Sharp's *The Rising in the North: The 1569 Rebellion* (Durham: Shotton, 1975).

[95] Kesselring, *The Northern Rebellion*, 90.

participants of the rebellion. William Cecil, at the time Elizabeth's secretary of state, ordered to execute a small number of people "in every special place where the rebels did gather any people, and in every market town or great parish, there be execution by martial law."[96] We can also imagine that jury nullification was a worry among the queen's councilors as the rebellion had been quite popular in those regions. Indeed, in the trials the Crown conducted at common law, the attorney general had a difficult time obtaining indictments and attempted in several instances to remove cases to King's Bench.

Like the Pilgrimage of Grace, the Crown attempted to obtain evidence for its prosecutions at martial law. In this case, the evidence taking was probably more extensive. It also involved torture. In the same memorandum that advocated for using martial law, William Cecil made plans to use torture to uncover the key participants of the rebellion:

> some persons of sundry parts being apprehended, should be committed to strait prison, and being put to fear, and as need should require, pinched with lack of food and pains of imprisonment, should be examined to declare the names of those that were with the rebels, or sent them relief; upon examination of 30 or 40 of such offenders, dwelling in several places, the number would be known.[97]

The Privy Council warrants do not survive for this period so we cannot trace how often torture was used. Circumstantial evidence indicates that Crown officials used torture to obtain information on the rebels. And it is probable that the Crown through using torture managed to obtain information on participants. The Earl of Sussex, by early January, had lists of men he wanted tried at courts martial.[98] We also have an idea that the evidence gathered against those

[96] Quoted in Kesselring, *The Northern Rebellion*, 122.

[97] TNA, SP 15/15 no. 139.

[98] Kesselring, *Northern Rebellion*, 124-5.

eventually convicted was more substantial than simply implication by another when under torture. Bowes reported in a 1573 memorandum on the use of martial law in the aftermath of the rebellion that he had only convicted the "greatest offenders; for there was none executed by me, but such as did confesse with their owne mouths that they were in the actual rebellion."[99]

The lists that Sussex compiled were not convictions upon record. We know this because Sir George Bowes held judicial proceedings in January where he examined suspects and gave verdicts. Records for several of these tribunals have survived. They are the only courts martial records of the sixteenth century, although they offer almost no details about the ways in which Bowes administered the proceedings. Bowes only listed the name of the suspect who came before the court, where he was from, perhaps what his occupation was if he was a constable or other local officer, and if he was executed or not. The top of the record reads:

> Rebells convicted before Sir George Bowes knight mshall of the quenes matie Armye levyed in the north Pte At the sessions or mshals court holden at Allerton and Thyrske the xiiith xiiiith xxth & xxiith dayes of Jannuarye in the xiith yeare of the Reigne of or Souarigne ladye Elizabeth etc and executed as foloweth[100]

A suspect coming before the court had little chance of survival. However, two did survive. When one "Robert Peters" came before the court, his execution was "stayed at the earnest sugt of Anthony Wycleff."[101] Bowes also stayed the execution of another man named William Waller, at the suggestion of one Thomas Layton. Who was Thomas Layton? We do not know. But these stays of execution had to be acquittals because Bowes did not have the authority to grant a

[99] Sharpe, *Rising in the North*, 188. The original is BL, Harley Ms. 6991, no. 32.

[100] DUL, Bowes Ms. 534 f. 6. F. 8 is an account of a court martial at Richmond.

[101] Ibid., f. 6v.

pardon. The word "stay" suggests Bowes had reviewed evidence on Peters in advance and had planned on convicting him, but a petitioner whom he trusted convinced him otherwise. These two examples show, furthermore, that Bowes allowed men to speak at the hearings, something that would not have been done at a proclamation of one's guilt by notoriety. Bowes conceived of himself as being a judge who operated by law. The law in turn allowed Bowes to legitimate an incredible amount of violence.

According to both the architects of the martial law proceedings and to Bowes, those executed at martial law were of the meaner sort. Cecil wanted to make it clear that no person of freehold was to be tried at martial law. The Earl of Sussex agreed, and had informed Cecil that he had already made it clear to his lieutenants not to try the propertied well before Cecil issued his commands. And George Bowes, in his 1573 memoranda to the Privy Council on the courts martial, declared that he had only executed the meaner sort. Why did these men want to delimit martial law proceedings to the poor? Cecil did not believe the Crown could alienate real property of those convicted of treason at martial law. Allowing the propertied to come before juries meant that the Crown could obtain their property through forfeiture.[102]

Cecil and Sussex probably understood this bar from their readings of medieval precedent. We have seen that in 1352 along with passing a treason statute, parliament banned the alienation of property by the Crown by any means except those that were qualified by chapter 29 of Magna Charta.[103] This stricture forced the various kings of the fifteenth century to posthumously attaint those they had convicted upon record during war in order that they might obtain their property.

[102] Conviction of felons was quite lucrative for the Crown. Krista Kesselring, "Felony Forfeiture and the Profits of Crime in Early Modern England" *The Historical Journal* 53:2 (2010), 111-39.

[103] See prologue.

The Elizabethans seem to have understood this same boundary. Martial law in their view could not alienate property.

But military officials believed they could take moveable property. George Bowes as provost marshal travelled around the countryside taking the moveable property of those he had executed. One Robert Peverlt, for example, forfeited goods estimated at £3 9s 6d. Bowes took £3 of it. During this scramble for property, there were disputes over who was entitled to it. On 4 February, Sir Thomas Gargrave, another of Elizabeth's servants who participated in the martial law proceedings, protested to William Cecil that Bowes had been taking the moveable goods of the rebels illegally. They should have gone instead to the queen because the rebels had levied war against her.[104] These men do not seem to have followed any set rules, although historians have argued that courts martial alienated one third of all moveable property. What is more likely is that there were no such set rules.

Henry VIII had not thought once about alienating property, moveable or otherwise. But he did focus on the temporal state: martial law could only be practiced when the banner was raised. Elizabeth did not seem to care at all about this boundary. No reference to a state of war was made during the great northern rebellion. William Cecil, several years later, declared that martial law could be used in states of war or in "turbulent times." Perhaps this looser guideline was what Elizabeth used to employ martial law in 1569/70. Ideas about when, where, and on whom martial law could be used were various and often strategically employed.

The continuities were in what both regimes perceived to be the usefulness of martial law procedure. The swiftness and terror of martial law, they hoped, would restore order in previously

[104] Sharp, *Rising in the North*, 173.

turbulent areas.[105] The entanglements of indictment by grand jury were avoided. The Crown sought through martial law to impose discipline on its populace in ways not dissimilar to the ones commanders utilized to put down mutinies or punish cowardice. After rounds of negotiation, the Crown defeated the rebels with force, and then publicly executed a select number of the participants to terrorize the rest. With both of these rebellions, the Crown used its military to execute martial law. But throughout the sixteenth century, it began to experiment with using martial law through other means.

3. Martial Law Beyond the Army

Tudor monarchs quickly saw the uses of this procedural complement to common law well beyond the confines of the army and those committing treason within its vicinity. It thus invoked martial law through print to terrorize hostile populations into obedience. It could employ martial law for specific cases against those whom the Crown perceived to be an especially dangerous threat. It could delegate martial law to civilian officials, to naval officials, and to chartered companies. Nearing the end of Elizabeth's reign, the Crown and Privy Council saw martial law as a solution to many legal problems.

In 1548-49, the Protectorate of Edward VI was in a state of panic over the rebellions taking place throughout England. Their solution was to create county officers in charge of local forces – usually militia or trained bands – who had powers of martial law. At the height of the rising in 1549 Edward's council thought about creating county "marshals" to apprehend mutineers and rebels. The plan outlined that they would then bring the prisoner before a panel of

[105] Thus in November 1587, when Elizabeth's council of war was preparing for the Spanish invasion fleet, they believed that they might have to execute those who created a "stir" by martial law in order to keep the populace under control. BL, Harley Ms. 444, fol. 114.

four men of the county, two sheriffs and two gentleman" who would examine the defendant and adjudge guilt. If they decided the defendant was guilty he or she was to be executed immediately on the next market day.[106] The Crown granted men of the county a martial law jurisdiction.

After they had quelled the uprisings, the Privy Council began to make plans for how these sorts of uprisings could be prevented in the future. One of their solutions was to create a lord lieutenant in every county of the realm during periods of turbulence. The lord lieutenant, who was often a member of the Privy Council, became the Crown's chief military officer of the county, and was responsible for training the militia. The Edwardian government also decided to give these lord lieutenants powers of martial law but only during times of unique distress. A lieutenancy commission from 1552, for example, stated that the lieutenant was to "fight against the king's enemies and rebels and to execute upon them the martial law and to subdue invasions, insurrections, etc."[107] Initially these positions were temporary, and the lieutenancy fell into decline in the reign of Mary and in the early reign of Elizabeth.

However, after 1585, the lieutenancy became a permanent county office and would remain so throughout the seventeenth century. And the Crown consistently put a clause relating to martial law in the lieutenancy commission. In the 1628 parliament, MP's wondered about the

[106] TNA, SP 10/8/9. For the actions of the Council in this period, see Dale Hoak, *The King's Council in the Reign of Edward VI* (Cambridge: Cambridge University Press, 1976), 165-230. For the creation of the lieutenancy, see Gladys Scott Thomson, *Lords Lieutenants in the Sixteenth Century*: *A Study in Tudor Local Administration* (London: Longmans, 1923), 14-42; Neil Younger, *War and Politics in the Elizabethan Counties* (Manchester: Manchester University Press, 2012). For the militia see Lindsay Boynton, *The Elizabethan Militia, 1558-1638* (London: Routledge, 1967). None of these works address the lieutenant's martial law powers extensively in part because they probably never used them.

[107] Notice of Commission of Lieutenancy for the Duke of Somerset (May 5 5 Edw. VI), reprinted in Thomson, *Lords Lieutenants*, 150. The commissions of lieutenancy under Mary simply commanded that they could kill by any enemies or rebels by any means necessary. Thomson, *Lords Lieutenants*, 150-1. Those of Elizabeth, like that of Edward, gave the lieutenant powers to execute rebels and enemies at martial law. Thomson, *Lords Lieutenants*, 153. Elizabeth eventually copied these powers into her commissions to her lord generals. See, for example, LPL, Ms. 247, fos. 5-7, 9-11v.

lieutenant's powers of martial law. Some thought that this clause only meant the lieutenant had powers to slay rebels and invaders in the heat of battle, not to hold actual hearings at a martial court. Unfortunately, there is no evidence that lords lieutenants actually used martial law in either the sixteenth or seventeenth century. However, it is likely that they would have had powers to hold courts martial should the need arise.[108]

The procedure of martial law was useful as a threat, just as much as it was useful in practice. Tudor monarchs used printed literature to threaten their subjects with death by martial law if they refused to obey monarchical commands. The most common method was the royal proclamation. Royal proclamations, in the words of historian Frederic Youngs, were a "a royal command, normally cast in a distinctive format, which was validated by the royal sign manual, issued under a special Chancery writ sealed with the Great Seal, and publicly proclaimed."[109] Proclamations were temporary measures designed to address a problem that could not be immediately addressed through parliamentary statute or at law. Very often, proclamations attempted to enhance the enforcement of pre-existing statutes. Others created new offences entirely. Opinions on the limitations of proclamations varied in the Tudor period, as the statutes that had defined their powers in 1539 and 1542 had been nullified in 1547.[110] The legal status of proclamations by the late 1580s was unclear.

[108] Lords Lieutenants also had powers to appoint provost marshals, but they reserved the right to execute men by martial law. Provosts could only execute by martial law after the lord lieutenant had authorized it. See The Marquis of Northampton to William More, 30 June 1552, SHC, 6729/10/12.

[109] Frederic A. Youngs Jr. *The Proclamations of the Tudor Queens* (Cambridge: Cambridge University Press, 1976), 9-10.

[110] For the statute of 1539 see E.R. Adair, "The Statute of Proclamations" *English Historical Review* (1917): 34-46; Joel Hurstfield, *Freedom, Corruption, and Government in Elizabethan England* (Cambridge, MA: Harvard University Press, 1973), 33-41. The most comprehensive examination of the statute comes from Rudolph Heinze, *Proclamations of the Tudor Kings* (Cambridge: Cambridge University Press, 1976), 153-78. The acts have been

The legal status was not as important as the messages the monarchy could send to its subjects through the proclamation.[111] Officials proclaimed the commands of the monarch in at least four market towns within every county. These proclamations were formal and probably well attended. The chronicler Henry Wriothesley described the announcement of a proclamation of martial law in 1549:

> The eighteenth day of July was a proclamation made in the city of London for martial law, both the sheriffs riding and the knight marshall with them in the middle with the trumpet and the common crier afore them one of the clerks of the papers with him, which proclamation was made in the city in divers places in the forenoon, and at afternoon without the gates of the city.[112]

We can see from this description that people in and about London would have had a difficult time not hearing about the proclamation of martial law.

Henry VIII was the first to use martial law proclamations. He did so during the height of the Pilgrimage of Grace. The king in October 1536 issued a proclamation that ordered the punishment for unlawful assemblies. Henry cautioned those currently assembling to go back to their homes. If they refused, he would "proceed against them with all…royal power, force, and minions of war." Then he would destroy "them, their wives, and children, with fire and sword, to the most terrible example of such rebels and offenders."[113] Henry's use of the proclamation was a straightforward threat. The purpose of the proclamation was to generate order through fear.

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printed in *Tudor Royal Proclamations* (hereafter *TRP*) ed. Paul L. Hughes and James F. Larkin 3 vols. (New Haven: Yale University Press, 1964-9), i. 545-54. For a general introduction to proclamations, see *TRP* i. xxi-xliii.

[111] Sharpe, *Selling the Tudor Monarchy*, 83-7.

[112] Quoted in Barrett L. Beer, "London and the Rebellions of 1548-9" *Journal of British Studies* 12:1 (Nov., 1972), 27-8.

[113] *TRP*, i. no. 168.

The proclamations of martial law in Henry's son's reign continued this theme. The protectorate government in the summer of 1549, during the height of the rebellions against the regime, issued a proclamation declaring martial law on any rioters.[114] The regime made this proclamation after it had issued a pardon to all past rioters, and after it ordered its magistrates to investigate the causes of the riots – enclosures – and punish those who had committed crimes. In June, the regime threatened any future rioter that they would be punished by the laws of the realm. This threat did not seem to work, so one month later, it issued a proclamation that declared that any rioter could be punished "upon pain of death presently to be suffered and executed by the authority and order of law martial, wherein no delay or differing of time shall be permitted or suffered."[115] The regime was using the idea of swift justice by martial law to terrify rioters into obedience.

By the reign of Edward's sister, Mary, the Crown began to think that the fear of martial law might deter religious dissent. In the summer of 1558, Mary issued a proclamation that declared that the owners of any seditious, heretical, or treasonous books would "without delay be executed for that offence accordynge to thordre of marshall lawe."[116] Those who currently owned the books could avoid this dire fate by giving up their books to the authorities who would have them burned. The claim to jurisdiction was that just by owning a heretical book, the subject

[114] The edition of Tudor Royal Proclamations is generally excellent. However, in certain instances the authors seem to have crafted their own titles for proclamations that were not in the original editions. For example, a June 1549 proclamation that threatened future rioters with punishment by the laws of the realm has been labeled by Hughes and Larkin as "Pardoning Enclosure Rioters; Ordering Martial Law against Future Rioters." However, there is no reference to martial law in the title of the original version of the proclamation (STC 7822), and martial law does not appear in the body of the text. The same can be said for *TRP*, ii. no. 438 (STC 7879).

[115] *TRP*, i. no. 341. There are some stories from 1549 of both London magistrates and county provost marshals using martial law but they are difficult to substantiate. Some of these stories clearly contain factual inaccuracies. See Beer, "London Rebellions" 27-8 and Boynton, "The Tudor Provost Marshal," 440.

[116] *TRP*, ii. no. 443. I have quoted from the original (STC 7884).

was “a rebel” and in a state of open warfare against the Crown. This proclamation came in the context of Mary’s campaign to eliminate “evangelicals” – what we would call Protestants, what she would call heretics – from England.

What could be used against owners of heretical books could also be used against the abettors of pirates.[117] In 1572, Elizabeth proclaimed that all pirates had to leave her harbors and towns. She also threatened those living within England with death by martial law for aiding pirates. Any subject who traded, either directly or indirectly, with pirates or convey any victuals to them would “suffer martial law as a manifest breaker of the common peace betwixt this realm and other realms and countries.”[118] Within the proclamation Elizabeth offered a carrot as well as a stick. If those who had colluded with pirates ceased their activities within five days of the printing of the proclamation, all their past misdeeds would be pardoned. The claim to martial law jurisdiction was based on the *ius gentium*. Pirates were considered to be *“hostis humani generis”* the enemy of all nations.[119] Thus anyone who helped pirates was the equivalent to rebels and traitors.

In the summer of 1588, Elizabeth made a similar proclamation to the one Mary had made in the summer of 1558 against the ownership of heretical books.[120] This proclamation, naturally given Elizabeth’s Protestant sentiments, was aimed at specific works by Catholics which challenged Elizabeth’s right to rule as Queen of England. Some even advocated for her

[117] *TRP*, ii. no. 585 (STC 8044).

[118] Ibid.

[119] Quoted in Mark Hanna, “The Pirate Nest: The Impact of Piracy on Newport, Rhode Island and Charles Town, South Carolina, 1670-1730” (unpublished PhD Dissertation, Harvard University, 2006), 2.

[120] *TRP*, iii. no. 699.

deposition. The Proclamation was made only weeks before officials spotted the Spanish Armada off the coast of Cornwall. In this uneasy time, the Privy Council wanted to prevent any internal uprising from happening simultaneously with a Spanish invasion. As in 1558, the Proclamation offered a carrot: the owners of seditious and heretical works were to immediately give them up to Crown officials without showing them to anyone. However, if they refused, the Queen's lord lieutenants had the right to convict and punish them according to martial law. All of the defendant's moveable property would be forfeited to the Crown.

In the summer of 1588, lord lieutenants and their assistants searched for heretical books in the homes of suspected Catholics. The Earl of Huntington, who was the Queen's president of the council of the north as well as the lieutenant in the ridings of Yorkshire, sent out orders on 28 July to his provost marshals to seek out vagrants, heretics, and spreaders of rumors.[121] They had powers to whip offenders and to send them to the stocks. If they were especially notorious, they could send them to York, presumably for examination by Huntington. They were also to seek out "lybles and wryttinges…contrary to the honor of her Maties proclymacon latelie published."[122] Unfortunately, there is no evidence relating to the provost's findings or if the lord lieutenant actually used powers of martial law to punish offenders.

Even if the Crown did utilize martial law in the summer of 1588, actual punishment was not the primary purpose of the proclamation. In 1536, 1549, 1558, 1572, and in 1588, proclamations of martial law were meant to deter the populace from engaging in dangerous activities that evaded ordinary legal solutions. All of these proclamations were a part of an extended negotiation, where the Crown also offered pardons for these illegal behaviors. In all of

[121]Letter Book of the Earl of Huntington, HEHL, HM 30881, f. 112-113v, 177-v.

[122] Ibid., f. 113.

these cases, we can detect some relationship between the specific misdeed that worried the Crown and the general idea of treason.

The Privy Council actually employed martial law rarely. The only clear example comes from late January 1558, in the immediate aftermath of Mary's loss of Calais. Some feared a French invasion The lord warden of the Cinque Ports, Sir Thomas Cheyne, reported to the Queen and her council that the mayor of Canterbury had caught two men, Robert Cockerell and Francis Barton and accused them of speaking seditious and traitorous words against her majesty. He also sent depositions of their acts. The Warden reported that as per the instructions the mayor had received from the Privy Council earlier in the year, they could proceed by martial law.[123] We do not have the instructions the Crown sent to the Warden or to the mayor and alderman of Canterbury, but apparently they could use martial law. The warden informed the Crown that they should proceed against Cockerell "by order of the marshall lawe without any length keeping of him" so that his fate would be a "terror to others." In the margins, the recipient wrote that "that if the words in the deposition be dewly proved against him."[124]

We know little about the Crown's justification for punishing these two men by martial law. It is possible that both Cockerell and Barton were soldiers. Canterbury housed around 100 Crown soldiers that winter. But those with martial law jurisdiction were not officers in pay in the army. However, it is clear that Cockerell was a Protestant. On his way to execution, the alderman of Canterbury asked him to repent and say a pater noster. Cockerell refused and according to William Oxenden, the new lord warden of the Cinque Ports, blasphemed God before he died.[125]

[123] Sir Thomas Cheyne to the Queen, 23 Jan. 1558, TNA, SP 11/12/32.

[124] Ibid.

[125] William Oxenden to Mary, 3 Feb. 1558, TNA, SP 11/12/46 and 46 I.

Barton was only sentenced to the pillory. Protestants swearing against Mary in a time of fear apparently needed to be executed at martial law. The point in the punishment of these two men, the rebels in 1537, 1549, and in 1570, in publishing proclamations of martial law, in granting lords lieutenants martial law jurisdiction was to instill obedience into the populace through a legal strategy that removed powers of conviction from the jury and into the hands of the judges.

Conclusion: Martial Law and its boundaries

In 1573, Elizabeth demanded a commission of martial law so she could execute an attempted assassin. In 1573, the zealous puritan Peter Birchet attempted to kill one of the queen's new favorites, Sir Christopher Hatton. Unfortunately both for Birchet and his victim, the person he attacked was not actually Hatton but Sir John Hawkins, the famed privateer. Hawkins survived the attack. But his luck did not assuage Elizabeth's wrath. After Birchet had been seized, Elizabeth wanted to execute him immediately by martial law. Many within the Queen's council strenuously objected to her demands. William Cecil, who heard of the affair from a letter by the Earl of Sussex, noted that martial law should not be used in times of peace when "ye procedings must be by forme of judiciary process wch put her by yt purpose."[126] Instead the jurisdiction should only be used in armed camps and in turbulent times. Elizabeth's councilors wanted martial law bounded to some vaguely conceived state of tumult.

The councilors stopped Elizabeth on this occasion, but these protests hardly bound martial law jurisdiction. Crown officers had crafted martial law from commissions of *oyer* and *terminer* and from commissions that had granted legal powers to the generals and marshals of the king's hosts. The procedure by information embedded in these martial law commissions was part

[126] Thomas Earl of Sussex to the Lord Treasurer, 28 Oct. 1573, BL, Harley MS 6991, no. 35.

of a larger trend by the Crown to bypass procedure by indictment for certain offences. This procedure was controversial, and many common lawyers sought to stop it, both by limiting ecclesiastical jurisdiction, and by restraining martial law. But martial law proved too useful as a procedural complement to common law for the punishment of certain offences. In order to govern its armies and navies during times of war, in order to quell rebellions, religious dissidents, pirates and their abettors, invaders, even workers on fortifications, the Crown turned to the only jurisdiction that used information in cases that involved life and limb. The only boundary to its jurisdiction by the end of the sixteenth century, and only to certain advisors, was that it should be confined to turbulent times. Considering how turbulent the sixteenth century was, this boundary granted martial law a broad jurisdiction.

Chapter Two:
Conviction by the Senses:
Making Summary Martial Law, 1556-1628

Within decades of its invention, Crown officers – the most prominent of whom was the Earl of Sussex, the lord deputy of Ireland from 1556 until 1563 –adapted martial law procedure.[1] By utilizing a combination of medieval English and European legal ideas, they created a new strain of martial law which was used most often in Ireland to combat the perceived lawlessness amongst the poor. Martial law in Ireland thus took on two forms: one reserved for Crown soldiers – "plenary martial law" – and one reserved for "vagrants" and "idlers." The judge marshal of Ireland in 1641, Adam Loftus, Lord Ely, dubbed this form "summary martial law:" a confusing name because all martial law involved summary procedure.[2] But summary martial law procedure was even swifter than its counterpart: no court proceedings were necessary. Instead, martial law commissioners convicted based upon the evidence their own senses had gathered. Due to the dress or reputation of the suspect, the martial law commissioner sensed their guilt, convicted them, and hanged them immediately upon the next tree.

While the procedures differed, the rationales for using martial law and summary martial were consistent. Crown officers in Ireland communicated their policy through proclamations. The purpose was to inspire terror. Through the threat of martial law, Crown officers hoped for transformation. Those poor Irish who were contemplating joining the private retinues of Irish lords hostile to Crown authority might think again and choose obedience instead. The strategy

[1] For Sussex, see Wallace T. MacCaffery, "Radcliffe, Thomas, Third Earl of Sussex," in *ODNB.* Radcliffe did not become the Earl of Sussex until 1557, but for simplicities sake, I will just refer to him as the Sussex throughout this chapter.

[2] John Rushworth, *Historical Collections of Private Passages of State, Weighty Matters in Law, remarkable proceedings in Five Parliaments* 8 vols. (London, 1721), viii. Loftus' deposition came during the treason trial of the Earl of Strafford, who parliament was trying to convict of treason in part by claiming he had used martial law illegally. For a lucid account of Strafford's trial, see J.S.A. Adamson, *The Noble Revolt: The Overthrow of Charles I* (London: Weidenfeld & Nicolson, 2007), 215-26.

also allowed delegated authorities to avoid potential jury nullification or the delays of the highly irregular assize circuits.

When scholars have examined summary martial law, they have been tempted to conflate it with private conquest.[3] Through martial law commissions, according to this view, Crown officers gave adventurous English martial men *carte blanche* powers to conquer the "wilds" of Ireland by any means necessary. These new men certainly possessed an enormous amount of discretion: too much, as the English Privy Council realized by the end of the sixteenth century. Nevertheless, Crown officers made a distinction between conquest and martial law jurisdiction. As opposed to the killings on the battlefield that crushed the strength of the opposition, summary martial law powers targeted specific wrongs that through terror could be corrected. It was thus meant to serve as a complement to common law process.

By 1589, the English Privy Council thought that this technology was both useful and dangerous. It incorporated some aspects of summary martial law procedure into proclamations meant to deter vagrancy and rioting in England in the 1590s. However, it also sought to restrain, both in Ireland and in England, the discretion of martial law commissioners. Ideas about summary martial circulated through England and Ireland. Through this process, Crown officers restrained summary martial law jurisdiction but also continued to employ a more circumscribed version to combat riot and rebellion.

Tudor Ireland

[3] David Edwards, "Beyond Reform: Martial Law and the Tudor Re-Conquest of Ireland" *History Ireland* 5 (1997): 16-21.

The English Crown claimed Lordship over Ireland based upon a twelfth century grant by the Papacy to Henry II called *laudabiliter*.[4] In reality, the island by the beginning of the sixteenth century contained multiple polities. The English Crown only possessed effective jurisdiction over the Pale: the four counties that surrounded the city of Dublin, and maintained close ties with the port towns of Munster and Connacht, whose merchant leadership often desired Crown protection in order to maintain their autonomy from over-mighty Anglo-Irish and Irish lords.[5] Along with this region – which maintained close ties to England due to wealthy sons' attendance in English universities and Inns of Court – the English Crown demanded allegiance, and in theory received it, from three great Anglo-Irish magnates, the Fitzgeralds of Kildare, the Butlers

[4] Ireland was turned into a "kingdom" by statute in 1541 so Henry VIII did not have to rely on a grant from the pope to claim sovereignty over Ireland. For general histories of sixteenth century Ireland see Colm Lennon, *Sixteenth Century Ireland: The Incomplete Conquest* (New York: St. Martin's Press, 1995); Steven G. Ellis, *Tudor Ireland: Crown, Community and the Conflict of Cultures, 1470-1603* (London and New York: Longman, 1985); and Steven G. Ellis with Christopher Maginn, *The Making of the British Isles: The State of Britain and Ireland, 1450-1660* (Harlow: Pearson Longman, 2007). These have generally replaced the three volume history of sixteenth century Ireland by Richard Bagwell, *Ireland Under the Tudors* 3 vols. (London: Holland Press, 1963), and the *New History of Ireland* ed T.W. Moody, F.X. Martin, F.J. Byrne, Art Cosgrove, W.E. Vaughan 9 vols. (Oxford: Clarendon Press, 1976-2009), iii.

[5] The Terminology used for group identities for historians of sixteenth century Ireland has always been problematic. Those living in sixteenth century Ireland who claimed to be "English" were members of families who had lived in the island for hundreds of years. Naturally, in this long period of time, intermarriage between those who arrived either during the initial 12th century conquest of Ireland or later on from England, Wales, Normandy, or somewhere else within the Angevin or Plantagenet lordship and native Irish speakers. Further, many claiming Englishness by the sixteenth century were bi-lingual. See Vincent Carey, "Neither Good English nor Good Irish: Bi-Lingualism and Identity Formation in Sixteenth Century Ireland" in *Political Ideology in Ireland, 1541-1641,* ed. Hiram Morgan (Dublin: Four Courts Press, 1999), 45-61. However, while in reality these identities were fungible, contemporaries had strong associations with being either English or Irish based on an extensive genealogical tradition, particularly within Irish polities. Irish bards distinguished *Gaedhil* (Gaels), which would have included not just those native to Ireland but also Gaelic Scotland from *Gaill* (foreigners). Ellis, *Tudor Ireland*, 46-7. These differences were reinforced by two different church administrations that operated within Ireland: the church *inter hibernicos* administered by the Archbishop of Armagh and the church *inter anglicos* administered by the archbishop of Dublin. Canice Mooney, *The Church in Gaelic Ireland 13th to 15th Centuries* (Dublin: Gill, 1969). It was also reinforced by law. The statutes of Kilkenny passed in 1366 banned intermarriage between the English and Irish, and forbade the English from adopting Irish dress or use brehon law. J.A. Watt, "The Anglo-Irish Colony under Strain, 1327-99" in *A New History of Ireland*, ii. 386-91. By the end of the sixteenth century, English families who maintained allegiance with the Catholic Church who also claimed descent from the Anglo-Norman conquerors began to gloss themselves as the "Old English" in contrast to the new English settlers. Nicholas Canny, *The Formation of the Old English Elite in Ireland: O'Donnell Lecture delivered at the University College Galway 6 Sept. 1974* (Dublin: National University of Ireland, 1975).

of Ormond, and the Fitzgeralds of Desmond.[6] These earls, in some ways like their counterparts in the north of England and in the marches of Wales, had their own private armies and their own courts of justice. The Crown had no control over the rest of the island. In this "land of war", so-called by the English, Irish magnates ruled their polities by Brehon law.

For most of the fifteenth and early sixteenth centuries, English monarchs ignored Ireland. They left its administration to its powerful and autonomous Irish magnates, the most important being the Earls of Kildare. Often taking the title of lord deputy of Ireland, the Earls of Kildare used Crown authority to maintain peace and order, but also to advance their economic and political interests on the island. They did so by building networks of alliances with Irish polities in and around the Pale who aided the Kildares with their military campaigns.[7] Occasionally Tudor monarchs attempted to restrain their autonomy. In 1494, Henry VII sent an English administrator, Sir Edward Poynings, to lead the Dublin government in an attempt to root out Yorkist loyalists.[8] This experiment ended in 1496 due to its costliness. In 1520, Henry VIII sent the Earl of Surrey to Ireland with a similar intention of taking the Irish government out of the

[6] For the Fitzgeralds of Kildare, see Vincent P. Carey, *Surviving the Tudors: The Wizard Earl of Kildare and English Rule in Ireland, 1537-1586* (Dublin: Four Courts Press, 2002). For the Butlers of Ormond, see David Edwards, *The Ormond Lordship in County Kilkenny, 1515-1642: The Rise and Fall of Butler Feudal Power* (Dublin: Four Courts Press, 2003). For the Fitzgeralds of Desmond, see Anthony MacCormack, *The Earldom of Desmond, 1463-158: the Decline and Crisis of a Feudal Lordship* (Dublin: Four Courts Press, 2005).

[7] Ellis, *Tudor Ireland*, 85-104; Brendan Bradshaw, *The Irish Constitutional Revolution of the Sixteenth Century* (Cambridge: Cambridge University Press, 1979), 3-31.

[8] Poynings introduced what is now known as "Poynings' Law" which stipulated that the monarch of England or his or her council needed to approve any bill before it was to be considered by a sitting Irish Parliament. This rule was meant to circumscribe the powers of the governor just as much as to limit the legislative initiative of Irish parliaments. Indeed, prior to 1634, Irish parliaments believed that the law safeguarded its interests from over-mighty governors. D.B. Quinn, "The Early Interpretation of Poynings' Law, 1494-1534" *Irish Historical Studies* 2:7 (March, 1941): 241-54; R.D. Edwards and T.W. Moody, "The History of Poynings Law" Part I, 1494-1615, *Irish Historical Studies*, 2:7 (March, 1941): 415-24.

hands of the great magnates and tying it more firmly to Westminster.[9] This costly experiment also ended in failure. By the 1530s, little had changed within the Irish polity.

This stasis led to criticism of the Crown by the Pale elite who since the beginning of Henry VIII's reign desired a more powerful governor to sit in Dublin who was independent of the magnates. Palesmen were particularly upset over the exactions made upon them by the Earls of Kildare and other local strongmen, who forced them to billet their private retinues which often consisted of professional soldiers dubbed as "gallowglass:" mercenaries associated with the western isles of Scotland, and "Irish kerne:" light infantry associated by English writers as coming out of the woods and bogs of Ireland. Strongmen maintained these forces through practices categorized under the umbrella term of "coign and livery:" forced billeting and taxation on residents of the strongman's area of influence.[10] The Palesmen demanded that the private retinues of the great lords be disbanded, that the Crown stop granting the lord deputyship to one of the great lords (in particular the earls of Kildare), that these new administrators see to it that English law operate within the Pale, and that defense of the Pale once more be entrusted to local landholders. If the Crown refused to listen, the Palesmen reasoned that Dublin and the Pale would suffer the same fate as all of the other previous Crown holdings in Ireland: they would be lost to over-mighty subjects.[11]

In the aftermath of Henry's jurisdictional break from Rome, he and his council finally listened to these pleas. In 1533, the king decided that the Earl of Kildare should be replaced as

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[9] A good description of Surrey's administration can be found in Christopher Maginn, *William Cecil, Ireland, and the Tudor State* (Oxford: Oxford University press, 2012), 15-35.

[10] Katharine Simms, *From Kings to Warlords: The Changing Political Structure of Gaelic Ireland in the Later Middle Ages* (Woodbridge, Suffolk: The Boydell Press, 1987), 116-28; K.W. Nicholls, *Gaelic and Gaelicized Ireland in the Middle Ages* (Dublin: Gill and Macmillan, 1972).

[11] The best overview of this literature is in Bradshaw, *Constitutional Revolution,* 32-57, and in Maginn, *Cecil, Ireland, and the Tudor State,* 15-35.

lord deputy. In response to his removal and perhaps also in response to Henry's break with Rome, the Earl of Kildare's son raised his standard against the Crown. In the summer of 1534, Henry sent an army to Ireland under the command of Sir William Skeffington to put down the revolt. After laying siege to Kildare's chief fortress at Maynooth, Skeffington decisively broke the Earl's military power and summarily executed forty of Kildare's followers by martial law – no doubt while his standard was raised. English armed forces, albeit small in number, were in Ireland to stay. So too were English administrators. It would not be until the Restoration that an Irish peer would again obtain the post of lord deputy of Ireland.[12]

From the middle of the 1530s through the middle of the 1550s, English born lord deputies attempted to carry out a myriad of reforms. Rather than eliminating the great magnates, lord deputies sought to incorporate them into the Dublin government by persuasion while also limiting their legal and martial autonomy. Further, Crown agents attempted to replace the great magnates as chief givers of patronage on the island – a project that was initially successful due to the Crown's escheatment of all monastic lands in 1536-7.[13] Starting in the 1540s under Sir Anthony St. Leger, the Crown attempted to incorporate the great Irish lords into a network of allegiance by offering them English titles in exchange for their obedience to the Crown – a policy dubbed "surrender and re-grant." Along with these more gentle policies, Crown officers occasionally used military force. Starting in the 1550s, lord deputies began building and maintaining military forts on the western edge of the Pale. Eventually, they successfully defeated the O'Connors and O'Mores in the Irish midlands – in parts of what are now counties Leix and Offaly – and created the first of what would become many English "plantations" in territory

[12] Laurence McCorristine, *The Revolt of Silken Thomas: A Challenge to Henry VIII* (Dublin: Wolfhound, 1987).

[13] See Brendan Bradshaw, *The Dissolution of the Religious Orders in Ireland under Henry VIII* (Cambridge: Cambridge University Press, 1974).

previously held by Irish polities. Initially, these plantations were meant to defend the Pale and to provide a "civilizing" example to the Irish.[14]

In spite of these attempts to pacify the enemies of the Crown and extend English rule in Ireland, peace and order remained elusive. Palesmen continued to complain about the lawlessness of the private retinues of great men and continued attacks upon the Pale. Even in areas that were technically under English control, great men continued to employ private retinues that – at least according to Palesmen – engaged in almost constant criminality. The courts of Dublin, which mirrored the courts of Westminster, were in operation.[15] But lord deputies had difficulties throughout the sixteenth century maintaining regular circuits outside the capital. Itinerant justices made yearly circuits around the Pale, but it is unclear whether these courts redressed the disorders that were constantly complained of by English settlers.[16]

In the numerous tracts Palesmen wrote to the English Privy Council, all stressed the need for law and justice in Ireland. All associated the Irish territories with lawless behavior. Many writers, who believed incorrectly that English monarchs had once ruled the entire island in a halcyon medieval past, understood these lawless regions to be the product of two impulses. First, lords in Ireland had committed the sin of covetousness.[17] Instead of serving their master, the English monarch, great lords had claimed independence and raised their own retinues. To make matters worse, according to these commentators, English inhabitants of the island would soon

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[14] Ciaran Brady, *The Chief Governors: The Rise and Fall of Reform Government in Tudor Ireland, 1536-1588* (Cambridge: Cambridge University Press, 1994), 1-71, 169-78, 245-65.

[15] For an overview of the Dublin legal system in the sixteenth century, see Jon Crawford, *A Star Chamber Court in Ireland: The Court of Castle Chamber, 1571-1641* (Dublin: Four Courts Press, 2005), 27-81.

[16] Nicholas Canny, *The Elizabethan Conquest of Ireland: A Pattern Established, 1565-76* (Hassocks, Sussex: The Harvester Press, 1976), 18.

[17] "A Treatise for the Reformation of Ireland, 1554-55" ed. Brendan Bradshaw, *Irish Jurist* new ser. 16 (1981): 299-315.

become disobedient to the Crown. Without strong governance, "evin englishe bloodes [would] wax wylde yrishe."[18] In order to redress these problems, the Palesmen again called for a strong leader from Dublin who could impose peace and obedience on those they glossed as being unfaithful and unnaturally independent of the Crown. But what laws should this Dublin prince employ?

Everyone who claimed Englishness believed the Irish were inferior as a civilization.[19] Markers of this savagery included Irish dress, language, customs, and lifestyle. Part of the reason why Ireland was so violent and disobedient, according to these commentators, was that lords could raise their retinues so easily due to the availability of labor in Ireland. Because many of those living within the Irish lordships engaged in herding they had too much downtime. During their idleness, these "cow-boys" acted either as strongmen and retainers to Gaelic lords or they engaged in criminal behavior on their own initiative. Convinced of the inferiority of Irish civilization, many English administrators believed that more severe laws were necessary to instill order, obedience, and civility into those who had previously only known "savagery" and "lawlessness." English officials perceived the use of mercy, necessary to mitigate the severity of the laws in England, as being counterproductive in Ireland. Softness would only encourage disobedience. While the language in which these messages of cultural superiority became darker over the course of the sixteenth century, the ideas that undergirded these views of the

[18] "Edward Walshe's Conjectures" ed. D.B. Quinn *Irish Historical Studies* v (1946-7): 316. Other tracts of this nature include "Dysorders of the Irisshery, 1571" ed Nicholas Canny, *Studia Hibernica* 19 (1979): 147-60, and Rowland White, "Discors Touching the Reformation of the Realm of Ireland" ed N.P. Canny, *Irish Historical Studies* 20 (1976-77): 439-63. Brady, *Chief Governors*, 45-53.

[19] David Beers Quinn, *The Elizabethans and the Irish* (Ithaca, NY: Cornell University Press, 1966); Canny, *Elizabethan Conquest of Ireland*, 117-37; Nicholas Canny, "The Ideology of English Colonization: From Ireland to America" *William and Mary Quarterly* 30:4 (Oct., 1973): 575-98; and Canny, *Making Ireland British* (Oxford: Oxford University Press, 2001). Many of these attitudes towards Irish civilization had been in circulation since the twelfth century histories of Henry II's conquest of Ireland. Gerald of Wales. For an exploration of these discourses in medieval Ireland, see James Muldoon, *Identity on the Medieval Irish Frontier: Degenerate Englishmen, Wild Irishmen, Middle Nations* (Gainesville: University of Florida Press, 2003).

relationship between law, mercy, and governance in Ireland remained relatively constant from the middle of the century onwards.[20]

Some, like the cantankerous poet Edmund Spenser, called for a violent conquest of the island, and the virtual elimination of the native Irish.[21] Most desired a policy that combined violence and terror with compromise in an attempt to transform the native Irish into more "civilized" subjects. They would have sought a less violent approach that incorporated Irish lords into a new network of officials beholden to the lord deputy.[22] Nevertheless, they still wanted to apply terror and severity along with negotiation and mercy at least until the "wild Irish" became obedient – sometime in the very distant future. They believed this cruelty was necessary because according to some contemporary political theory, obligations were often initially forged through fear. To many, Crown officers needed at least initially to employ cruel laws in order to instill obedience into those recently brought under English rule.[23]

Making Summary Martial Law

[20] John Derricke, *An Image of Ireland* (London, 1581). Vincent P. Carey, "Icons of Atrocity: John Derricke's "Image of Ireland" in *World Building and the Early Modern Imagination* ed. Allison Kavey (New York: Palgrave MacMillan), 233-54.

[21] Edmund Spenser, *The Faerie Queene* ed A.C. Hamilton, Hiroshi Yamashita and Toshiyuki Suzuki (New York: Longman, 2001). Andrew Hadfield, *Edmund Spenser: A Life* (Oxford: Oxford University Press, 2012). On his politics towards Ireland, see Andrew Hadfield, "Spenser, Ireland, and Sixteenth Century Political Theory" *Modern Language Review* 89:1 (Jan. 1994): 1-18. Walter Lim, "Figuring Justice: Imperial Ideology and the Discourse of Colonialism in Book V of the *Faerie Queene* and A View of the Present State of Ireland," *Renaissance & Reformation*, xix (1995): 45-67.

[22] Ciaran Brady has argued that more English administrators believed in this approach than that advocated by Spenser. Brady, *Chief Governors*.

[23] Ciaran Brady "Introduction" in *A Viceroy's Vindication? Sir Henry Sydney's Memoir of Service in Ireland, 1556-1578* ed Ciaran Brady (Cork: Cork University Press, 2002), i-vi. Vincent P. Carey, "The Irish Face of Machiavelli: Richard Beacon's *Solon his Follie* (1594) and Republican Ideology in the Conquest of Ireland" in *Political Ideology in Ireland*, 83-109.

Let us examine how the Earl of Sussex and his council made summary martial law. While tracing the exact genealogy of all the ideas that went into its making is impossible, we can trace three distinctive sources. First, it is probable that Sussex looked to past English law – both laws against vagrancy, illegal retaining, and against outlaws – for inspiration. Second, Sussex probably was influenced by continental strategies such as conviction and summary execution by reputation. Third, he was influenced by martial law as it had been practiced in England.

He outlined his ideas months before he was to take office in Dublin in an April 1556 treatise on how to reform Ireland, entitled "A Present Remedy for the Reformation of the North and the rest of Ireland."[24] The proposals were mostly aimed at Ulster, where the Dublin administration had no authority and where many English administrators feared the Scots might obtain a toe-hold on the island. Most of Sussex's proposals, as the historian Ciaran Brady has noted, were unoriginal.[25] There was one notable exception. Sussex argued that marshals or provost marshals should be sent forth all through the realm to search for "suspect psons vacabounds and all other ydell and maysterles men" and to punish them by martial law.[26] Sussex reiterated this policy position to the English Privy Council sometime in August 1556 after he was named lord deputy of Ireland.

Sussex took into account the concerns of the Palesmen over the lawlessness in Ireland and agreed that more severe measures were necessary to instill obedience to English governors. But he added a new gloss: for Sussex, these idle retainers were similar to "vagabonds:" a group of wandering, "able-bodied poor." These men and women, so it was believed, had the ability to

[24] "A Present Remedy for the Reformacon of the north and the rest of Yreland" TNA, SP 62/1/13; *CSPI* ,1509-73, 133-4.

[25] Brady, *Chief Governors*, 68-9.

[26] TNA, SP 62/1/13.

work but refused out of laziness, and instead lived a life of leisure, preying through crime on the industrious.[27] These idlers were naturally, according to contemporary social theory, given to criminality because they lived unsupervised by the natural governors within English society: male property-holders. They were thus masterless men. These criminals in waiting needed to be supervised and sent back to their homes. In order to accomplish this task, some statutes on vagrancy prescribed extraordinary punishments. A 1547 statute, for example, declared that all vagabonds would be made into slaves.[28] But martial law had not been an answer, at least in England, to the problem of the wandering, masterless poor.

Sussex initially commissioned summary martial law for delegates to use in Ulster in the summer of 1556. He and the Irish Privy Council granted the new "marshal of Ulster," George Stanley, powers to "execute the marshall lawe in all cases thought by him to be convenient."[29] In September, the Irish Privy Council gave identical powers to the new marshal of Ulster, Andrew Brereton.[30] By November, Radcliffe planned on issuing multiple commissions of martial law, and the Irish Privy Council accordingly drafted instructions that were to accompany the commissions. However, Radcliffe never issued, outside of the ones granted to the marshal of Ulster, the commissions of summary martial law.

He did not do so in all probability because the English Privy Council initially did not like Sussex's innovations. Sussex's proposals scared them. Summary martial law during times of

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[27] Paul Slack, *Poverty and Policy in Tudor and Stuart England* (London: Longman, 1988); Slack, *The English Poor Law, 1531-1782* (Basingstoke, Macmillan, 1990); A.L. Baier, *Masterless Men: The Vagrancy Problem in England, 1560-1640* (London: Metheun, 1985); R.V. Manning, *Village Revolts: Social Protest and Popular Disturbance in England, 1509-1640* (Oxford: Clarendon Press, 1988), 157-86.

[28] 1 Edw. VI c.3.

[29] "The Irish Privy Council Book 1556-71" in *HMC, Haliday*, 7.

[30] Ibid., 10.

peace on vagrants was a new concept and one the council thought illegal. In September 1556, the Council sent Sussex a message thanking him for his service. However, they cautioned him on his proposal to punish vagabonds by martial law:

> those lewd persons do well deserve severe punishment, y[e]t do they thinke it not best they be proceaded withal by the marshall lawe, but that whensoever he shall finde any suche notable offendours he do cause them to be ordered and ponisshed according to the laws of the realme.[31]

It is probable that Sussex abstained from employing summary martial law due to the reservations expressed by Mary's council. No trace of his proposal to use martial law on vagabonds exists for the remainder of Mary's reign. Sussex instead only issued commissions to punish by martial law those in open rebellion against the Crown's authority.[32]

In 1560, two years into the reign of Elizabeth I, Sussex finally implemented the plan he had made in the spring of 1556 in light of recent conflagrations between the Dublin government and Shane O'Neill, the disputed leader of the O'Neill in Ulster. Shane O'Neill posed a problem because he was powerful and he was not, in the eyes of the English, legitimate. In 1542, the lord deputy of Ireland Sir Anthony St. Leger had made an agreement with Shane's father Conn to surrender to the queen in order that he might be re-granted his rights and privileges as the Earl of Tyrone. O'Neill's first born son Matthew was named his successor to the earldom and was created the Baron of Dungannon. However, succession in Brehon law did not follow the rules of primogeniture. Shane over the next decade increasingly earned his father's trust as a military leader who eventually displaced his elder son with Shane. However, Matthew aligned himself

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[31] *APC*, vi. 349.

[32] *The Irish Fiants of the Tudor Sovereigns: during the times of Henry VIII, Edward VI, Philip & Mary, and Elizabeth I* with a new introduction by Kenneth Nicholls, 4 vols. (Dublin:Éamonn de Búrca, 1994), i. (Mary), nos. 228-9, 242.

with members of the English army, who he had helped in campaigns against the Macdonnell's, a polity that comprised northeast Ireland and parts of Western Scotland, who the English dubbed as "Scots." By the time of Sussex's lord deputyship, Shane had consolidated power in Ulster and for the next decade consistently threatened the security of the English Pale. Sussex's expedition in 1560 was one of many attempts to neutralize this threat.[33]

Three points need to be made about the 1560 commissions of martial law. First the commissions were issued in a time of distress. Sussex probably issued them out of a fear that Shane O'Neill might incite rebellion within the Pale as a part of his military strategy.[34] The commissions were supposed to put down through fear any unwarranted gatherings and to eliminate those who English officials deemed to be "traitors in waiting:" the vagrants and idlers who were supposedly the most likely to commit outrages if they had the opportunity to do so. Second, the commissions were not aimed at Ulster, the area under the control of Shane O'Neill, and the place where Sussex was leading his host. Instead, Sussex aimed the martial law commissions at territories in the Pale and other English-controlled areas. He commanded delegated authorities in counties Meath, Westmeath, Kildare, Louth, Carlow, and Waterford to execute the commissions. The commissions of martial law were thus not an analogue to private conquest. Commissions of martial law were fundamentally different than conquest or killing "by the sword," even if we might categorize both as being violent. Third, the commissions were not exclusively granted to military figures. The first commission to county Meath, for example,

[33] Christopher Maginn, "O'Neill, Shane" in *ODNB*; Ciaran Brady, *The Chief Governors*, 72-112; Stephen Alford, *The Early Elizabethan Polity: William Cecil and the British Succession Crisis, 1558-1569* (Cambridge: Cambridge University Press, 1998).

[34] Sussex by 1560 had written several tracts on Ireland for the English Privy Council and all of them suggested that O'Neill might encourage tumult and rebellion within the Pale and elsewhere in Ireland. Brady, *Chief Governors*, 100.

named among others Robert Dillon, the Chief Justice of the Common Pleas. Martial law was a legal strategy.[35]

Until 1603, the commissions of martial law that lord deputies issued underwent few changes from those of 1560. Most of these commissions are listed in the Calendar of Fiants, a nineteenth century antiquarian work that catalogued all commands from the Irish Chancery to the master of the Great Seal to issue a commission based on the authority of the lord deputy of Ireland.[36] This publication is all we have left of the fiants: they did not survive the Irish war of Independence in the early twentieth century. Over 400 commissions for martial law were written during Elizabeth's reign, which were based off the fiants.[37] The editors only paraphrased the first, written in 1560 for county Meath, and subsequent fiants that departed from this template.[38]

Several original commissions survive.[39] We are going to examine one granted to Warham St. Leger, the provost marshal of Munster, issued in 1579. We can be reasonably sure that this commission is identical to the ones granted by Sussex in 1560.[40] We can also be reasonably sure that St. Leger's instructions are identical to the instructions given to St. Leger, because five sets of instructions survive from the period; all are nearly identical.[41] From this examination we can

[35] *Fiants Elizabeth*, nos. 218 (which includes commissions to counties Meath, Westmeath, Louth, Carlow, Waterford, and Kildare), 230, 251, 264, 285.

[36] Kenneth Nicholls, "Introduction" in *Fiants* i. v-xi.

[37] This number is based on the fact that the Calendar of Fiants often bundles together what would have been eight or nine separate commissions into one entry in the calendar. See for example *Fiants Elizabeth*, no. 682.

[38] *Fiants Elizabeth*, no. 218.

[39] See for example, LPL, Ms. 597, fos. 187-92, 299-301; LPL Ms. 608 f. 68; NLI d. 3106; d. 2687; d. 3261; NLI Ms. 8066/2; NLI, Colclough Ms. 18768; HH ,CP 215/13.

[40] LPL, Ms. 597, fos. 187-92. This is probably true because the fiant for the commission says "as in 218." *Fiants Elizabeth*, no. 3595.

[41] *HMC, Haliday*, 20-1; LPL, Ms. 597, fos. 189-191v; LPL, Ms. 616; NLI, Ms. 18768; NLI Ms. 2688-89.

learn why Sussex wanted to use martial law, what legal problems he attempted to resolve, and how he thought he was going to supervise the jurisdiction. [42]

Perceived procedural advantages lay at the heart of the justification for using summary martial law. In the commission to St. Leger, the lord deputy declared that certain types of people needed to be prosecuted by "speedie and sharpe meanes rather than by our common laws." These people were the "haughtie livers and idell vagabounds" who were not certain in their allegiance to the Crown, and who consistently harassed the Queen's subjects. We can trace these ideas back to general outcries by Palesmen that private retinues and vagabonds consistently engaged in criminality, and forced exactions and depredations upon them. The "speediness" of the trial was meant to inspire terror into the populace. The same point can be made for the use of capital punishment, as opposed to the whippings, beatings, imprisonment, or even slavery that had been prescribed in vagrancy and livery statutes in England and Ireland before 1560.

The legal ideas embedded in this summary procedure can be traced back to medieval English law. Medieval kings had from time to time granted powers to convict by the senses to their legal deputies. The most common delegation of this jurisdiction was to prosecute riot.[43] However, those who had this power could not take the life and limb of the rioters. During the 1490s, JPs often possessed powers to convict men of being illegal retainers or liveries of lords

[42] Along with powers of martial law, these commissions delegated extensive sovereign powers to its recipients; powers like the ability to allow safe-conducts and treat with enemies that were generally reserved for monarchs, or lord protectors in England. I will not discuss these powers in any detail here as Rory Rapple has already handled them well in his recent work. Rapple, *Martial Power and Elizabethan Political Culture: Military Men in England and Ireland, 1558-1594* (Cambridge: Cambridge University Press, 2009).

[43] J.G. Bellamy, *Criminal Law and Society in Late Medieval and Tudor England* (New York: St. Martin's Press, 1984), 8-32, 54-84. In the case of riot, the JP was commanded to go to a place that had been forcibly entered into. If the JP saw that anyone was currently holding a place forcibly he could convict them upon sight. See for example 15 Rich. II c. 2. J.H. Baker has described these powers as conviction in open court "where knowledge of the offence was conveyed through their own senses. "Criminal Courts and Procedure at Common Law 1550-1800" in *Crime in England, 1500-1800* ed J.S. Cockburn (Princeton: Princeton University Press, 1977), 24. Baker clearly has the idea of contempt in mind. See J.C. Fox, *History of Contempt of Court* (Oxford: Oxford University Press, 1927).

upon sight.[44] But again, these powers did not include capital punishment. Indeed, it is difficult to affirmatively trace the use of the form of martial law that Sussex desired to use on idlers and vagabonds in Ireland – what would eventually be called "summary martial law" – in England.

Second, Sussex clearly thought his legal strategy was "martial law." But it is difficult to locate his practices with previous uses of martial law. While provost marshals had been temporarily appointed in the reign of Edward VI to aid lords lieutenants, they were not given summary martial law powers.[45] Several stories from chroniclers of the rebellions of 1549 hint that provost marshals used summary martial law, but the veracity of these are difficult to verify.[46] In 1558, two years after Sussex's proposal for Ireland, the Marian regime thought about granting provosts summary martial law powers to execute rebels or causers of "stirs," and drafted a proclamation to the effect.[47] However, it did not grant its provost marshals these powers.[48] It is possible, although the prescriptive literature says nothing about it, that summary martial law was practiced in the army for certain offences.

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[44] These policies were an attempt by the Crown to circumscribe but not eliminate the military powers of the nobility. See S.J. Gunn, *Early Tudor Government, 1485-1558* (New York: St. Martin's Press, 1995), 42-8. Older histories asserted that the Tudors intended to break noble power. For a revision of this view, see G.W. Bernard, *The Power of the Early Tudor Nobility: A Study of the Fourth and Fifth Earls of Shrewsbury* (Sussex: Harvester Press, 1985).

[45] See Chapter one.

[46] Richard Grafton, *Grafton's Chronicle, or History of England. To Which is added his table of bailiffs, sheriffs, and mayors, of the city of London. From the year 1189 to 1558 inclusive* 2 vols. (London, 1809), ii. 519-20.

[47] This came two years after Sussex's plans for Ireland. Boynton, "The Tudor Provost Marshal," 440-41; R.R. Steele *Catalogue of Tudor and Stuart Proclamations* (Oxford: Clarendon Press, 1910), no. 486.

[48] In August 1558, one of Mary's provosts, Sir Gyles Poole, attempted to put down a riot taking in place in St. James' Fair in London. One of his men killed one of the rioters in the process. Mary's Privy Council ordered a coroner's inquest to hear and determine the matter. Presumably if they found a true bill, then the assistant to the provost would have been tried for murder. *APC*, vi, 370.

Sussex was probably influenced by continental practice. By 1556, he had already served as an envoy to France, the Low Countries, and to Spain in the service of Phillip II.[49] The difficulty is locating which continental practice shaped his thinking. In the Holy Roman Empire, for example, in the fifteenth century, some city governments convicted "strangers" of capital crimes solely by their reputation.[50] But he could have gotten ideas elsewhere. Most monarchs and principalities on the continent in periods of war gave extraordinary judicial powers to provosts. These powers varied according to time and place, but in France, monarchs had since the fifteenth century given their provosts powers to arraign and summarily execute vagabonds and other highway robbers. Unfortunately, there is no definitive proof that Sussex borrowed these practices so he could employ them in Ireland.[51]

Along with idlers, the commission authorized St. Leger to search out any disorders within the county, and if he found any persons to be felons, robbers, or "notorious evell doers," he could execute them by martial law. Sussex probably made this command from older practices. He perhaps replaced the idea of outlawry and the hue and cry with execution by martial law. In medieval English law, if a suspect refused to come to court, he could be declared an outlaw. Magistrates banned outlaws from participating at law or from holding office, and confiscated their property. If the outlaw was a suspect in a felony proceeding, the local law officer – the sheriff or justice of the peace – often issued the "hue and cry:" a posse of all the leading property

[49] Wallace T. MacCaffery, "Thomas Radcliffe, Third Earl of Sussex" in *ODNB.*

[50] Laura Stokes, *Demons of Urban Reform: Early European Witch Trials and Criminal Justice, 1430-1530* (Basingstoke: Palgrave Macmillan, 2011), 84-5.

[51] Lindsay Boynton, "The Tudor Provost Marshal" *English Historical Review* 77:304 (Jul., 1962): 437-9; Georges Guichard, *La Jurisdiction des Prévots du Connétablie et des Maréchaux de France* (Lille: Douriez-Bataille 1926), 27-65.

holders within the given jurisdiction in which the wrong had supposedly been committed.[52] The posse could not kill the suspect unless he or she resisted arrest. Sussex wanted to grant more severe powers to his police. He did so because the problem of suspects fleeing from judicial proceedings was more problematic in Ireland than it was in England. Suspected robbers and murderers often crossed county lines or retreated into areas not controlled by English authorities, thus avoiding arrest and trial. Further, because Dublin authorities distrusted the Irish population at large, they did not order the hue and cry as often as in England. Instead, Sussex gave his legal officers powers to search out and destroy fugitives without the aid of the local community. Martial law became an enforcement mechanism for the common law courts.

Finally, martial law commissioners had jurisdiction against those deemed to be notorious. We shall recall that English monarchs in the medieval period often executed traitors upon record based upon the notoriety of their wrongs. Acts of attainder – where parliament convicted a suspect of treason based on a vote – were likewise based on the idea of notoriety. We have also noted that the forms of martial law commissioners used in England never employed the idea of notoriety. But in Ireland, the practice in general was revived, whether or not English jurists claimed martial law jurisdiction.[53] The inclusion of this idea was central to the martial law commission because commissioners could execute not just those who had been convicted at law, but also those infamous for their criminality.

The variations to the commission were few. In some instances, the lord deputy either raised or lowered the minimum moveable and real property thresholds that a man or woman had

[52] Susan Stewart, "Outlawry as an Instrument of Justice in the Thirteenth Century" in *Outlaws in Medieval and Early Modern England* ed John C. Appleby and Paul Dalton (Farnham, Surrey: Ashgate, 2009), 37-54; Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1989), 70-2.

[53] TNA, SP 63/39, f. 156v.

to meet in order to avoid martial law jurisdiction. The usual stipulation was that anyone who owned more than 40s in freehold, or anyone that possessed more than 10li. in moveable goods was exempt from martial law. These requirements existed because real property was not forfeit for those convicted at martial law, and when it came to moveable property, Sussex had devised a scheme where the martial law commissioner was allowed to keep 1/3 of all forfeited moveable property while the Crown only received two thirds.[54] This rule was probably an adaptation, and an inversion of the respective percentages taken by Crown and commissioner, of army regulations relating to ransom payments. Every so often these stipulations changed: sometimes the lord deputy raised the standard to 20li in moveable goods making it more difficult to execute someone at martial law. Or they lowered the real property requirement, making it an easier standard to qualify for martial law.[55] More often –these commissions were usually issued during rebellions – the lord deputy gave martial law powers "without restriction" to his delegates.[56]

Along with these formal powers, the lord deputies of Ireland gave instructions to their martial law commissioners. In these instructions, we can better understand how the lord deputy desired to circumscribe the martial law powers he had given his commissioners as well as communicate to the populace at large how they needed to act in order to avoid execution at martial law. Like the commissions, the instructions changed little from 1556, when Sussex first drafted them to accompany commissions that were never actually sent out through the end of Elizabeth's reign in 1603.[57]

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[54] This rule is stipulated in the instructions to the commissioner. See *HMC, Haliday*, 21.

[55] *Fiants*, Elizabeth, nos. 2437, 2092.

[56] Ibid., no. 2456.

[57] *HMC Haliday*, 20-1.

The first stipulation in the instructions reveals that the lord deputies had also drafted proclamations of martial law. Extant copies of these proclamations no longer exist. However, we know lord deputies distributed them widely. The instructions to St. Leger demanded that he publish proclamations in every parish church within the province so that all subjects knew the provost's powers, and would be unable to plead ignorance. Along with this desire to inform subjects of the martial law commissioner's powers, the proclamation gave them instructions on how to avoid execution. The lord deputy gave all masterless men and vagabonds eight days to return to their place of origin before the martial law commissioner could execute them summarily. If the idler was to stay in the city or county where he was currently living, he needed a passport or letter from his master – a landholder – that stated he was his servant. Through this threat, the Crown hoped the idlers would become obedient, accounted for, and productive.

This instruction resembles those found in statutes against vagrancy in both England and Ireland. Vagrancy statutes since Henry VIII had demanded that local officers – sheriffs, mayors, constables and the like – maintain lists of all men within their jurisdiction that begged for a living. If the beggar was not from the town, wapentake, county, or region, the officer was to give them a passport to return to their home, where they could either apply for a license to beg, or if they continued to refuse to work and were able-bodied, would suffer imprisonment along with corporal punishment. The instructions similarly tried to control the idle men and women, although instead of corporal punishment for disobedience Irish officials could kill vagrants summarily.[58]

According to the instructions, the martial law commissioner was supposed to act as an auxiliary police officer in the aid of often overmatched local law officers. They were to

[58] 33 Henry VIII c.15 Ir.

investigate robberies and murders, detain the aiders of felonies for prosecution at law, and to supervise the highways. With this last responsibility, martial law commissioners could upon sight punish at their discretion anyone wearing Irish dress that did not possess a passport that was travelling at night unaccompanied. Occasionally, martial law commissioners could execute "rymers or bards," men who supposedly sowed discord. If the martial law commissioner found that men were "taken in the manner of stealth or robbery" – as in caught in the act – they could be hung on the next tree. The commissioner could also bring suspects to the nearest judicial officer – a mayor or sheriff or justice of the peace – and if that person confirmed the suspect was a criminal, the martial law commissioner could execute him or her on the spot.

Sussex and his successors circumscribed these powers in two ways. First, the commissioner utilized martial law on either those glossed as English or Irish provided that they possessed less than 10li moveable property or 40s in real property. However, the policy was clearly aimed at those the lord deputies viewed as "Irish" because the martial law commissioners were also supposed to abstain from executing those of "honest name": which almost certainly meant names that sounded English. It was assumed that the commissioners could with their sight spot poor Irish men and women, and convict them with the information they had acquired. Second, martial law commissioners were supposed to keep track of all those they had executed, and every month they were supposed to send this list to the lord deputy. Presumably, he could punish his commissioners for malfeasance if they had executed someone illegally. These were not strong constraints.

Using Summary Martial Law

The martial law commissions became a normative component of the legal order from 1560-1582. Unfortunately we have little information on how commissioners used their martial law powers. The scanty records we possess point to the conclusion that martial law commissioners understood their martial law powers, while involved in the same project of creating peace and order, as distinct from either common law process or conquest by the sword. English legal officers used these summary martial law commissions in all areas, including Dublin, the seat of English power in Ireland through 1582. And they used martial law to punish a variety of wrongs, not simply treason through open rebellion. Through their senses, martial law commissioners heard, determined, and convicted suspects of the wrongs that fell within their jurisdiction. All three, at least from the surviving correspondence, involved violence.[59]

During this period, Sussex developed plans to extend a network of officials loyal to him that would control most of Ireland. Sussex, who retained his post as lord lieutenant of Ireland until 1564, granted martial law commissions on a yearly basis to the legal commissioners who operated in the Pale and in the territories associated with the lordship of the Earl of Ormond.[60] In 1561, no doubt again during a campaign against the O'Neill, Sussex issued a commission of martial law to the marshal of his army, George Stanley, who had jurisdiction throughout the entire island. On two occasions, Sussex issued martial law commissions to delegates sent to bring obedience in the country of the O'Byrnes and O'Tooles who controlled the Wicklow Mountains just south of Dublin.

[59] Trying to make definitive abstract distinctions between these three practices is difficult, but it is more important that Crown officials consistently made the distinctions. For the violence of the law, see Robert Cover, "Violence and the Word" *Yale Law Journal* 95 (1985-86): 1601-29.

[60] *Fiants*, Elizabeth, nos. 218, 230, 251, 264, 285, 304, 395, 443, 469, 502, 580, 581, 582, 590, 682, 724, 725.

After his departure, his successors realized his ambitions, at least in South and West Ireland. They accomplished this feat through negotiation and an enormous amount of judicial and military violence. By 1582, English delegates had engaged in open warfare with both Irish polities and Anglo-Irish magnates, the most prominent being the two rebellions by the Desmond affinity in 1569-72 and 1579-82. Lord deputies in this period granted summary martial law commissions to four types of officers.[61] First, starting in 1569, the English government established presidency councils in Munster and Connacht. These multi-jurisdictional tribunals were based off those established in Wales and the North of England. The goal was to provide the subjects of these areas the laws of Westminster – or in the case of Ireland, Dublin – without making the subjects travel so long a way.[62] The result, it was hoped, was that the council would undermine the local baronial or palatinate courts of the great magnates because subjects could now seek legal redress elsewhere. The lord president of the council was also supplied with a small military retinue and was charged with supervising the activities, martial or otherwise, of the great magnates of the area. Second, Sussex and Sidney established constables or "seneschals" in Irish polities.[63] These men were charged with supervising a specific Irish polity, like the O'Byrnes or O'Tooles or the O'Brians of Thomond. Unlike the presidents, the seneschal did not have powers to hold assize or other common law courts but he could negotiate with the Irish

[61] *Fiants*, Elizabeth, nos. 809-10, 824, 861, 896, 940, 953, 961, 979, 999, 1007, 1010-15, 1019-20, 1027, 1059, 1086, 1119, 1190-92, 1196, 1233, 1253, 1261-3, 1270, 1283, 1302, 1329-33, 1335-6, 1379, 1381-2, 1412, 1416, 1432, 1457, 1487-8, 1505-7, 1518, 1520, 1535, 1548, 1636-7, 1647, 1661, 1728, 1782, 1810-2, 1814-5, 1829-35, 1845, 1855-6, 2092, 2094, 2099-2100, 2104-5, 2114-5, 2119-20, 2122, 2133, 2139-40, 2143-4, 2150, 2152, 2162-3, 2174-5, 2181, 2183, 2195, 2200, 2220-2, 2292-3, 2326, 2351, 2359-61, 2364, 2374, 2379, 2390-1, 2404, 2430, 2437, 2456, 2461, 2484, 2521, 2529-31, 2536, 2544, 2553-5, 2751, 2757, 2766, 2772, 2775, 2807, 2814, 2815, 2821, 2824, 2829-30, 2841-2, 2844, 2851, 2863, 2868-70, 2899, 2905, 2907, 2912, 2916, 2918-23, 2933, 2937, 2945, 2949-50, 2952, 2958, 2975, 2979, 2991-3, 2997, 2999, 3001, 3019, 3051, 3061-2, 3143-5, 3168, 3178, 3188, 3190, 3233, 3482, 3486-8, 3517, 3523-4, 3528, 3588-96, 3601-2, 3623, 3626-8, 3630-1, 3636, 3669-70, 3695, 3755, 3814, 3848-9, 3860, 4040-2, 4045-7, 4050-3, 4055, 4057-60, 4062-5, 4098.

[62] For these tribunals in Ireland, see Canny, *The Elizabethan Conquest of Ireland*, 93-117.

[63] Brady, *The Chief Governors*, 271-90.

magnates, and he could use martial law to punish the same types of wrongs as others who possessed martial law commissions. Like the lord presidents, the seneschal had martial law powers, and could raise forces in order to pursue military action against those the lord deputy declared to be traitors. These seneschals were often supposed to report to the lord presidents of Munster or Connacht.

Third, the lord deputy co-opted Anglo-Irish and even at times Irish magnates into this network, and gave them powers similar to those of the seneschal. The Earls of Kildare and Ormond regularly received commissions of martial law for the areas traditionally recognized as being under their lordship. Even John of Desmond, of the Desmond family that would not survive the 1580s, received a martial law commission in 1567. Irish magnates, likewise, at times received these powers. For example, Sir Henry Sidney granted martial law commissions to "Donogh Mac Carty Reogh" (the MacCarthy Reagh) who were the barons or princes of "Carberry" in what is now county Kerry. Sidney also gave commissions of martial law to "Hugh Magneys" in 1576 for the territory of "Magneys" (probably the barony of Iveagh in what is now County Down), and to the Mac Teiges in 1567 who had jurisdiction over Muskerry a region in county Cork.[64] Fourth, the sheriffs and local constables of English counties received martial law commissions. By 1585, Irish lord deputies had created counties in most of the island. King's and Queen's counties in the midlands were established in 1557. In 1569-70, Sidney created counties Galway, Roscommon, and Clare in western Ireland. In some of these new counties, the lord deputy gave sheriffs martial law commissions, as well as often entrusting them with other common law duties.[65]

[64] *Fiants*, Elizabeth, nos. 1007, 1010, 1019, 2912.

[65] See the map in Maginn, *Cecil, Ireland, and the Tudor State*, xv.

The martial law commissions were often used in conjunction with those of common law and military action in the name of maintaining peace and order. In 1566, for example, Sir Henry Sidney, the lord deputy of Ireland, reported to the English Privy Council that he "caused sessions to be held" in all the counties of Leinster and in certain parts of Munster.[66] He claimed that he executed fifty traitors at common law, while he executed twenty by "martiall order." The Earl of Ormond, writing to William Cecil in 1586, declared that "sword, the mshall law, and of late the common law" had gotten rid of treasonous and criminal people in the county of Kilkenny, where the earl resided.[67] Henry Sidney made a similar distinction in 1577, when he reported his judicial undertakings to the Crown.[68] The Earl of Ormond and Lord Justice Fitzwilliam conceived of martial law as being a different tool from either from those of common law or "the sword," but as serving the same purpose of waging justice against those disobeying Crown authority. Martial law acted as a complement to common law and to military conquest.

The best evidence for how lord deputies wanted martial law used comes from a report of service prepared by Piers Butler Fitz Edmond of Roscrea in 1589. FitzEdmond had received a commission of martial law in February 1586 while sheriff of County Tipperary.[69] In 1589 he sought to secure a pension from the lord deputy of Ireland and thought that by listing his services performed he might obtain his goal. In the document, FitzEdmond listed all of the Irish rebels he had either caught or killed while in the service of the Earl of Ormond and all those he had personally killed "then and there" by martial law. Because he prepared this list in the hopes that

[66] Sidney to Privy Council 15 April 1566, TNA, SP 63/17 f. 31.

[67] Ormond to Burghley, TNA, SP 63/110, f. 125v.

[68] *CCM*, ii. 52.

[69] "Note of the Good Services and Worthy Exploits which Piers Butler (FitzEdmond), of Roscrea, hath done in Ireland by direction of the Earl of Ormond, TNA, SP 63/149 f. 215. *Fiants*, Elizabeth, no. 4962.

he would be rewarded, we know that this list comprised actions FitzEdmond believed the lord deputy and the Crown wanted performed by martial law commissioners. All in all, FitzEdmond listed sixteen executions over the course of his three years as sheriff. Ten of those executed were supposed thieves. Three were "known" to have participated in the Desmond rebellion. One had supposedly aided traitors. One was a suspected arsonist. One had spoiled and broken up a house. These were a range of wrongs not simply that of treason through open war against the Crown.

Reputation often provided the proof. In three cases, FitzEdmond claimed the suspect had confessed to his crimes (all those executed were male). But in the others, FitzEdmond executed the suspect because he was "known," "notable," "common or vagrant" "notorious" or of "evil fame and name." The only proof demanded for these executions was that of reputation. We have seen this legal theory in operation before in the fourteenth century for great treason trials where the king upon his record convicted one of his nobles, usually in the aftermath of a rising. In Ireland a lowly sheriff possessed even greater discretion than these great kings of old – who had enough judicial discretion to cause the parliaments of the fourteenth century to try on several occasions to restrict their powers.

English officials also used these three methods of violence to put down rebellions. By 1582, the policies of Sidney and his successors had caused many Irish and Anglo-Irish lords to contemplate military action against the Crown. The two largest rebellions were undertaken by the Desmond affinity in Munster. The Earls of Desmond, we shall recall, ruled one of the three great Anglo-Irish lordships in Ireland which encompassed county Kerry and parts of counties Cork, Limerick, and Waterford. The Fitzgeralds of Desmond, even less so than the Fitzgeralds of Kildare and the Butlers of Ormond, had little enthusiasm for the new political network being established in Munster. They also had little enthusiasm for the Butlers of Ormond, and continued

their private rivalry with them well into the 1560s, culminating in a major set piece battle at Knockdoe, Co. Waterford in 1565. The Butlers greatest weapon, however, was their influence at court. "Black Tom" Butler, the tenth Earl of Ormond, was a cousin of the Queen and a Crown favorite He used his position to undermine the Desmonds. Faced with both new English administrators and a hostile Crown, many within the Desmond affinity, led by James Fitmaurice Fitzgerald, revolted against the Crown in 1569.[70]

The Crown under Sir Humphrey Gilbert and Sir John Perrott effectively put down the revolt by 1573, although James Fitzmaurice escaped to the European continent. Fitzmaurice returned in the summer of 1579 on a holy crusade to eliminate the Protestant English from Ireland. FitzMaurice was successful enough to gain the backing of many Irish lords in Munster. By autumn even the reluctant Earl of Desmond joined forces with FitzMaurice. Along with this native help, FitzMaurice had obtained the aid of some Spanish adventurers, who landed in Ireland in Smerwick on the Kerry coast in 1580. Although the second Desmond rebellion proved to be a much greater military challenge to the Crown, by 1582 under Lord Grey de Wilton and the Earl of Ormond, the Crown successfully and brutally quelled the rebellion.

They did so through common law, martial law, and by the sword. William Fitzwilliam, the lord justice of Ireland, wrote in 1571 to Elizabeth that Irish rebels would be prosecuted by the "ordinary tryall of law and those of the vyle and base sort by your marshall lawe." Those in the field were killed by the sword in the heat of battle.[71] The Earl of Ormond likewise in 1571 reported that in the aftermath of the first Desmond rebellion he had executed 200 traitors at

[70] This rising included disaffected members of the Butler affinity. David Edwards, "The Butler Revolt of 1569" *Irish Historical Studies* 28 (1992-3): 228-55. Ciaran Brady, "Faction and the Origins of the Desmond Rebellion of 1579" *Irish Historical Studies* 22 (1981): 289-312. Canny, *Elizabethan Conquest*, 99-100.

[71] Sir William Fitzwilliam to Elizabeth 29 Sept. 1571, TNA, SP 63/34, f. 38. Not all those caught would be killed, although the vast majority was. The gaol record of Kilkenny was sent to Elizabeth. Some suspects were bailed. Ibid., f. 39.

martial law, and he had delivered "divers others" to be tried at common law.[72] In another account of the justice following the Desmond rebellion, Sir John Perrot, the lord president of Munster, reported that he had hanged 800 rebels, "by the lawes of this Realme and also by the marshall lawe."[73] He did not say how these executions had been divided. Lord Grey de Wilton likewise reported that he had killed over 1,500 men and women in his attempt to put down the second rebellion. Once again, all "loose and idle" people were put to death at martial law.[74] The numbers of executions were large; the details about how commissioners performed them were few. In all probability, they convicted the poor or mean Irish by what they had seen, not by information provided by witnesses.

Debating Martial Law, 1582-92

Throughout the 1560s and 1570s, English Privy councilors stayed silent about the summary martial law commissions. However by the early 1580s, many had mounting concerns about the policy. The sheer brutality of Arthur Grey de Wilton's employment of martial law in the aftermath of the second Desmond rebellion caused outrage among influential and loyal lords in Ireland, who gained a hearing in England to voice their concerns.[75] Further, by the mid-1580s, the English Privy Council planned a major new undertaking: the plantation of Munster by Protestant English families on lands formerly possessed by the Earls of Desmond and their affinity. The Crown had no desire to subject English men and women to the legal regime meant

[72] "Some Part of the Earl of Ormond's Service done since 13 August 1569 by virtue of his Commission and Instructions given to him by Lord Deputy Sidney and the Council. TNA, SP 63/39 f. 156v.

[73] Sir John Perrot to the Privy Council, 9 April 1573, TNA, SP 63/40 f. 57.

[74] "Order Taken by the Lord Chancellor and Council of Ireland," TNA, SP 63/68, f. 39.

[75] David Edwards, "Ideology and Experience: Spenser's View and Martial Law in Ireland" in *Political Ideology in Ireland*, 127-57.

for the "wild Irish." Further, if English deputies had convicted these traitors by martial law, their property was not forfeit. Some on the Privy Council realized that summary martial law as currently practiced was a hindrance to Crown attempts to conquer the island.

Complaints were also coming into the Privy Council from the Palesmen and those who considered themselves "English," but who were not the newcomers: the military officers, adventurers, and planters recently come over to Ireland. These men and women had ties to the great mercantile families in the Irish port towns. Many had sent their sons to English universities and Inns of Court. It was these families of the Pale that earlier in the century had complained about the depredations of the Earls of Kildare, and demanded an increased Crown presence on the island and severe laws to eliminate idlers and retainers. By 1580, these families switched their position. The policies that the Irish lord deputies enacted, which were often based on these calls for reform, were expensive, and the Palesmen had to pay for them. Further, the new English administrators that Sidney had sent into Munster, Connacht, and even into the Pale were abrasive and violent. These newcomers often viewed the Palesmen with suspicion due to their continued adherence to the Catholic faith. The situation had become so tense by 1580 that some leading Pale families rose in rebellion.[76]

In 1582, a short tract entitled "A Remembrance for Ireland" outlined the problems the English of the Pale, who increasingly referred to themselves as the "ancient English" or "Old English," had with the government of Ireland.[77] The tract complained that the commissions of martial law had been given to men of "meane calling," who could call in any man they desired, and had the right to make new laws and ordinances. This vast discretion scared many of the

[76] Ciaran Brady, *The Chief Governors*, 204-07.

[77] "A Remembrance for Ireland" TNA, SP 63/90, f. 150.

"ancient English" living in the Pale who fled their livings. So terrified were the old English of these martial law commissioners that many had fled into Ulster in order to avoid their arbitrary power. The "Remembrance for Ireland" was only the first of several tracts decrying the abuse of power by martial law commissioners towards the inhabitants of their jurisdiction. Many claimed that the seneschals, sheriffs, and provost marshals used their martial law powers to extort Crown subjects. Provosts and sheriffs, after all, could claim the moveable property of those they executed.[78] They could also levy fines, and presumably utilize their position of power as leverage to extort those within their jurisdiction through the creation of protection rackets.[79]

Elizabeth, either by this tract or by the advice of Ormond and Croft, listened to these complaints. In 1582, she sent revised instructions to de Wilton.[80] Elizabeth and her council had for some time been frustrated with the continued disorders, rebellions, and wars in Ireland, which were costing her enormous sums of money. Already in 1580, upon Grey de Wilton's appointment, she laid the blame for many of these disorders on the English soldiers and their depredations. She wanted Wilton to reign in the violence of the martial men in Ireland.[81] By 1582, Elizabeth's desire to maintain peace and order in Ireland led her to restrain the delegation of summary martial law commissions because she believed that summary martial law caused rather than eliminated unrest.

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[78] "Note of Matters to be laid to Captain Heron's Charge" TNA, SP 63/12, f. 37. The accounts date to 1558, but Heron first received a martial law commission in 1560. *Fiants*, Elizabeth, no. 218. Heron earned money from "fines" at martial law. Also see M.D. O'Sullivan, "Barnabe Googe: Provost Marshal of Connaught, 1582-1585 *Journal of the Galway Archaeological and Historical Society* 18:1/2 (1938): 1-39.

[79] Rapple, *Martial Power and Elizabethan Political Culture*, 240-3.

[80] These instructions can be found in BL, Add. Ms. 4786, fos. 37-8, and in BL, Add. Ms. 37, 536, fos. 14-16.

[81] "Instructions to Thomas Lord Grey de Wilton" printed in *Desiderata Curiosa Hibernica* (Dublin, 1772), i. 25. This may have been truly meant although only five years later Elizabeth and her council planned a massive new plantation in Munster on the escheated lands of those who had participated in the Desmond Rebellion.

William Cecil wrote the instructions. He was concerned that the commissioners were abusing their power. In particular, Cecil had heard that Irish officials were using martial law to clear jails in lieu of ordinary or common process. Cecil declared that it was "dishonourable to use the martiall law when the Ordinarye course of the lawe maie redresse the offence."[82] Honor is a notoriously difficult term to define in the early modern period.[83] But here, Cecil was using it to describe a violation of a jurisdictional norm. We shall recall that Cecil in England had strongly opposed the queen's desire to kill Christopher Birchet by martial law because it was during a time of peace. The same concern is evident in his instructions to Wilton. If ordinary process could be used – because it was a time of peace – it should be used. Irish officials had avoided common law process because, according to Cecil, martial law allowed for the "oppression of the people and the enriching of themselues."[84] Due to these problems, the instructions demanded that the lord deputy recall all martial law commissions from the captains, seneschals, and sheriffs who had previously received them.

The jurisdiction shopping that Cecil was so concerned about had taken place, although it cannot be known on what scale it took place. First, the constables of the jails probably at times cleared them through martial law.[85] Second, we have a clear example of Dublin officials removing a case into martial law once they detected that it might be difficult to obtain a conviction at common law. Indeed, this jurisdiction shopping continued after 1582 when the Irish Privy Council decided to try Dermot O'Hurley, the Catholic archbishop of Cashel, for

[82] BL, Add. Ms. 37, 536, f. 15.

[83] See Brendan Kane, *The Politics and Culture of Honour in Britain and Ireland, 1541-1641* (Cambridge: Cambridge University Press, 2010), 5-16. Linda Pollock, "Honor, Gender, and Reconciliation in Elite Culture, 1570-1700" *Journal of British Studies* 46:1 (Jan., 2007), 3-29.

[84] BL, Add. Ms. 37, 536, f. 15.

[85] James Grace, Her Majesties Constable at the Gaol in Kilkenny to Sir John Perrot TNA, SP 63/129, f. 100.

treason in 1584.[86] In March of that year, the Privy Council arrested Hurley while in possession of letters from Rome as well as a letter of his appointment as Catholic archbishop of Cashel. In order to find out more about his network, the lord deputy authorized the secretary of state to torture him by putting his feet into iron boots and then setting them over a fire. So far, this treatment is what any Catholic agent could have expected after getting caught by Elizabeth's spies.[87]

But his confession raised a problem for the Privy Council. According to Irish treason law, the wrong had to be committed in the island. Hurley had only admitted under torture to plotting against Elizabeth while in Rome. Also, due to his stature among the Catholic population, the lord deputy did not want to risk an open trial, where a defiant archbishop might turn himself into a Catholic martyr. He told the secretary of state of England, Sir Francis Walsingham, that he wanted to execute Hurley instead by martial law. The secretary, not as averse to martial law as Cecil, left the matter to the lord deputy's discretion, and several weeks later, the lord deputy had Hurley executed at martial law. During this exchange, the lord deputy never made a substantive claim that Hurley was guilty of treason at martial law, or justified the jurisdictional switch in any way other than that Hurley owned little real property.[88]

Along with the abuses of martial law commissioners, the Crown was concerned that traitors with real property were being executed at martial law which would prevent the Crown from escheating property and moveable goods.[89] The end result was that the queen might lose

[86] For Hurley's appointment see *CSPI,* 1574-85, 465.

[87] David Edwards "Dermot O'Hurley" in *ODNB.* Lords Justices to Walsingham, 7 March, 1584 TNA, SP 63/108 f. 25.

[88] Loftus and Wallop to Walsingham TNA, SP 63/111 f. 27.

[89] BL, Add. Ms. 37,536, f. 14v.

lands desperately needed to finance the Irish government which had become increasingly expensive over the course of her reign. The Crown realized, as it would turn out correctly, that Irish litigants might be able to successfully challenge alienations of land by the Crown of those convicted at martial law.

Indeed, Irish families successfully defended their titles to land by taking advantage of the fact that their ancestors had been executed by summary martial law. We do not know how many engaged in this strategy because legal records for the sixteenth century are so scarce. However there are two extant records from the 1590s that we can examine. Both are examples of cases heard before commissions of inquest which the Crown, Starting in the middle of the 1580s and continuing into the 1590s, commanded to operate in order to find "concealed Crown lands" – land held by tenants without legal title that the Crown could escheat in order to sell it for a profit. The commissioners comprised the chief legal officers of each county. These men would impanel a jury, who in turn would hear information from local authorities into landholdings.

Unfortunately, the records of these two inquests are brief. The first comes from a hearing on 14 April 1591, when Crown officers in County Wexford obtained information on the lands and tenements of five men who had been executed in Dublin by martial law. Why were these landholders brought to Dublin and executed by martial law? At least one commentator, who was an English soldier and administrator, wrote that martial law commissioners took the land of prominent householders by arresting them, sending them to Dublin to be executed at martial law, presumably by the lord deputy or a prominent government official, and then divvying up their land.[90] This abuse of power might be what had happened to these Wexford men, but the record

[90] Thomas Lee, "A Brief Declaration of the government of Ireland opening many corruptions in ye same: discovering discontentments of the Irishry and the Cause of moving these expected troubles" in *Desiderata Curiosa Hibernica* , i. 87-114. For the career of Thomas Lee, see John McGurk, "A Soldier's Prescription for the Governance of Ireland, 1599-1601: Captain Thomas Lee and his Tracts" in *Reshaping Ireland, 1550-1700:*

reveals no more about their fate. In any event, the jury found the information to be true, therefore "they find that all and singular which the aforesaid persons so hanged by Marshall Law or ought to have at the time of their deaths shall be and remain to their heirs and assignes."[91] Because the men had died by martial law, their real property descended to their heirs. Another family a year later came before a similar commission to uncover concealed Crown lands in county Tipperary, and used an identical strategy to recover their property. They secured title because they were the lawful heirs to a man who had been executed by martial law.[92]

The concerns so far about summary martial law were that commissioners were abusing them, and those abuses hurt the Crown in its attempts to Anglicize Ireland and to pay for the enterprise through escheated land. In 1583, a third criticism was levied against the policy: summary martial law might provoke rebellion. That year, Sir James Croft, a former lord deputy of Ireland and member of the English Privy Council, wrote a treatise on the state of Ireland for the eyes of Cecil and other prominent privy councilors. For Croft, the summary martial law commissions were bad policy because they targeted not rebels against the Crown but ordinary subjects.[93] This severity provoked rebellion. Croft was careful to note that he was not referring to the "wylde Irish." Indeed, we can see in Croft the attitude that summary martial law was a necessary tool to instill obedience through terror into those still living in Irish ways. But Croft worried that summary martial law might by its same cruelty and severity turn English subjects

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Colonization and its Consequences: Essays presented to Nicholas Canny ed Brian MacCuarta (Dublin: Four Courts Press, 2011), 43-61.

[91] NLI, Ms. 29,711 (6). This inquisition does not mean, as David Edwards has argued, that the jurors thought "the state was guilty of murder." Instead, the jurors correctly understood that the Crown could not escheat the property from those who had been executed at martial law. Edwards, "Ideology and Experience,"142.

[92] NLI, d. 3181.

[93] Maginn, *William Cecil, Ireland and the Tudor State*, 161-2.

against the Crown and in some instances even provoke rebellion. For the better stability of the island, Irish laws needed to look more like English laws.

Even though the Crown was concerned with summary martial law in 1582, it did not end the policy. Commissions of summary martial law were still awarded to some – including the Earl of Ormond and his delegates in counties Kilkenny and Tipperary – and the presidents of Munster and Connacht had the liberty to use martial law on rebels and invaders. The main region that was relieved from summary martial law commissions was the Pale. No summary martial law commissions were issued for counties Dublin, Meath, or Westmeath. And only one commission, to the Earl of Kildare, was issued for county Kildare. In areas that still had a predominant Irish population, like King's and Queen's counties, the policy continued unabated.[94]

By the end of the decade, many on the English Privy Council wanted to further delimit martial law. By this time, the Council had completed its largest plantation scheme in Ireland to date. Taking the escheated lands from those who had participated in the Desmond Rebellion, in 1586 the Crown established the "Munster Plantation" which by 1589 consisted of well over three thousand English settlers in counties Cork, Kerry, parts of Limerick, and northwestern Waterford.[95] These new settlers not only made Ireland more "English," according to the English Privy council, it also meant that these new families expected to have access to the same legal tools that they would have been able to draw on in England. The continued use of summary martial law in theory would cause discontent among this already settled populace.

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[94] *Fiants*, Elizabeth, nos. 4105, 4119, 4190-1, 4249, 4455, 4483-4, 4527, 4530, 4549, 4556, 4573, 4601-2, 4640, 4658, 4790, 4829, 4954, 4961-2, 4967, 5007-8, 5023, 5027, 5039, 5044, 5048, 5109, 5117, 5234, 5238, 5289-90, 5292-3, 5361, 5393, 5397.

[95] Michael MacCarthy-Morrogh, *The Munster Plantation: English Migration to Southern Ireland, 1583-1641* (Oxford: Clarendon Press, 1986), 115-6; Anthony Sheehan, "the Population of the Plantation of Munster: Quinn Reconsidered" *Journal of the Cork Historical and Archaeological Society*, 87 (1982):107-17. For the plantation generally see MaCarthy-Morrogh, *The Munster Plantation*; and Canny *Making Ireland British*, 121-64.

Summary martial law policy also provoked protest in Connacht, where the new lord president, Sir Richard Bingham, used it to threaten Gaelic lords into submission. In 1585, the Irish government came up with a new composition scheme that allowed Gaelic lords to claim exemption from taxation on their demesne lands if they agreed to end practices like Coigne & Livery, and submit disputes to the Presidency courts. Many lords, including the Earls of Thomond and Clanrickarde, found this proposal appealing. But others, like the Burkes of County Mayo, who had not received English titles, felt insecure about the increased supervision of the English president. The leadership of the Burke lordship also became personally hostile to the new president Sir Richard Bingham, who had attempted to assert his authority over the province through demands of loyalty and through brutal common law sessions held in Galway. The Burkes refused to submit, and Bingham responded by executing several important members at martial law. A short insurrection followed, which forced the lord deputy to lead a host into Connacht: an expensive and undesirable measure.[96]

The complaints against Bingham continued well after he put down the Burkes' rebellion. By this point, Connacht was inhabited not just by the Irish, but also by new English settlers and former inhabitants of the Pale who had travelled to Connacht, and invested in land in the aftermath of the formation of the provincial council.[97] These families had come to the province in part on the assurance that it would be governed by English common law, which supposedly would protect them from the depredations of the Irish lords. But increasingly, these families were

[96] Rory Rapple, "Taking up Office in Elizabethan Connacht: The Case of Sir Richard Bingham" *English Historical Review* (Apr. 2008): 277-99. "A True Discourse of the Late Rebellion of the Bourkes" Nov. 1586, TNA, SP 63/126 fos. 216-219. "A Discourse of the Services done by Sir Richard Bingham in the County of Mayo" Oct. 1586 TNA, SP 63/126 fos. 146-153.

[97] Bernadette Cunningham, "The Composition of Connaught in the Lordships of Clanrickard and Thomond 1577-1641" Irish Historical Studies 24 (1984), 1-14; Mary O'Dowd, *Power, Politics, and Land: Early Modern Sligo, 1568-1688* (Belfast: Queen's Univesity of Belfast, 1991), 35-40.

worried about the depredations of the English lord president. Much resentment grew about Bingham's style of rule. A revolt in Iar-Connacht, a province in the far west of the region, erupted in no small measure due to the president's brutality towards dissidents.

In July 1589 the lord deputy of Ireland, Sir William Fitzwilliam wrote to Cecil from Athenry. He had travelled to the west of Ireland in order to restore order to the province and probably to assert his authority over Sir Richard Bingham. After "manie daies," and after reviewing many of the "wicked" practices used by inferior officers, Fitzwilliam claimed he restored the country to order. He added that Connacht would remain in order if "wicked and inferior officers and ministers maie be restrained from their bloody part and extorcons and the Comon Lawe onlie vsed."[98] In the early part of the century, Palesmen and others desirous of expanded English rule demanded that if only the arbitrary exactions of Irish lords could be stopped, Ireland could be pacified. Now this same argument was being used to restrain the provincial officials who had overseen the subduing of the Irish magnates.

Fitzwilliam blamed the unquiet in Connacht to Bingham's use of martial law. Therefore, he informed Cecil that he and his council had restrained Bingham's martial law commission by "or seacret aduises and commaundemts."[99] Fitzwilliam still wanted the populace of Connacht to think that Bingham had powers of martial law so that they would be too scared to engage in rebellion or sedition. Useful only as a threat, martial law was too dangerous to actually delegate. Bingham and his lieutenants were, according to Fitzwilliam, too liable to abuse their powers of martial law. Order was best maintained instead through common law.

[98] Fitzwilliam to Burghley, 3 July 1589, TNA, SP 63/145 f. 145. Bingham was outraged that his powers were being stripped. Bingham to Walsingham, 11 July 1589, TNA, SP 63/145 f. 149.

[99] TNA, SP 63/145 f. 145.

The attacks on summary martial law continued into the next year. In January, the secretary of state, Walsingham, apparently asked Robert Gardener, the chief justice of King's Bench in Ireland to draft a proclamation that called in the martial law commissions.[100] Gardener, who agreed that martial law should be banned in Ireland, drafted the commission for the English Privy Council several days later.[101] Gardener's draft proclamation made several points that suggested why according to some martial law was necessary in the first place, and why now they should be recalled. For Gardener, the obedience of the population at large meant that the martial law commissions were no longer necessary. Indeed, they were dangerous because inferior officers – the senseschals, sheriffs, and captains – exploited their martial law commissions to extort the queen's subjects. Further, they executed subjects who, according to their commissions, should not have fallen under their jurisdiction. Those suspected of felony for example, not just felons, had been killed at martial law. The potential for abuse was too high for the program to continue.[102] William Cecil agreed, and wrote two tracts on governance in Ireland where he advocated the end of summary martial law. He reiterated that using martial law in times of peace was dishonorable, and that it should be restricted to times of rebellion and invasion. Even in those times, only the Irish Privy Council should authorize its use. Only two martial law commissions, which were both issued in 1590, were made from 1590 until 1594.

Now that the Munster planation had been made, that Connacht had a lord president, that the great Irish magnates of Ulster had submitted to Elizabeth, summary martial law was no longer necessary, or so many English administrators believed at the time. The military governors

[100] Gardener to Walsingham, TNA SP 63/150, fos. 6-7.

[101] Gardener, "Memorial for Ireland" TNA, SP 63/150, f. 14. It is not clear when this tract was written. Perhaps Gardener had written it for the Privy Council who then asked Gardener to write a Proclamation ending martial law.

[102] "Draft Proclamation to Restrain Martial Law in Ireland." TNA, SP 63/150 fos. 8-v.

who had employed the policy needed to be restrained. Summary martial law would only inhibit colonization and perhaps lead to rebellion among previously loyal subjects. Ireland, according to these men, should look more like England. And its laws should be identical to that of England. But even as the summary martial law commissions were being drawn in, we should note that no one really claimed that they had been illegal. Dishonorable, perhaps abused, and in many ways ineffective in achieving the Crown's aims, summary martial law was nevertheless a viable legal option that had not been constrained to a specific state of time.

Summary Martial Law in England

By 1589, members of the English Privy Council had contemplated summary martial law. Cecil had summary martial law commissions in his papers. He had written two tracts that analyzed the weaknesses of the policy as it was practiced in Ireland. Others had perhaps perused the various tracts written on summary martial law by Gardener, Croft, and by the Old English of Ireland. Of course, all of these tracts had decried the use of summary martial law commissions as being dishonorable and as being too easy to abuse by its commissioners. But members of the Privy Council reasoned that summary martial law was not all bad: even in 1589 officials in Ireland thought it useful enough as a form of terror to only strip the lord president of Connacht of his martial law powers in secret. Summary martial law – if it was properly supervised; if it was used only for short periods of time; and if it was used only for certain types of people like vagabonds – might be useful in England. Let us examine a flurry of martial law proclamations in England from 1589 through 1602. As we shall see, English administrators brought summary martial law into England in an attempt to eliminate vagrancy and rioting.

These proclamations were a departure from the previous martial law proclamations issued by the Tudors in England. We have already examined martial law proclamations issued by the Crown, beginning in the midst of the Pilgrimage of Grace in the reign of Henry VIII through a proclamation banning heretical books in the summer of 1588 under Elizabeth I. While these proclamations differed in the types of wrong they sought to punish, all nevertheless fell under the categories of treason or sedition. Further, while often vague in actually telling the subjects of England how or if they were to be enforced, the Crown never granted summary martial law powers to those who were supposed to supervise their enforcement. However, the proclamations Elizabeth issued from 1589 through 1602 all either threatened to license or actually licensed officers to use summary martial law to enforce them – usually to provost marshals appointed by each county or corporate town. Further none of the wrongs in these proclamations were treasonous. Instead, the proclamations targeted vagrants, returned soldiers, and rioters.

The Crown issued the proclamations during a period of economic crisis and international turmoil. Overpopulation and economic stagnation made many within England – particularly the young and under-employed – restless. As Steve Hindle has noted, the period contained a "larger element of permanent deprivation" which led to mass vagrancy, particularly among the young.[103] Continued wars against Spain and against rebels in Ireland not only put an enormous amount of financial pressure on Elizabeth and her council but it also made them anxious over any internal dissent that might open another front for her enemies to exploit. All of these factors made the end of Elizabeth's rule some of "the most terrible years through which the country has ever passed."[104]

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[103] Steve Hindle, *The State and Social Change in Early Modern England* (New York: Palgrave MacMillan, 2000), 54.

[104] Keith Wrightson, *English Society, 1580-1680* (London: Hutchinson, 1982), 144.

In particular, the Elizabethan Privy Council could not solve the problem of vagrancy. A consistent and intractable problem throughout the sixteenth century, the Privy Council deemed it to be a serious threat to security in 1589 because of the supposed criminality of the vagrancy population. These able-bodied men and women was increased in 1589 due to the return of soldiers from England's failed attempt to invade Portugal.[105] Many of these former soldiers did not have enough money to get back to their county of origin. Many probably had nothing to go back to. So instead, they milled around the port-towns where their ship had landed, and begged for aid.

Elizabeth had already attempted to regulate both vagrants and returned soldiers. In both 1572 and 1576, her parliaments through statute ordered that all vagrant persons receive passports from local authorities within two days of the publishing of the act so they could return to their place of birth. Once they had returned, if they qualified for it, poor relief would be waiting for them. The Crown had attempted to enforce this act through two proclamations in 1576 and in 1587 to little effect.[106] Elizabeth had also attempted through proclamation to force returned soldiers to go home in August 1589. They had not, at least according to Elizabeth, obeyed this command. Soldiers remained in the ports, and vagrants, according to the Crown, were claiming to be soldiers so that port officials would leave them alone. To make matters worse, an expedition into France led by Sir Francis Willoughby was expected to soon return, making it likely that more returned soldiers would loiter around port towns.[107]

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[105] For England's foreign policy in this period, see R.B Wernham, *After the Armada: Elizabethan England and the Struggle for Western Europe, 1588-1595*(Oxford: Clarendon Press, 1984).

[106] 14 Eliz. c. 5; 18 Eliz. c.3; *Tudor Royal Proclamations* (hereafter *TRP*) ed. Paul L. Hughes and James F. Larkin, 3 vols. (New Haven: Yale University Press, 1964-9), ii. nos. 637 & 692. Frederic Youngs, *The Proclamations of the Tudor Queens* (Cambridge: Cambridge University Press, 1976), 73-74.

[107] *TRP*, iii. no. 715.

On 14 November, Elizabeth threatened vagrants with execution by martial law.[108] She declared to those who would not return home that "in due course of policy cause the said…provost marshals above mentioned to proceed out of hand to the punishment of the transgressors of the late proclamation." Here was the threat of summary martial law. But she stayed her hand. Instead, those vagrants and vagrant soldiers had two days to repair to either a mayor or justice of the peace and receive a passport so they might travel back to their birthplace. Like other statutes relating to vagrancy, and like the summary martial law proclamations in Ireland, the Crown gave a time window for vagrants to self-correct their behavior.

Elizabeth next declared that should these vagrants and vagrant soldiers refuse to return to their home county they would be subject to summary martial law. Or would they? If they refused to obtain a passport, Elizabeth declared that they would be executed within the county or city in which they were caught "according to such direction as shall be given by warrant from her majesty in that behalf to be made."[109] What Elizabeth and her council was not letting the public know in the proclamation was exactly how these vagrants were to be dealt with once they were caught by the provost marshal. The procedure actually envisaged was contained in a draft privy seal warrant, written on 14 November.[110] In this draft, the Queen and her council maintained control over martial law procedure by mandating that provost marshals only catch and imprison masterless and vagrant persons. The lord lieutenant or acting deputy lieutenant then needed to write to the Privy Council outlining all of the provost's prisoners and their purported offences. If six privy councilors believed that execution by martial law was warranted, then a privy seal

[108] *APC*, xviii. 222; *TRP* iii. no. 716; *CSPD*, 1581-90, 629.

[109] TNA, SP 12/228/10.

[110] Privy Council to the Lord Chancellor, 14 November, 1589 TNA, SP 12/228/10; another copy of this warrant is in BL, Lansdowne Ms. 59, no. 80.

commission would be drawn up by the Lord Chancellor to the lieutenant who would then direct his provost marshal to execute those convicted by the Privy Council at martial law.[111] This plan gave the Privy Council the ability to circumvent common law. But it also allowed them to maintain control over the use of martial law.[112]

The best evidence we have of this procedure comes from County Hertfordshire, where William Cecil served as lord lieutenant. In December 1589 Cecil directed Sir Henry Cocke, his deputy lieutenant, to hold a special session to clear the jail of all the vagrants the Hertfordshire provosts had imprisoned. In his January response to Cecil, Cocke claimed that he heard fifteen cases of vagrancy, and issued passports to twelve of the men so that they might return to their home counties.[113] But three of the vagrants were repeat offenders. According to the 1572 statute against vagrancy, those who were caught more than once had committed a felony, and were thus subject to capital punishment. Cocke had the three accordingly indicted, but ordered a respite for the men so that Cecil might review their cases. If he so desired, Cecil could have sought a privy seal warrant to execute the three men at martial law, although we have no evidence of his ultimate decision. Indeed, there is no evidence that anyone was killed by martial law through the 1589 proclamation. Very few records from the provost marshals survive. But, as we have seen, there would have been records of such executions had they actually taken place.

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[111] This procedure was explained to the Lord Chancellor in a letter dated 17 November. "A Letter to the Lord Chancellor of England," *APC*, xviii, 224.

[112] This control is reflected in the instructions sent out by the Privy Council to the lords lieutenants and provost marshals, which directed them to imprison vagrants and "proceed further wth them according to such authoritie and direccon as he hath or shall receaue form that purpose." Privy Council to sheriffs and justices of the peace of Surrey, 25 Nov. 1589, SHC, 6729/10/78. Also see *HMC*, Finch, i. 29, and LMA, jour. 22 f. 347v. In London, the provost was to deliver them to the Bridewell where two alderman were to examine them the following day and issue those not needing felony prosecution passports, Ibid., f. 441.

[113]Sir Henry Cocke to Burghley, 7 Jan. 1590, BL, Lansdowne Ms. 62, no. 26 printed in Lindsay Boynton, "Tudor Provost Marshal", 449-50. It is likely that along with the passports, Cocke ordered some kind of physical punishment like whipping. This corporal punishment was common in other special sessions of the 1590s. See BL, Harley Ms. 7018 no. 6 for 1592 and BL, Lansdowne Ms. 78 no. 53.

The most complete record we have of the provost's activities is a memorandum written by the provost Sir George More of Surrey, which was directed either at the Privy Council or to the deputy lieutenant of the county.[114] More had jurisdiction over the highways just south of London, one of the most highly trafficked areas by vagrants and masterless men.[115] More detailed how he and his underlings searched all of the alehouses and other inns in search of returned soldiers and masterless men, which was conducted at least one night of every week. More made no mention of anyone being prosecuted at martial law. Instead, he seemed desirous of a more clement policy. He wanted to be able to grant passports to vagrants and soldiers (after the two day window) who were not committing any trouble. He also desired a standing commission of *oyer* and *terminer* to hear and determine cases against highway robbers, who he claimed were a much greater problem than vagrants and returned soldiers.

In all probability, no one was killed by summary martial law in 1589/90 in England. It is likely that no one was supposed to be killed. Instead, Elizabeth and her council simply wanted to terrify vagrants into obedience while instituting a new county officer who would be directly responsible for enforcing the vagrancy statutes already on the books. At least one "rogue" was not fooled by the proclamation. Henry Cocke related to Cecil that he had overheard a conversation between an old rogue and a young masterless man.[116] After claiming that he had lived "merrily" for seventeen years wandering up and down the countryside, the rogue admitted that "ther was great speeches aboute London, that ther shoulde be provoste marshalles in every sheare, to hang them uppe." But he reassured the young man by stating, "they dare not doe it, for

[114] "Memorandum of Sir George More," SHC, 6729/3/29, undated. But the memorandum refers to the November 1589 proclamation so it was probably written sometime during More's three month tenure as provost marshal.

[115] More did not live near London and asked to be replaced as provost marshal in March 1590 because he had to travel so far from his home. SHC, 6729/3/30.

[116] Sir Henry Cocke to Burghley, 7 Jan. 1590, BL, Lansdowne Ms. 62, no. 26.

theie are as much afrayed of us, as we are of them, they know ther are manye of us, and ther are many Ennymes abroad, and at home also, therefore I warrant thee, they dare not hurt us." Indeed, the only ones who were terrified in the winter of 1589 were the queen and her council.

Eventually, Elizabeth and her council allowed to provosts what they had only threatened to allow in 1589. Initially in 1590, Elizabeth and her council reverted to former attempts at prosecuting the vagrancy statutes of 1572 and 1576 without using veiled threats of summary martial law.[117] The Crown continued to use the office of provost as a threat to the justices of the peace: should they fail to do their duty, they would be supplanted.[118] The policy generated some protest within counties not simply because justices of the peace felt threatened, but also because of the cost. Provosts and their assistants had to be maintained through county rates, and at least some counties simply did not want to pay the expense. One of the few jurisdictions that could afford to continue to pay these new policemen was the city and corporation of London: a jurisdiction which by 1591 was ravaged by disorders both by vagrant, "lewd" people, returned soldiers, and apprentices and other semi or under-employed classes. In order to quell the disorders that sprang from the rioting of these groups that the city in conjunction with the Privy Council continued to experiment with summary martial law.[119]

The vagrancy problem was most acute in London. By 1590 the city was nearing 200,000 people. It had become a great magnet for all of the under-employed or unemployed of the

[117] The Queen thus issued a proclamation in 1591 that demanded justices of the peace enforce statutes against vagrancy. *TRP*, iii. no. 736.

[118] *William Lambarde and Local Government: His Ephemeris and Twenty-Nine Charges to Juries and Commissions* ed. Conyers Read (Ithaca: Cornell University Press, 1962), 107.

[119] London aldermen seem to have paid for the provosts. In 1596, for example, all aldermen were ordered to pay 30s for the upkeep of the city marshals. LMA, Rep. 23 fos. 503, 511. For the development of the permanent city marshal as an office, see Paul Griffiths, *Lost Londons: Change, Crime, and Control in the Capital City, 1550-1660* (Cambridge: Cambridge University Press, 2008), 291-431.

countryside. Many youth came to London to learn new trades. By the end of the sixteenth century, it has been estimated that almost fifteen percent of the population were apprentices to some craftsmen or merchant.[120] Many of these men were of foreign birth, a fact not lost on the often xenophobic London elite. Increasingly nervous due to food shortages and overpopulation, the mercantile elite that ruled the city sought to use provost marshals, often dubbed city marshals, to quell the rioting and disturbances of the apprentices.[121]

In June 1591, the Crown issued a proclamation that declared that all apprentices, vagrants, idle and masterless men in London or in its nearby counties be rounded up by a newly appointed provost marshal. If any of these types of people resisted arrest or refused to be "readily reformed and corrected by the ordinary officers of justice" they were to be executed "without delay" by martial law.[122] This legalization was a product of rioters resisting arrest, and breaking out their imprisoned compatriots.[123] After the proclamation was issued, the Crown organized two tribunals to sit at Newgate, one to handle vagrants and masterless men, the other to handle soldiers and those who pretended to be soldiers, to examine all those caught by the appointed provost marshal. They were then to issue passports, usually after receiving corporal punishment, so that these idlers might return home.[124] The instructions gave great discretionary powers to the provosts. No one was to go out at night except the justices of the peace or the provost and his officers. No assemblies were allowed. Anyone caught writing seditious pamphlets were subject

[120] Manning, *Village Revolts*, 187-200.

[121] Ian Archer, *The Pursuit of Stability: Social Relations in Elizabethan London* (Cambridge: Cambridge University Press, 1991), 1-17.

[122] *TRP* iii. no. 735.

[123] Manning, *Village Revolts*, 207-08.

[124] BL, Lansdowne, Ms. 66, no. 94.

to martial law. Rioters were to be apprehended and anyone caught trying "aide the partie that should be arrested" was to be executed by the provost marshal at martial law.[125] Highly organized in theory, the policy was at the very best haphazardly implemented. Riots continued into 1592, and so did the vagrancy problem.[126]

On three more occasions, Elizabeth and her council attempted to employ summary martial law. In 1595, thirteen separate riots, usually begun by apprentices, sent the city of London into complete disorder. Once again, the city appointed a provost marshal and assistants.[127] Again, the London government organized tribunals for the punishment and transportation of vagrants and vagrant soldiers. And once again, the Crown issued a proclamation that threatened anyone who resisted arrest with execution by summary martial law. In 1598, the Crown again threatened vagrants who actively resisted legal officers with death by martial law and scolded its justices of the peace for failing to enforce its statutes against vagrancy.[128] While there are no records of summary executions, provosts under these proclamations would not have been required to take note of them.

Some Londoners challenged the provosts' powers at law. While we only have scattered references to this process, it is clear that aggrieved men and women took provosts to court over their actions. In February 1596, for example, the mayor committed John Read, one of the city's marshals, for an "vnseemly se[r]che."[129] Reed had apparently attempted to apprehend a "lewd

[125] Ibid., no. 93.

[126] The Privy Council reprimanded the mayor in 1592 for not putting down a riot more forefully. *APC*, xxii. 549-50; xxiii, 19-20, 28-9, and 242.

[127] *TRP*, iii. no. 769.

[128] *TRP*, iii. no. 796.

[129] LMA, Rep. 23 f. 508v.

woman," but was forcibly prevented from doing so by some men "of the temple."[130] Eventually, a writ of trespass was issued against Reed, and damages were found for the plaintiff.[131] Common law courts thus had the ability to supervise the jurisdiction of the provosts.

Some thought that the proclamations were, if not illegal, then a very bad idea. The Earl of Essex, one of Elizabeth's most powerful Privy Councilors, was incredulous over the summary martial law proclamation of 1598. He was no stranger to martial law; Essex was one of Elizabeth's most experienced military commanders. And he was no stranger to strict discipline. Only a year and a half later, Essex would decimate one of his regiments in Ireland for cowardice. But the use of summary martial law in England during a time of peace scared him. Essex, who had recently been named the Earl Marshal of England, had some within his circle study the history and rights of the office and due to the information he had acquired, he made a claim that all provost marshals within England should be appointed and supervised by him. This claim caused others on the Privy Council to write to the Earl in September to ask if he approved of their appointments.[132] The Earl wrote to the Privy Council and commented not on the appointments, but on the proclamation itself.[133] It would be against "her maties mercifull and excellent gouernt" to allow summary martial law to operate in England. Like Cecil, the Earl of Essex pointed out the temporal boundaries that should not be violated: martial law should not be used as long as "her kingdom is free from inuasion and rebellion."[134] At the very least, according

[130] It is not clear who these men were. LMA, Rep. 23. f. 532v. Apparently the case was initially heard before the Court of Star Chamber.

[131] LMA, Rep. 25, fos. 36v, 46.

[132] Privy Council to the Earl of Essex, 6 Sept. 1598, HH, CP 63/108.

[133] The Earl of Essex to the Privy Council, [undated, 1598] HH, CP 64/67.

[134] Ibid.

to Essex, vagrants and rogues should have the right to appear before a "martial court:" in other words plenary martial law process.[135]

Essex believed that using this type of law undermined the stability and happiness of the kingdom and might provoke widespread unrest and even rebellion. Like Cecil, he believed that this summary martial law was useful but only if temporally bounded. In times of rebellion or invasion perhaps summary martial law should be used. But it should not be used in times of internal peace. In these arguments, Essex shared a common voice with William Lambarde, a notable jurist and legal writer of the period. Lambarde in 1591 declared in his speech that "we are not peremptorily sentenced by the mouth of the judge…but by the oath and verdict of jurors that be our equals."[136] Lambarde worried that this practice was being replaced by the presence of provost marshals with powers of summary martial law.

The arguments of Essex and Lambarde did not win. The Crown used summary martial law again in February 1601 when Elizabeth proclaimed that all loose and idle people found in London would be executed at martial law. These powers were granted to provosts during the rebellion of none other than Essex, who had raised his standard against his queen. James I continued to use summary martial law during times of riot in both 1607 and again in 1618.[137] In England, summary martial law fairly quickly became circumscribed to riot. Martial law commissioners never had access to multiple jurisdictions like they did in Ireland. And they were always supervised by other legal officers.

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[135] Ibid. Essex in his letter referred to French summary executions, what he termed procedure "*sans repliqué*.."

[136] Quoted in Christopher Brooks, *Law, Politics, and Society* (Cambridge: Cambridge University Press, 2008), 92.

[137] *Stuart Royal Proclamations*, ed James F. Larkin and Paul L. Hughes 2 vols. (Oxford: Clarendon Press, 1973), i. nos. 71 and 177.

Supervising Summary Martial Law in Ireland

The English Privy Council had become increasingly concerned about the use of summary martial law in Ireland. Nevertheless, after the outbreak of a large rebellion in Ulster in 1594, it recognized that summary martial law was still necessary. Many Irish officials, likewise, argued that Ireland needed distinctive legal forms from those of England. However, even when lord deputies granted summary martial law jurisdiction, common law commissioners supervised it.

In 1594, the peace that English privy councilors had been so pleased by in 1590 unraveled. The Earl of Tyrone, who was always only at best a tenuous ally to the lord deputy, decided to join with the Earl of Tyrconnell in a war against the English Crown after perceiving that his autonomous rule of his lordship in Ulster was being undermined by new English administrators.[138] The Earls began their war in Ulster, but eventually attracted supporters throughout much of the island, most notably in Munster where Irish men and women dispossessed by the Munster Plantation gleefully destroyed the new English settlements. Once again, the Spanish attempted to take advantage of the turmoil, this time landing a contingent in Kinsale on the south Munster coast in 1602. The war almost brought the English government to its knees. Elizabeth was forced to send, at least by English standards, large numbers of troops from England into Ireland led by some of her most prominent generals. Finally, days after Elizabeth's death, the English lord deputy came to a negotiated truce with the Earls of Tyrone and Tyrconnell at Mellifont.[139]

[138] Hiram Morgan, *Tyrone's Rebellion: The Outbreak of the Nine Years War in Ireland* (Woodbridge, Suffolk: The Royal Historical Society, 1993).

[139] For the military history of the Nine Years War, see Cyril Falls, *Elizabeth's Irish Wars* (London: Metheun, 1950), 202-340. Ellis, *Tudor Ireland*, 314-15.

Even before the war broke out, English commentators had reservations about the circumscription of summary martial law to states of invasion and rebellion. Richard Becon, a Suffolk born administrator of Munster, wrote in a 1594 treatise on how Ireland should be governed entitled *Solon his Follie*, that English administrators should continue to use martial law in areas of Ireland that contained a large presence of native Irish speakers.[140] Sir Thomas Lee later in the decade agreed, and argued that although martial law could be abused by administrators in areas where the English had settled in Ireland, governors in the "wild areas" of Ireland should be able to use it.[141]

Others wanted a return to the martial law policy of the 1570s and 1580s. Edmund Spenser was the chief supporter of this view. Spenser, had, we have seen, come to Ireland in the company of Lord Grey de Wilton. Afterwards, he had become involved in the Munster plantation, which had recently been attacked by Irish forces. In light of these events, Spenser believed that the plan to make Irish laws identical to those of England erroneous. In 1596, he wrote a manuscript treatise entitled, "A View of the Present State of Ireland" which fleshed out this protest in detail as well as laying out a plan for a comprehensive military occupation of the island. The work takes the form of a dialogue between Eudoxus and Irenaeus, the former an official in England and the latter representing an administrator representing the views of Spenser and others who desired a return to a more martial form of government.[142]

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[140] Richard Beacon, *Solon his Follie (1594)* ed and annot. Claire Carroll and Vincent Carey (Binghamton: Medieval & Renaissance Texts & Studies, 1996), 22-6.

[141] Canny, *Elizabethan Conquest of Ireland*, 118.

[142] The best work on Spenser's views on martial law is Edwards, "Ideology and Experience," 127-58. There has been considerable debate over how original Spenser was as a thinker, and how influential he was among new English settlers. Ciaran Brady, "Spenser's Irish Crisis: Humanism and Experience in the 1590s" *Past and Present* 111 (May, 1986): 17-49; Nicholas Canny, "Spenser's Irish Crisis: Humanism and Experience in the 1590s" *Past and Present* 120 (Aug. 1988): 201-09; Ciaran Brady, "Spenser's Irish Crisis: Humanism and Experience in the 1590s:

The dialogue started, after Irenaeus gave Eudoxus a brief history of politics of the island, with a discussion of Ireland's laws. Eudoxus, because he was from England, assumed common law to be the natural way for Ireland to be governed. But Irenaeus explained to him why common law was problematic. First, English governors had to worry about jury nullification by Irish jurors: "when the cause shall fall betwixt an English-man and an Irish, or betweene the Queene and any free-holder of that country, they make no scruple to passé against an Englishman, and the Queene."[143] Further, even if English jurors could be found, the evidence brought to trial would come from "base Irish people" who were liable to perjure themselves or act in some other deceitful manner. Forced to abide by common law, English administrators could never eradicate the many traits of the Irish civilization – herding, coign and livery, and so on – that Irenaeus believed prevented the island from being reduced into civility. Among other proposals, the Crown needed to place military governors with powers of summary martial law throughout the island to terrorize the Irish into obedience.

During the Nine Years War, the lord deputies of Ireland seemed to agree with Spenser, and once again issued commissions of summary martial law.[144] From 1594-6, they only granted commissions to the Earl of Ormond in order to keep his lordship under control. By 1597, as the war dragged on unsuccessfully for the English, the Dublin government issued commissions of summary martial law to all the counties in and around the Pale and to its military commanders in the north. By 1598, the lord deputy granted commissions to every jurisdiction on the island, but

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Reply" *Past and Present* 120 (Aug., 1988), 210-15. Nicholas Canny, "Edmund Spenser and the Development of Anglo-Irish Identity," *Yearbook Eng. Studies* xiii (1983), 1-19; Canny, *Making Ireland British*, 1-55.

[143] Spenser *A View of the Present State of Ireland*, 30.

[144] *Fiants* Elizabeth, nos. 5880-2, 5891, 5932, 6020, 6028, 6073, 6084, 6091-2, 6103, 6111, 6116, 6126, 6135, 6144, 6164, 6199, 6202-17, 6221, 6223, 6227-8, 6237-8, 6240-1, 6243-7, 6255-6, 6260, 6281-2, 6285, 6288, 6290-1, 6307-8, 6319, 6324, 6342-3, 6356, 6364, 6367, 6375-6, 6385, 6415, 6420, 6528, 6546-7, 6572, 6637, 6645, 6675.

only for a two month period. The lord deputy also began in 1598 to authorize clearing jails by martial law because the chaos caused by the wars prevented judges from riding their circuits. These practices continued until the end of the war in 1603.

With peace, the new king James I, issued a proclamation that recalled many of the commissions of martial law that had been issued during the war.[145] In February 1605, James declared that due to the fact that many martial law commissioners had abused their power for private gain, they needed to hand in their commissions within forty days of the printing of the proclamation. However, many exceptions were made. The mayors of the port towns, the great lords like the Earls of Ormond and Thomond, sheriffs who had already received commissions and the lord presidents of Munster and Connacht all maintained their privilege to employ martial law. Even the Earl of Tyrone, who only two years earlier had been in open warfare against the Crown, received a commission of martial law.

What changed, from what we can tell, was not the limitation of the summary martial law commissions but the supervision of those commissions by common law jurists.[146] In the aftermath of the Nine Years War, regular assize circuits began to operate throughout Ireland.[147] Many of these commissioners, following in the path of Gardener and Cecil, sought to curtail summary martial law jurisdiction. One of its most prominent opponents was Sir John Davies, a prominent legal theorist who became the Solicitor General of Ireland in 1603.[148] Davies also

[145] BL, Add. Ms. 41,613, fos. 26v-29v.

[146] This is a difficult point to make in part because the records of Dublin's central courts in the sixteenth century have not survived.

[147] John McCavitt, "Good Planets in their Several Spheres – The Establishment of the Assize Circuits in Early Seventeenth Century Ireland" *Irish Jurist* XXIV (1989), 248-78.

[148] For Davies' career, see Hans Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge: Cambridge University Press, 1985).

believed that the Irish needed to be civilized in order for the island to become obedient to the Crown. But from Davies' perspective, terror was not the means to civilize Ireland. Instead, the Irish remained "barbaric" because they continued to be "oppressed" by Irish customs, and because English administrators had not fully introduced common law into the kingdom.[149] Davies' goal as solicitor general was to root out all those legal customs, both English and Irish, which he deemed to be repugnant to English law.

Davies attacked summary martial law policy in 1606.[150] That year, the provost marshal of Munster, Sir George Downing, used his powers of martial law to summarily execute a "fool" who was travelling in county Limerick. The wrong was vagrancy, which meant that the "fool" was not a property owner and, if the provost had executed him legally, would not have been carrying a pass from a property owner. Unfortunately for the provost marshal, the fool had a pass on his body when he was killed. The Earl of Thomond, a powerful Irish magnate who had submitted to the Crown, had claimed the fool as one of his followers. Enraged by this wrongful execution, the Earl of Thomond demanded justice. In spite of the vigorous protests of the lord president of Munster, Sir Henry Brounker, Davies and the other commissioner when they travelled on their assize circuit agreed to hear the case – with Brounker presiding over the court. A ground jury found an indictment of murder to be a true bill. Then a petty jury initially convicted Downing of the offence after hearing evidence from the Earl of Thomond. But Brounker delayed the public reading of the sentence until the following day, to the dismay of the common law judges. In the meantime he threatened the jury that they should arrive at an

[149] John Davies, *A Discouerie of the State of Ireland with the true causes why that kingdom was neuer entirely subdued, nor brought vnder obedience of the crowne of England* (London, 1612).

[150] The accounts of these events are "The Lord Thomond's Account of the Proceedings against John Downing" TNA, SP 63/218/42 enclosure; David Edwards, "Two Fools and a Martial Law Commissioner: Cultural Conflict at the Limerick Assize of 1606" in *Regions and Rulers in Ireland, 1100-1650: Essays for Kenneth Nicholls* (Dublin: Four Courts Press, 2004), 237-65.

alternative verdict or he would prosecute them at the Court of Castle Chamber. The jury remained steadfast, and convicted Downing.

Davies and the other common law commissioners agreed that Downing should be pardoned. The Earl of Thomond was inconsolable; he believed his dead servant had been deprived of justice. Brounker was likewise inconsolable. Storming out of the sessions, Brounker believed his authority and his honor had been undermined. Indeed they had. The point, from Davies perspective, was not to make a spectacle by executing an officer of the Crown. Instead, it was that the common law had the right to supervise the Crown's other jurisdictions. As Davies put it to the Earl of Salisbury, he was not going to subvert the lord president's or his deputy's authority. But common law judges had the right to examine "whether he exceeded his authority maliciously or no."[151] The days of martial law commissioners operating unsupervised were over.

Summary martial did not come to an end after 1606, but the powers of summary martial law commissioners became increasingly constrained. Irish administrators, like the lord deputy Sir Arthur Chichester, often wanted to continue to use it, but had to justify summary martial law to an English Privy Council that was increasingly opposed to its unrestricted use. Further, Chichester worried about the common law judges who supervised the activities of the provost marshals. The Council in the sixteenth century had even more reason to fear that summary martial law would turn English subjects against the government because they had just initiated an even bigger plantation – the Ulster Plantation – which settled English and Scottish Protestants on the former lands of the Earls of Tyrone and Tyrconnell.[152] In 1615, fearing plots for a new insurrection against the English government in Ulster, Chichester wrote to the Privy Council that

[151] *CSPI*, 1603-06, 471.

[152] Chichester in 1613 informed some of the most prominent Catholics of the realm that provosts had not been given powers of summary martial law in six years. *CSPI*, 1611-14, 415.

he had authorized provost marshals to use summary martial law "but with restraints, as it lay not in their power to put any man to death without the consent and allowance of some justice of the peace."[153] Further, that justice of the peace was to take into account special examinations – in other words evidence was required before execution. Even these activities were closely monitored by John Davies who reported in 1615 that he and other common law judges had overseen many indictments of provosts who had overstepped their bounds. By the end of James' reign, Irish administrators still used summary martial law, but on a much more restricted basis.[154]

Conclusion

Ideas about summary martial law looped through England and Ireland. Reading about idlers and retainers in Ireland, the Earl of Sussex applied ideas relating to vagabonds and illegal retainers in England, and perhaps was influenced by continental practice, and crafted a form of summary martial law that stood outside of any temporal bounds. Initially hesitant about allowing this policy to go forward, the Privy Council eventually allowed Sussex to employ the policy throughout Ireland. His successors continued this strategy, and granted summary martial law commissions to their expanding network of legal officials. By 1582, many living in Ireland complained that summary martial law led to abuse, that it encouraged rebellion, and that it prevented colonization. Eventually, the commissions were confined to temporal states of rebellion and invasion. But at that very moment, English privy councilors thought that summary martial law could be used in England to combat vagrancy and riot. In spite of protests, and always under the eye of common law officials, Stuart monarchs continued using summary

[153] *CSPI*, 1615-25, 38.

[154] Ibid., 301.

martial law to combat riots. These constraints were incorporated into an Ireland that by 1603 was more at peace. By the 1620s, summary martial law survived in both kingdoms, in spite of the reservations of many, and the two variants looked increasingly similar to one another. Freed from any temporal bounds, the Crown used summary martial law to complement common law for wrongs that were dangerous to the public order and that were difficult for common law officers to solve. Crafted as a tool to control retaining practices in Ireland, Crown officers domesticated it, and then sent many of the constraints adopted for England back into Ireland.

Part Two:
Transformation: Martial Law and Military Improvement

Through martial law, the Crown had attempted to instill discipline into its subjects through terror. By the end of the sixteenth century, many military theorists who had either trained with or fought against European armies began thinking that the mechanisms by which the Crown had attempted this strategy were insufficient. New ways of fighting war on the continent and larger armies and navies challenged the Crown, its ministers, and its martial community to make transformations in their military apparatus so that they might keep up with their more potent European rivals. Along with attempting to update tactics and strategy, these ministers focused on improving the martial discipline of Crown forces. Before the Crown competed on the same scale as its continental rivals, it transformed its army and its navy through emulation and adaptation of continental examples.

Martial theorists, since Roman times, had always believed in a causal link between rigorous discipline and success on the battlefield.[1] Between 1585 and the end of the seventeenth century, the Crown transformed the laws of martial law, its procedure, and the ways in which courts martial were administered and supervised with this same hope – often unrealized – that better discipline might lead to more success. Private trading companies, like the Virginia Company of London, adopted similar strategies for their newly founded plantation in Jamestown.

The product of this transformation was more laws, more rules relating to procedure, and more records. By the end of the seventeenth century, due to the administrative structures the Crown built, consistently kept records of court martial proceedings were expected. These records reveal increased supervision over the lives of soldiers. They also reveal a culture of law. Even for minor offences, soldiers had their day in court. Lawyers examined evidence. Councils of war

[1] Vegetius, *Epitome of Military Science* trans. N.P. Milner (Liverpool: Liverpool University Press, 1993), 2, 67-8.

heard and determined cases. Once known for its speed, courts martial by the end of the seventeenth century had slowed down. Once known for the enormous discretion commanders possessed, by the middle of the seventeenth century, those discerning powers were divided amongst the commander's officer corps.

Chapter 3:
Transformations in Law Making

Between 1585, when Elizabeth sent a royal army to the Low Countries, and 1642, when England descended into civil war, English jurists and commanders transformed the articles of war. They did so in self-conscious emulation of armies they perceived to be superior to their own, and ones that had in large measure trained much of the English nobility in the ways of war.[1] Along with tactics and technology, English military writers focused on improving discipline through law. Better laws would produce a more orderly and thus more successful martial polity. This process of attempted improvement did not simply mean that the English copied continental examples or those from Roman history.[2] Instead, commanders and their counsel thought deeply about martial law making, applied examples from successful armies selectively, and combined those additions with prescriptions designed for the perceived specific needs of their campaign or garrison. The combination of innovation with imitation that had in the past proven to instill discipline into previously unruly soldiers made martial law an enticing form of law for the Virginia Company, who in 1609 decided that its Jamestown plantation could no longer function under common law. This process was experimental and additive. By the English Civil Wars, the articles of war were over 100 ordinances long. In theory, soldiers were under increased supervision. Almost every activity was regulated: who a soldier spoke to, how he acted to his superior, how he acted to his fellow soldiers, to the civilians and shopkeepers in and around the

[1] R.V. Manning, *An Apprenticeship in Arms: The Origins of the British Army, 1585-1702* (Oxford: Oxford University Press, 2006); Barbara Donagan, *War in England, 1642-49* (Oxford: Oxford University Press, 2006), 33-62; D.J.B. Trim, "Fighting Jacob's Wars. The Employment of English and Welsh Mercenaries in the European Wars of Religion: France and the Netherlands, 1562-1610 (unpublished PhD dissertation, University of London, 2002).

[2] For overviews of martial prescriptive literature, see Henry J. Webb, *Elizabethan Military Science* (Madison: University of Wisconsin Press, 1965).

camp or garrison, his cleanliness, his performance on duty, his religiosity, and anything else the council of war thought he did wrong came under their purview.

Martial Lawmaking and the Dutch Wars

The commander proclaimed martial laws. Whatever he or she believed to be good law could be made into one of the army's written constitutions. By the end of the fourteenth century, it had become customary for the Crown or its delegate to issue proclamations in writing before the outset of any military campaign in a "code of war" or "Articles and ordinances of war." Technically, the commander authored these codes. However, he or she always did so with the advice of counsel, which would have included lawyers trained in Roman civil law: the judge marshals and later judge advocates general and their assistants. These prescriptions governed camp discipline, ransom payments, pillage, disputes, religious observance, and the execution of justice. The commander issued new proclamations as the campaign went forward in order to resolve any legal problems that he or she believed had arisen. Jurists and commanders glossed these laws, in accordance with Aquinas' divisions, as those particular to a political body.[3] Most compared the army to an urban corporation or to a state, and just as a state needed law for the maintenance of order, so too did an army. Increasingly influenced by neo-stoicism, the articles of war mandated the duties of soldiers within the martial polity, and prescribed the penalties for the failure to perform those duties.[4]

[3] Thomas Styward, *The Pathwaie to Martiall Discipline* (London, 1582), 7. Matthew Sutcliffe, *The Practice, Proceedings, and Lawes of Armes* (London, 1593), 340.

[4] The *locus classicus* of stoic views are Cicero, *On Duties* ed. M.T. Griffin and E.M. Atkins (Cambridge: Cambridge University Press, 1991). For the reception of stoic ideas in the late sixteenth and early seventeenth centuries, see Gerhard Oestreich, *Neostoicism and the Early Modern State* (Cambridge: Cambridge University Press, 1982). For its reception in natural law theory in the seventeenth century, see T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 1996).

Soldiers entered into the army voluntarily, or so the prescriptive literature said. Before one could enter into martial polity, a soldier had to swear an oath. The 1586 oath mandated that the soldier "sweare and promise to doe all loyal true and faythefull service unto the Queen of Englande her most Excell. Majesty."[5] Before making this oath, the soldier's military officer had to make him aware of the articles of war, and the solider had to agree to live under those rules.[6] By the seventeenth century, the new recruits had to declare that "All these lawes and Ordinances which have publikely here beene read unto us, we do hold and allow of as sacred and good…"[7] Commanders and their council were concerned that all new recruits be read the ordinances of war within three days of entering into their camp.[8] The soldiers needed to understand the laws they were subject to because they had the right to fulfill their duties. The substance of martial law was the word of the commander, as Sir Thomas Smith in his widely read work *De Republica Anglorum*, suggested. However, the word of the commander needed to be known by all parties before it counted as law.[9]

Martial lawmaking had the potential for creativity. But until 1585, it went untapped. The codes of war were roughly consistent with their medieval predecessors both in topic and in

[5] This oath is printed in Charles Cruikshank, *Elizabeth's Army*, (Oxford: Oxford UniversityPress, 1966), 293.

[6] Thomas Audeley. "Art of Warre," BL, Add. Ms. 23,971, f. 3v.

[7] *Lawes and Ordinances of Warre*, (London, 1639), 27.

[8] C.G. Cruikshank, *Elizabeth's Army*, 303. At least in the French case, the soldier had the ability to leave if he did not like the codes, or if he felt mistreated by his captain. See the Prince of Condé's code, which was translated and printed by Sir Thomas Digges, *A Arithmetical Treatise named Stratioticos* (London, 1590), 298. Recruitment for the army was largely conducted through indentures, where the Crown commissioned the nobility to raise a certain number of troops through their county networks. But increasingly during the reign of Elizabeth, justices of the peace and deputy lieutenants began to press men for service because the English were at war both in Ireland and in the Netherlands. These practices were unpopular and were protested against during the parliament of 1628. The best authority in print on this subject is Mark Charles Fissel, *English Warfare, 1511-1642* (London and New York: Routledge, 2001), 82-114; the most comprehensive work on military recruitment in the early sixteenth century is still Jeremy Goring, "The Military Obligations of the English People, 1511-1558 (unpublished PhD dissertation: University of London, 1955).

[9] Sir Thomas Smith, *De Republica Anglorum* (London, 1583), 44.

length. The code of Richard II was 26 articles long. The codes of Henry VIII's armies, those of his son, and the first codes of the armies of Elizabeth were similar in length.[10] The laws and their respective punishments remained fairly consistent in this period. As we have already seen, Elizabethan statesmen had used martial law quite creatively – both its summary and plenary forms – as a procedural alternative for wrongs that were cognizable at common law, but that might prove difficult to obtain convictions. The only substantive adaptation at martial law was to take wrongs that were not punishable by death, like vagrancy, and to turn them into capital offences. As Barbara Donagan has noticed, it was not until the code of the Earl of Leicester, written in 1585, that English commanders and jurists began to think more critically about the potential of the substance of martial law.[11] Before we examine the particulars of this code, let us first examine some of the changes in European warfare generally which might help us understand why at this moment English commanders sought to renovate the articles of war.

Warfare in Europe from the beginning of the sixteenth century onwards was a near constant. The king of France's wars in Italy and against the Holy Roman Empire, the wars of religion in France, the various conflicts in what is now Germany between Protestant and Catholic princes, and most importantly, the raging war in the Low Countries between the king of Spain and the newly proclaimed Dutch Republic from the 1560s onwards meant that polities throughout Europe needed to constantly raise and maintain forces for offensive maneuvers while at the same time focus on defending their towns and forts from their enemies. The pressure to achieve military success led to two military innovations from the late fifteenth century onwards.

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[10] *Statutes and Ordynances for the Warre* (London, 1544); "Orders for the Soldiers in Newhaven" *CSPF,* 1562, 326-7.

[11] Donagan, *War in England,* 144-5. Leicester's code has been printed in Cruikshank, *Elizabeth's Army*, 296-303. There are two manuscript versions in the British Library, BL Add. Ms. 30,170, f. 35, and 38,139, f. 16v.

Both favored the defensive side.[12] First, the so-called *trace italienne,* a star-shaped fortress designed in Italy in the fifteenth century to neutralize artillery fire, allowed those in command of towns under siege to hold out against advancing armies for much longer than their predecessors of the early fifteenth century.[13] Second, by the end of the sixteenth century, despite the protest of several crotchety English military theorists who longed to continue to use the longbows that defeated the French at Agincourt, infantry forces universally carried firearms – in the form of harquebuses and muskets.[14] Although there are disagreements between scholars on the precise influence of firearms, most agree that at least initially they favored the defensive side in any engagement.[15]

Warfare in the sixteenth century was in a state of tactical equilibrium. The products of this impasse were twofold. First, European monarchs recruited cadres of increasingly professionalized engineers and artillery experts to attack and maintain defensive fortifications.[16] This impulse did not simply lead to larger royal armies and navies; it also led to the rise of

[12] The starting point of the military revolution thesis, and the one in which most scholars who have otherwise divergent opinions agree, is that fighting favored the defensive side in the sixteenth century until at least the 1590s. See Michael Roberts, *Essays in Swedish History* (London: Weidenfeld & Nicholson, 1967), 195-225; for an extensive discussion of "volley fire" see Geoffrey Parker, "The Limits to Revolutions in Military Affairs: Maurice of Nassau, the Battle of Nieuwpoort (1600) and the Legacy" *The Journal of Military History* 71:2 (Apr. 2007): 331-72. Geoffrey Parker, "The "Military Revolution, 1560-1660: A Myth?" *The Journal of Modern History* 48:2 (Apr. 1976): 195-216; Parker eventually revised the thesis of the military revolution for his Lees Knowles lectures at Trinity College, Cambridge which was eventually published as, *The Military Revolution: Military Innovation and the Rise of the West, 1500-1800* (Cambridge: Cambridge University Press, 1988). David Eltis, *The Military Revolution in Sixteenth Century Europe* (London: Tauris Academic Studies, 1995). For a critique of this literature, see Jeremy Black, *A Military Revolution? Military Change and European Society, 1550-1800* (Basingstoke: Macmillan Education, 1991). Bert S. Hall, *Weapons and Warfare in Renaissance Europe: Gunpowder, Technology, and Tactics* (Baltimore: Johns Hopkins University Press, 1997), 207.

[13] Parker, *Military Revolution,* 6-44.

[14] For the debate over the efficacy of firearms, see Cruikshank, *Elizabeth's Army*, 106-10.

[15] Eltis, *Military Revolution in the Sixteenth Century*, 16-21.

[16] For a nuanced view of the rise of "professional armies" see D.J.B. Trim, "Introduction," in *The Chivalric Ethos and the Development of Military Professionalism* ed. D.J.B. Trim (Leiden: Brill, 2003), 1-40.

professional classes of mercenary soldiers who contracted privately with monarchs for their martial services on a scale unheard of in the middle ages.[17] Two, commanders needed to keep these men in the field for much longer periods of time. One of the key strategies of the period was simply to outlast an opponent. Eventually, the population of a town would suffer disease and starvation and submit to the advancing army. Or, one of the armies in the field would dissipate due to hunger, lack of pay, or succumb to their desire to loot and pillage. Commanders thus had an incentive to oversee a strict disciplinary regime, and often employed jurists and clerks to make sure soldiers were kept in line. Monarchs, administrators, town officials, and civilians in general shared the desires of commanders albeit for different reasons. Strict discipline meant that soldiers might not pillage their lands or cities.[18]

While historians of the military revolution have focused on the Dutch – and in particular the innovations of Maurice of Nassau – it was the Spanish monarchs and their commanders that were the most innovative in discipline and military organization.[19] By the late sixteenth century, the king of Spain had the largest and most formidable force on the European continent which was led by the most feared generals. Thanks to new world silver, the king of Spain had the capital, or usually had the capital, to maintain this force and pay for officers and administrators

[17] For mercenary armies in this period, see David Parrott, *The Business of War: Military Enterprise and Military Revolution in Early Modern Europe* (Cambridge: Cambridge University Press, 2012).

[18] The literature about disciplining soldiers from civilian academics and jurists grew by the end of the sixteenth century and has been associated with the rise of neo-stoic philosophy. The key thinker of this movement was Justus Lipsius who wrote a long tract on military discipline based, of course, on Roman examples. Eltis, *Military Revolution in the Sixteenth Century*, 60-1.

[19] This point has recently been driven home by Jan Glete in *War and the State in Early Modern Europe: Spain, the Dutch Republic, and Sweden as Military-Fiscal States, 1500-1660* (London and New York: Routledge, 2002). Also see, Fernando González de León, "*Soldados Platicos and Caballeros*: The Social Dimensions of Ethics in the Early Modern Spanish Army," in *The Chivalric Ethos*, 235-68; González de León, "Doctors of the Military Discipline: Technical Expertise and the Paradigm of the Spanish Soldier in the Early Modern Period," *Sixteenth Century Journal*, 27:1 (Spring, 1996), 61-85. González de León, *The Road to Rocroi: Class, Culture, and Command in the Spanish Army of Flanders, 1567-1659* (Leiden: Brill, 2009), 107-20.

to run it. The king also had the most centralized war administration, at least until the 1590s, which had developed under Ferdinand and Isabella in the late fifteenth century and continued to develop under Philip II in the later sixteenth century. A group of humanists closely associated with this court began transforming the organization of the Spanish Crown's armed forces by aligning them with classical practice.

The reform activity continued through the sixteenth century under the Duke of Alba and his underlings, the so-called "school of Alba," who attempted to emulate the spirit of the Romans. Alba supposedly had memorized Vegetius and his followers likewise knew the treatise well. All of them had taken the lesson that discipline was essential to success. Alba's follower, Francisco de Valdes, mimicking Vegetius, declared that "that Armie which is best ordered, though it be least in number of men, shall always (according to reason) be victorious."[20] The desire for order and discipline among this group led to the making of the most influential treatise on the laws of war of the century, written by Balthasar de Ayala, and to the writing of the longest to date code of war, by Alba's *maestro de campo*¸ Sancho de Londono.[21]

The school of Alba had reason to focus on discipline because the soldiers of the Spanish army of the Netherlands were notorious for mutinying.[22] Due to the boom and bust nature of Spanish silver ships, soldiers often went unpaid for long periods. During these times of dearth,

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[20] Quoted in Eltis, *The Military Revolution of the Sixteenth Century*, 60.

[21]Balthasar Ayala *De Jure et Officis bellicis et disciplina militari libri III* ed. John Westlake 2 vols. (Washington : Carnegie Institution of Washington, 1912). Part of Ayala's treatise was on military discipline, *ibid*.,ii. 205-40. A modern edition of Londono's work is available, Sancho de Londono, *Discurso sobre la forma de reducer la disciplina military a mejor y antique estado* (Madrid: Blass, 1943); the work was also translated into English in the sixteenth century by Thomas Digges a former muster master general and military theorist in the second edition of his *A Mathematicall Warlike Treatise named Stratioticos*, 283-97. Digges' translation is fairly accurate (although truncated), and I have used it in this chapter. For an overview of these men's careers, see González de León, "Doctors of the Military Discipline."

[22] For the mutinies of the Spanish armies, see Geoffrey Parker, *The Army of Flanders and the Spanish Road, 1567-1659: The Logistics of Spanish Victory in the Low Countries* (Cambridge: Cambridge University Press, 1972), 185-206.

soldiers usually engaged in mutinies as a part of a negotiation strategy for better pay, or any pay, and food. The strategy, as Geoffrey Parker has shown, often worked. But it also put commanders in a precarious position, should the mutiny take place during a vital point in the campaign where an enemy commander take could advantage of Spanish weakness in order to secure victory. Military discipline, and brutal military justice, was meant to dissuade soldiers from engaging in mutinies.

Most of the laws in Londono's code were not new; they were not supposed to be. One can trace most to Roman and other antique sources, the most important being the chapter in Justinian's Digest on "things relating to the military" or *de re militari.*[23] Many others can be traced to the unwritten "laws of war" that we have already seen in operation during the middle ages. What was innovative about Londono's code was its comprehensiveness and level of detail. Much that had gone unwritten was now transmitted in writing from the commander to his lieutenants who would then inform their soldiers. The code focused heavily on camp regulations like how, where and when victuals would be brought into camp, and where they would be sold. No smuggling was allowed. The price of all goods was preset by the officers of the army. Regulations for pass systems, which authorized soldiers to leave camp, were written down. Rules that enforced the hierarchy of the army became more detailed. Soldiers needed to react to a variety of signals, trumpets and drums, in specific ways. Dueling was outlawed. Strict laws against rape and pillage were outlined. At least in theory, the soldiers of the Spanish armies lived under a brutal disciplinary regime.[24]

[23] *The Digest of Justinian* ed. Theodor Mommsen with the aid of Paul Kreuger trans. Alan Watson 4 vols. (Philadelphia: University of Pennsylvania Press, 1985), iv. bk. 49, ch. 16.

[24] Digges, *Stratioticos*, 283-97.

The English code of 1585 was made in the context of these military changes.[25] The spirit of the continental changes in discipline also influenced the 1585 code. The additions to Leicester's code involved regulations relating to treason, camp discipline, and desertion. They included rules against conference with the enemy, sending messages to the enemy, divulging important information, spying for the enemy, leaving camp without authorization or by a route other than the official entrance of the camp. In other words, many of the new written laws supervised activities relating to treachery and treason. The codes also included demands that soldiers pay strict attention to all of the trumpet signals of the camp, and increased the number of articles related to religious observance. These inclusions related to the assumed increased amount of time soldiers had to spend in military camps. Indeed another innovation in Leicester's code was the increased presence of clauses that demanded harsher punishments for repeat offenders, a problem associated with increased time spent in camp or on campaign. The omissions were just as important. From the middle ages onwards, commanders had included numerous articles relating to the rules of ransom. These by the end of the sixteenth century were cut down significantly.[26]

English military campaigns throughout the 1580s did not go well. During the early part of the decade Elizabeth had not sent a formal army into the Netherlands, but English mercenaries in fairly large numbers had gone over into the Low Countries to fight for the Dutch Republic. From 1581 until 1585, these hired bands experienced defeat after defeat by the hands of Alexander Farnesse, the Prince of Parma. In one of the most successful campaigns of the sixteenth century, Parma had roundly beaten the Dutch by treachery and by maintaining his army in the field

[25] Cruikshank, *Elizabeth's Army*, 296-303.

[26] Donagan, *War in England*, 144.

through discipline and good supply lines. The result was the fall of both Brussels and Antwerp in 1585.[27] The campaigns of the Earl of Leicester, and later the Earl of Essex, from 1585-7 were not as disastrous as those earlier in the decade, but they were hardly successful. Even more disastrous was the so-called "counter-Armada" launched in 1589 that had the not even close to being realized intention of invading Portugal.[28]

Calls for military reform, already present during the 1580s, increased by the 1590s. Some of these works emanated from a group of men who depended on Robert Devereux, the 2nd Earl of Essex, for patronage.[29] The Earl of Essex, who had been apprenticed in war during the Earl of Leicester's campaign in the Netherlands, fashioned himself as England's next great general cut in the mold of Alba and the Roman generals of antiquity. He lead Elizabeth's forces in campaigns in France in 1590, Cadiz in 1596, and in Ireland in 1599. One of Essex's projects throughout the decade was to improve Elizabeth's war machine. This reforming impulse included attempts to improve military discipline both in Elizabeth's armies and amongst her recruits, who often failed to appear at muster. He often supported former soldiers and administrators who wrote tracts on military tactics and discipline.[30]

By 1590, these martial theorists contemplated Sancho de Londono's text, which had been recently printed in England. In 1590, Londono was translated by Thomas Digges in his newest

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[27] Geoffrey Parker, *The Dutch Revolt*, (Ithaca, NY: Cornell University Press, 1977), 208-16. The brilliant campaigns of re-conquest conducted by the Prince of Parma in 1582-5 were successful in part because he successfully blockaded Dutch towns, and prevented them from engaging in commercial activity. According to Parker, Antwerp "was one of the best defended towns in Europe, it walls five miles in circumference, but it fell without a shot being fired against the city." Ibid., 215.

[28] R.B. Wernham, "Queen Elizabeth and the Portugal Expedition of 1589" *English Historical Review* 66:258 (Jan., 1951): 1-26; Wernham, "Queen Elizabeth and the Portugal Expedition of 1589 (Continued)" *English Historical Review* 66:259 (Apr., 1951): 194-218.

[29] For the Essex circle, see Paul E.J. Hammer, *The Polarisation of Elizabethan Politics: The Political Career of Robert Devereux, 2nd Earl of Essex, 1585-1597* (Cambridge: Cambridge University Press, 1999), 199-268.

[30] Ibid., 238-42.

edition of *Stratioticos*: a tract on military science, technology, and discipline.[31] Matthew Sutcliffe, the most experienced judge marshal of the period, wrote his compendious treatise on all things relating to war, and dedicated it to Essex in 1593 in the hopes that Elizabeth's soldiers would become better trained so that he would no longer have to worry about "either the malice, or power, or riches of the Spaniard."[32] But in order to neutralize the Spanish threat, Essex and Elizabeth's other martial men needed to follow their example because they were far more disciplined than the armed forces of other monarchs.[33] It was this discipline that allowed the Spanish to achieve their martial successes.

In order to improve English martial discipline, Sutcliffe provided the first comprehensive digest of military laws. Drawing on classical, French, Spanish, as well as English sources, Sutcliffe listed all those martial laws for the benefit of future commanders who could choose which laws they thought best for their campaigns. The chief example, although not the only one, for the digest was the texts from the school of Alba. According to Sutcliffe, Alba was, "though otherwise cruel, yet a man skilfull in matters of warre, for reformation of diuers disorders crept in among the Spanish soldiers, gaue order to Sacho de Londonno, to frame certaine statutes in writing."[34] Sutcliffe divided his military laws into nine categories: laws concerning religion and morality, laws concerning the common safety of the state and garrison, laws concerning the duties of captains and soldiers, laws concerning the camp or garrison, laws concerning "sea causes," orders relating to adventures at sea, orders relating to the providers or victuallers of

[31] Digges, *Stratioticos,* 283-97.

[32] Sutcliffe, *Practice, Proceedings, and Lawes of Armes* B4iv.

[33] Ibid., B4.

[34] Ibid., 303; it should be noted that immediately after he cited Alba, he also cited a code of war issued by Protestants in France in 1568, which was most likely the articles of war issued by the Prince of Condé (translated into English by Thomas Digges in 1579). Ibid., 311, 315.

armies and navies, laws relating to ransom and prisoners of war, and finally laws relating to the administration of justice. In each of these categories, Sutcliffe listed all the laws he thought to be useful for an army or navy on campaign, and then afterwards annotated each law and usually cited some historic example which supposedly proved the law's utility either because commanders used it effectively or because they failed to, which lead to disaster.

Although he did not generate new laws, Sutcliffe was hardly an unoriginal thinker.[35] Indeed, it would miss the entire point of the exercise. Part of what made past laws worth pondering was that they could be proven to have worked. With this information in hand, why create something new or untested if a law proven to be useful was readily available. Further, these laws were drawn together and adapted from a variety of sources. His creativity lay not in generation but in combination. Let us examine Sutcliffe's section on treasonable offences, what he titled the "laws relating to the safety of the state, garrison, and army" to contemplate this point further.

Sutcliffe listed eight articles relating to the safety of the state, garrison, and army.[36] These included a regulation against conspiracies against the state, army or general, against holding secret intelligence with the enemy, against rebellion or mutiny, surrendering a town to the enemy except under extremity, refusing to serve or deserting, running to the enemy, betraying the watchword or sleeping on watch, and against anyone who through foolishness made the enemy aware of the army's presence. Many of these laws can be traced to the Roman idea of *perduellio* or the "bad soldier" an idea we now associate with treason that predated the concept of "lese-

[35] Alan Watson, *Failures of the Legal Imagination* (Philadelphia: University of Pennsylvania Press, 1988).

[36] Sutcliffe, *Practice, Proceedings, and Lawes of Armes*, 310-16.

majesty." Some of these ordinances can be found in the treason statute of Edward III. But these lineages are not why Sutcliffe wrote the articles down.

Instead, historical examples proved their necessity. In regards to conspiracy, Sutcliffe noted, citing Tacitus, it was ordinary practice among the Romans to try conspirators for treason. But he also cited two examples of successful generals enforcing the measure: Scipio in Spain destroyed all the inhabitants of a town because they had attempted to betray the garrison. Cyrus of Persia, likewise, had one of his princes executed for treachery. Sutcliffe also used more contemporary examples. In order to justify his article against those who from laziness allowed the enemy to be made aware of the army's presence, Sutcliffe cited examples from the Wars of Religion in France. In 1569, for example, the Protestant armies were thwarted in their attempts to take Samur because soldiers had set fire to houses on their march, and alerted the enemy to their presence. The English in their attempted invasion of Portugal, likewise, were foiled in a plan to trap Spanish horsemen because one of the soldiers shot his firearm too soon. Good law might prevent these mistakes from happening in future campaigns.

Sutcliffe's legal logic led to some surprising conclusions, especially in the articles relating to morality and religion.[37] Sutcliffe, along with being a Civil lawyer and a judge marshal, was the dean of Exeter. A strong supporter of the Church of England, Sutcliffe spent much of his free time in the early 1590s attacking both the Catholic Church and Presbyterianism. He was hardly apathetic when it came to the religious debates that raged throughout Europe in the

[37] Sutcliffe cited Londono on a variety of other matters including, drunkenness, unlawful games (i.e. gambling), market regulations, protections for protected areas against pillage, two articles on camp cleanliness, protections for soldiers against maiming or death by abusive commanders, banning "common women," impeding justice, banning cartels within camps and violence owing to quarrels amongst soldiers generally, giving false alarm, and skirmishing without leave. In terms of regulating camp hygiene, Sutcliffe observed that the English and Spanish had similar rules, but they obserue it far better." Ibid., 329. The method by which he cited Londono is he wrote about a Spanish law or practice, then "footnoted" on the side of the page where he transcribed in Spanish the particular code from Londono's text that he was discussing.

sixteenth century.[38] And yet, in his section on religion, Sutcliffe approvingly cited Londono's code on four of the eight laws that he listed including laws against swearing, unlawful games, banning "common women", and most surprisingly, laws regulating religious observance. In a law that required the governors of the army to make sure soldiers attended religious service, Sutcliffe noted that "the Spaniards vnto euery tercio, or Regiment haue diuers Priestes, whom they haue in great estimation, and punish those that doe violate them either in worde, or deede."[39] For swearers and blasphemers, Sutcliffe noted that "The Spaniards inflict grieuous penalties vpon them that transgresse in this behalf: and all Christians ought to detest and banish all abuses."[40] This ecumenism, coming from a man not known for being ecumenical, was not even the strangest part of the section. Sutcliffe also approvingly cited in this section the Roman practices, who Sutcliffe defended as "ignorant of the true God, yet in matters of warre were most devout, and religious."[41] Their religiosity gave them victory, and they attributed their "evil successe" to lack of piety. For Sutcliffe, the English army needed to incorporate the religious practices of heathens and heretics in order to become more successful.

Sutcliffe's willingness to look intently at Spanish practices did not mean that subsequent English commanders simply copied the Spanish. Nor does it mean that they simply copied the Romans. Lawmaking, at least when it came to martial law, was never that simple. What people like Matthew Sutcliffe were doing instead was attempting to examine and evaluate any available remedy or tool so that a commander could employ it or adapt it to meet the demands of his

[38] Nicholas W.S. Cranfield, "Sutcliffe, Matthew," in *ODNB.* For his religious views, see Peter Lake, *Anglicans and Puritans? Presbyterianism and English Conformist Thought from Whitgift to Hooker* (London: Allen & Unwin, 1988), 126-7, 129-30.

[39] Sutcliffe, *The Practice, Proceedings, and Lawes of Arms.,* 308.

[40] Ibid., 309.

[41] Ibid., 306.

particular campaign. The commander and his council often surveyed a variety of past laws, either from English armies or from continental ones, and selected the ones they found most necessary for their upcoming campaign. The flexibility of the substantive law of martial law was one of its chief advantages.

This creative impulse was true of the English articles of war of the 1590s, where the Earl of Essex attempted to craft ordinances that would provide the most effective framework for the maintenance of discipline. Essex attempted to redress previous disciplinary problems or anticipate problems due to the unique circumstances of the forthcoming campaign. For example, when discussing an ordinance against drunkenness, Matthew Sutcliffe cited his experience in participating in England's failed invasion of Portugal in 1589, where apparently the insobriety of soldiers prevented a successful campaign.[42] The Earl of Leicester, ordered drunkards to be banished. Essex in 1590 copied this provision.[43] Now all drunkards were to be immediately banished from the army. However, this remedy was apparently not effective (perhaps it would have diminished his numerical strength too much). So in his 1599 ordinances for his army that was to be sent into Ireland, Essex adopted an escalating clause for those convicted of drunkenness: first soldiers were to be imprisoned, then fined and imprisoned, and then a "far greater punishment" that went unnamed in the code would fall upon the soldier thrice convicted of drunkenness. In other words, if a law did not work, he changed it.[44] Preemptive ordinances included provisions designed to ensure that Essex' Protestant soldiers not be ensnared by the Catholic faith during his 1590 campaign: including an order that no soldier enter a church during

[42] Ibid., 309.

[43] Cruikshank, *Elizabeth's Army*, 298. BL, Harley Ms. 7018, f. 77.

[44] *Lawes and Ordinances of Warre, established for the good conduct of the service in Ireland* (London, 1599), 9.

mass or matins.[45] Reaction, prediction, adaptation, imitation, and elimination were all strategies that English commanders and their council employed to make the ordinances of war.

So much was at stake when commanders made these laws. This at least was the idea behind Thomas Digges' inclusion of military laws in his 1589 edition of *Stratioticos*, a military treatise designed to teach military commanders skills necessary for victories on campaigns that had first been published in 1579. The second part of his treatise focused on military discipline because Digges believed that "the well and evil using of this Military Discipline among all naturall causes was the greatest, or rather the onely occasion, of the aduancing, establishing, or raising and defacing of all Monarchies, Empires, Kingdomes, [and] Common Weales."[46] Digges' focus on martial discipline was not new. But it was not enough, by 1589, to simply copy antiquity. Instead, a commander needed to "repaire to those Fountaines of perfection, and accommodate them to the seruice of our Time." Like so many English men who encountered continental armies, Digges came away thinking that the English had much to learn in the way of war, particularly from the Spanish. It was due to their military laws that "small handfuls of that megre wretched Nation (onely by obedience to their officers, and reuiuing among them a few of those antique romane customes) haue done things almost incredible, euen in these our dayes."[47] The Romans and Spanish, through their disciplinary regimes, had conquered the world. In order to achieve similar success, every option, even religious ordinances made by "heathens" and "papists", needed to be on the table. Martial law makers thus paid attention to the needs of their martial polity while also taking into account their aspirations for that polity's future greatness.

[45] BL, Harley Ms. 7018, f. 77.

[46] Digges, *Stratioticos*, Biiiv.

[47] Ibid., 297.

Making the Lawes Divine Morall and Martiall

The adaptability as well as the severity of martial laws – as opposed to English customary law - made it an attractive form of law for new plantations. In 1609, only a decade after the Essex circle was gathering information on and innovating in martial laws for Elizabeth's armies, the recently founded Virginia Company of London decided to adopt a martial law regime for its floundering, not yet three year old Jamestown plantation.[48] It did so in the winter of 1609 after receiving several reports from the planters that detailed the corruption, idleness, and vulnerability, of Jamestown. In order to remedy these defects and in order to create a disciplined fighting force capable of expanding the plantation into the interior of the continent, the Company established a new government structure that was to govern by martial law. In order to assure its investors who had heard nothing but terrible news about the plantation, the Company published the *Lawes Divine Morall and Martiall* in 1612 to show that its governors ruled the plantation through laws.[49] The makers of this code adapted, combined, imitated as well as generated new laws to govern the plantation.

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[48] The best overviews of the making of the Jamestown plantation are James Horn, *A Land as God Made it: Jamestown and the Birth of America* (New York: Basic Books, 2005), and Karen Kupperman, *The Jamestown Project* (Cambridge, MA: Belknap Press, 2009). For the history of the Virginia Company, see Wesley Frank Craven, *The Virginia Company of London, 1606-1642* (Williamsburg, VA: Virginia 350th Anniversary Celebration Corporation, 1957), and Craven, *The Dissolution of the Virginia Company: The Failure of a Colony Experiment* (Gloucester, MA: P. Smith, 1964). For a narrative that focuses on the labor problems the Company faced, see Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W.W. Norton, 1975), 44-91; Morgan, "The Labor Problem at Jamestown, 1607-18" *The American Historical Review* 76:3 (Jun., 1971), 595-611.

[49] *For the Colony Virginea Britannia. Lawes Divine Morall and Martiall* (London, 1612). The most exhaustive study of the application of these laws in Jamestown is still Sigmund Diamond, "From Organization to Society: Virginia in the Seventeenth Century" *The American Journal of Sociology* 63:5 (March, 1958): 457-75. For the genesis of the code, see Darrett Rutman, "The Virginia Company and its Military Regime," in *The Old Dominion: Essays for Thomas Perkins Abernathy* (Charlottesville, VA: The University Press of Virginia, 1964), 1-20. The only scholar to attempt to place the *Lawes Divine Morall and Martial* in the context of English law generally is David

In order to understand the context of the making of the *Lawes Divine Morall and Martial* better, let us examine what the Company's investors in London were learning about the Jamestown plantation circa 1609. The Company had received its charter in April 1606, which had actually authorized two companies: the "Plymouth Company" comprised of West Country merchants had rights to all uninhabited lands between 38 and 45 degrees latitude, while the "Virginia Company" comprised of London merchants had rights to settle in more southerly areas between 34 degrees and 41 degrees latitude. A Virginia Council, made up of Crown officials as well as members of both companies, would supervise the two plantations from London. The plan went into action for the southerly company when three ships of 144 mariners left London bound for the new world in December 1606 and arrived in what is now Virginia in April 1607.[50]

After it had landed, the planters formed their government. Unsurprisingly, the form of government the Council of Virginia chose was a presidency council: a multiple jurisdictional tribunal that English monarchs had established in Wales, the north of England, Munster, and Connacht in the sixteenth century to provide English laws to peoples who lived far away from the central courts of Dublin or Westminster.[51] Like those tribunals, the presidential council combined common law procedure with equitable proceedings in cases that did not involve life and limb. The leaders of the plantation were explicitly instructed that all criminal trials were to

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Thomas Konig. Konig, "Dale's Laws" and the Non-Common Law Origins of Criminal Justice in Virginia" *The American Journal of Legal History* 26:4 (Oct., 1982), 354-75. None of these works places the code in the context of martial lawmaking.

[50] Horn, *A Land as God Made it*, 33-45. *The Three Charters of the Virginia Company of London* (Williamsburg: The Virginia 350th Anniversary Celebration Corporation, 1957), 1-12.

[51] Horn, *A Land as God Made it*, 46-7.

be decided by twelve honest men, and from the little evidence that we have, the leadership in Jamestown followed these instructions.[52]

Nothing, including the presidential council, was successful about Jamestown. The Virginia Council learned about these problems firsthand in the summer of 1608. The precious minerals that Christopher Newport, one of the first captains of the enterprise, had promised the Company had been discovered to be non-existent.[53] Powhatans had attacked Jamestown, and killed settlers. Disease was rampant. The presidential council was rife with faction. Edward Maria Wingfield, the first president of the council, had been deposed and tried for corruption. He blamed the rise of factions for his dismissal. Through Wingfield's apology written in the summer of 1608, the eyewitness testimony of Christopher Newport, and a fairly detailed letter from John Smith, the now famous explorer extraordinaire, the Company learned of all the ills that had befallen Jamestown.[54] It decided that major changes needed to be made.

The decision to alter Jamestown's governing structure came months after many within the Virginia Company had already pushed for a more ambitious and expansive plantation in the new world. In the spring of 1608, the Company contacted Sir Thomas Gates, a member of the Company and an experienced soldier who served in Cadiz under the Earl of Essex, about possibly becoming the new governor of the plantation. Gates, who was at the time serving as a mercenary in the service of the Dutch Republic, was supposed to lead an expedition of around

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[52] Ibid., 57-9; Edward Maria Wingfield, *Discourse*, in *The Jamestown Voyages under the First Charter, 1606-1609*, ed. Philip Barbour, 2 vols. (Cambridge: Cambridge University Press, 1969), i. 213-33.

[53] Horn, *A Land as God Made it*, 55-6.

[54] Wingfield, *Discourse* in *Jamestown Voyages*, i. 213-33; John Smith, *A True Relation of Such Occurrences and Accidents of Noate as Hath Hapned in Virginia* in *The Complete Works of Captain John Smith (1580-1631)* ed. Philip L. Barbour 3 vols. (Chapel Hill: University of North Carolina Press, 1986), i. 23-97; Horn, *A Land as God Made it*, 132-5.

1,000 settlers and expand the plantation into the interior of the continent. Gates returned in the spring of 1609 after having been granted leave by the Dutch government.[55]

However, the form of government Gates was to participate in was going to be different than the current presidential council. In January 1609, the Company, probably under the leadership of Sir Thomas Smith, a notable London merchant and head of the East India Company, held a series of meetings at the house of the Earl of Exeter, the son of William Cecil and brother of the chief minister of England, the Earl of Salisbury, to discuss the failings of the Company.[56] After these meetings had ended, the Company issued a frank pamphlet which discussed its failings. The Company highlighted two in particular: the weakness of the government of the plantation, which caused faction and tumult, and the failure of the Company to adequately supply the plantation.[57] These problems would be resolved through new powers in a re-granted charter the Company was to submit to James I. The new authorization consolidated the two separate but related enterprises into one Company and named all Company members onto a new Virginia Council. Sir Thomas Smith was named the treasurer and leader of the Company. A new governor, Thomas West, Lord De La Warr, would sit in Jamestown unencumbered by a factional council or a term limit. He would be assisted by his lieutenant governor, Sir Thomas Gates, and eventually his marshal, Sir Thomas Dale, another veteran of the wars in the Netherlands who had

[55] For the increased militarism of the colony, see James Horn, "The Conquest of Eden: Possession and Dominion in Early Virginia" in *Envisioning an English Empire: Jamestown and the Making of the North Atlantic World* ed. Robert Appelbaum and James Wood Sweet (Philadelphia: University of Pennsylvania Press, 2005), 44-46.

[56] Horn, *A Land as God Made it*, 131-8. The meetings were held in the house of the Earl of Exeter. Alexander Brown, *The First Republic in America: An Account of the Origin of this Nation* (New York: Houghton and Mifflin, 1898), 73.

[57] The Company admitted its previous mistakes in *A True and Sincere Declaration of the Purpose and ends of the Plantation begun in Virginia* (London, 1610).

served the Earl of Essex in his 1599 campaign in Ireland.[58] The plan was that Gates and later De La Warr take a large number of men with them to Virginia to create interior settlements that would be better protected from Spanish ships. In the process, Gates was to attack the Powhatans, in particular their "priests" who were supposedly responsible for the death and destruction of England's first colony in Virginia, the so-called "lost colony of Roanoke," the news of whose fate had just arrived in England.[59]

It must have been in these meetings, about which we know almost nothing, that the Virginia Council hatched the idea to rule Jamestown by martial law. The minutes of the Company have not survived in this period. We do know, however, that some members of the Company had experience, often extensive experience, with martial law. The idea could have come from Gates or Dale or even Wingfield, all experienced soldiers. But it also could have come from Matthew Sutcliffe –the same Matthew Sutcliffe who had served in the Netherlands with the Earl of Leicester, at Tillbury with Elizabeth, and with the Earl of Essex in France. Probably through his connections with West Country merchants made during his tenure as Dean of Exeter, Sutcliffe had become a member of the "northerly" company in March 1607.[60] Under the new charter of 1609, Sutcliffe became a member of the Virginia Company and continued to be a member until the Company was dissolved in 1625.[61] Unfortunately, we do not know what if any role Sutcliffe played in the meetings of January 1609. But it would be quite strange if the

[58] For Dale, see Darrett Rutman, "The Historian and the Marshal: A Note on the Background of Sir Thomas Dale" *Virginia Magazine of History and Biography* 68:3 (1960): 284-94.

[59] Horn, *A Land as God Made it*, 135-50.

[60] *The Three Charters of the Virginia Company of London*, 25.

[61] Ibid., 31. Sutcliffe participated as a member in the 1620s, and served as a commissioner for the settling the government of Virginia. *The Records of the Virginia Company of London* ed. by Susan Myra Kingsbury, 4 vols. (Washington, D.C.: United States Government Printing Office, 1906-35), iii. 88, 333; iv. 363, 491, 494.

Company decided to use martial law without at the very least consulting the leading expert on martial law in England who also happened to be a member of the Company.

In June 1609, Gates left England with 500 settlers bound for Jamestown.[62] In the instructions for Gates, which were similar to those given to Lord De La Warr before his later voyage in 1610, the Virginia Company outlined the new legal regime that he was to oversee. Gone was the desire to practice English law. Gone also was the presidential council. In its place, Gates was to rule as governor with the advice of a small council of men who had experience in leadership positions within the plantation.[63] Gates was, "for Capitall and Criminal justice in case of rebellion and mutiny and in all such cases of [provident] necessity, proceede by martiall lawe according to your commission as of most dispatch and terror and fittest for this government."[64] Based upon the charter given to the Virginia Company by James in 1609, the governor was supposed to hear and determine all criminal and civil cases "as neere as convenientlie maie be, be agreeable to the lawes, statutes, government and pollicie of this oure realme of England."[65] Even though the king omitted the section in the previous charter that explicitly mandated a jury to hear and determine criminal offences, it seems likely that he wanted criminal causes heard by a jury. The governor was only supposed to be allowed to use martial law "in cases of rebellion or mutiny in as large and ample manner as oure lieutenant in oure counties within oure realme of England have."[66] This clause thus referred to James' lord lieutenants, who only had the

[62] Horn, *A Land as God Made it*, 152-3.

[63] Virginia Council, "Instructions Orders and Constitucons to Sr Thomas Gates Knight" May 1609 in *The Records of the Virginia Company of London* , iii.,15. De La Warr's instructions were consistent with Gates'. Ibid., 27.

[64] Ibid., 15.

[65] "Second Charter" in *Three Charters of the Virginia Company*, 52.

[66] Ibid.

circumscribed martial law powers that we have already examined. It seems as though the Company expanded its governor's and lieutenant governor's martial law powers on its own.[67] It is also likely that the Crown either did not care or actively supported the flouting of its circumscription of martial law.

Along with powers of using martial law procedure to punish criminals, Gates and De La Warre had power to hear and determine cases, and to make laws. They possessed the power to make, adapt, or add any laws they thought were necessary for the governing of the plantation. This law making power was delimited to their powers outlined in their commissions, which we no longer possess. Along with this lawmaking power, Gates and De La Warre had powers to hear and determine civil disputes according to equity in imitation of England's Lord Chancellor. Given both their extensive powers to use martial law and his powers to make laws, Gates and De La Warre were given an extraordinary amount of discretion.

Gates arrived in Jamestown in the spring of 1610 only after having survived being stranded on the island of Bermuda since the end of July 1609. Upon his arrival the colony was in a disastrous state. Almost a third of the colonists had died from Indian attacks in the past half year. The colonists had no food, in no small measure because many had refused to work. The current president of the council, Sir George Somers, planned to abandon Jamestown before his scouts spotted Gates' two ships. Gates, after having surveyed Jamestown, decided that abandoning it was a good idea. It was only due to the fortuitous arrival of Lord De La Warre in June accompanied by 150 settlers and provisions that the colony was not abandoned.[68]

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[67] Ken MacMillan has posited that the Crown was fully aware of, and supported, the Company's decision to use martial law in lieu of common law. This claim is certainly possible. At the very least, James and his ministers were unconcerned about the policy. MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006), 138-40.

[68] Horn, *A Land as God Made it*, 157-64, 172-81.

In the spring of 1610 Gates established the new laws of the plantation, which De La Warre accepted.[69] Most of these dealt with religious observance, crimes like theft and assault, and regulated commercial dealings with the Native Americans. By the spring of 1611, after De La Warre had returned to England, Sir Thomas Dale the new marshal of the colony arrived, and added new laws that delineated the responsibilities of the plantation members selected for military duty. He also codified the laws already made and sent them back to the Company in London. In 1612, William Strachey, the Company's secretary who had accompanied Gates on his initial voyage, published the code and labeled it *The Lawes Divine Morall and Martiall.*[70]

The *Lawes Divine Morall and Martiall* were more brutal than English common law; it was meant to transform the behavior of the colonists through "terror," which the Company believed to be "fittest for this government."[71] To give just one example, blasphemy in the *Lawes Divine Morall and Martiall* was deserving of the death sentence. The Company desired these strict laws because it wanted to prove to investors that the colony had not descended into lawlessness. In a sermon given before Lord De La Warre immediately before his departure for Virginia, the pastor William Crashaw preached that the governor had to make sure that his

[69] Gates dated the making of the laws to 24 May. De La Warre approved of the laws on 12 June. These comprise the first 37 articles of the code. *Lawes Divine Morall and Martiall,* 1.

[70] Dale wrote the last section of the code, entitled, "The Summarie of the Martiall Laws." Many of these orders are dated from June 1611. *Lawes Divine Morall and Martiall,* 20-89 (wrongly paginated as 41). Scholars have often claimed that only this section of the code was martial or "military law." See David H. Flaherty, "Introduction" in *For the Colony in Virginia Britannia Lawes Divine Morall and Martiall* ed. David H. Flaherty (Charlottesville: University Press of Virginia, 1969), xxv-xxvii. This dubious claim allows Flaherty to assert that the *Lawes Divine Morall and Martiall* were one of the "first written manifestations of the common law." Ibid., ix. However, the laws as outlined by Gates in the first section of the code were clearly based in part on the articles of war of English armies: see below. Further, the governor, lieutenant governor, and marshal heard and determined all cases involving the breach of these articles at a court martial. Hence the very first article in the code states that all those who willfully absent themselves from church services will be "punished according to the martial law in that case provided." *Lawes Divine Morall and Martiall,* 3.

[71] "Instructions to Gates," *Records of the Virginia Company of London,* iii. 15.

charges would not fall into degeneracy and lose the civility of Englishmen.[72] De La Warre likewise, when he arrived in the summer of 1610 to Jamestown, declared in his first speech that the planters were guilty of "idleness," and needed to return to work and religious observance lest they "degenerate" into "savages."[73] As in Ireland, the governors sought to employ martial law to terrorize the inhabitants into living like "Englishmen:" a form of legal shock therapy. The printing of the code was meant to prove that the Company was maintaining civility amongst its planters. In the preface written by Gates, the lieutenant governor declared that the printing of the code would quiet those who believed they "liued there laweless, without obedience to our Countrey, or obseruance of Religion to God."[74]

The code was not simply meant to bring the planters back into civility, and to inspire the idle into industriousness. The Company also hoped that strict discipline would help the planters defend the plantation, and later, engage in conquest. After De La Warre landed in Jamestown, he engaged in military activities against the Powhatans and other neighboring Native Americans. Under Gates, the "general" of the plantation, the colonists took the cornfields of Kecoughton (now Elizabeth City County). The next year, under Thomas Dale, the Virginians established Henrico upriver on the James. Through 1616, the Jamestown colonists continued to wage military campaigns against the Indians, guarded their holdings against Spanish attacks, and even on one occasion in 1613 attacked a nascent French settlement in what is now Maine on a privateering expedition.[75]

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[72] William Crashaw, *A Sermon Preached before the Right Honorable Lord LaWarr* (London, 1610).

[73] Quoted in Horn, *A Land as God Made it*, 181. For the plantation's labor problem, see Morgan, "The Labor Problem at Jamestown."

[74] *Lawes Divine Morall and Martiall,* A2v. This line was probably written by the secretary of the company, William Strachey.

[75] Horn, *A Land as God Made it*, 157-92; Horn, "The Conquest of Eden."

The makers of the code tailored it to meet the very specific demands of the Jamestown plantation. The creativity of their law making has caused consternation amongst those scholars who have examined the *Lawes Divine Morall and Martiall*. Some have fought over whether in fact it was a martial law code in the tradition of the English articles of war.[76] During these debates, the paradigm for the code has proven elusive in no small measure because the only English code that was available to American scholars working in the middle of the twentieth century was the Earl of Leicester's 1585 code for his force meant for the Low Countries. Answers that historians have provided to this question have ranged from asserting that the code was based on Leicester's Code to it being loosely based on Leicester's Code, to it not being a martial law code at all, to only part of the code being based on English martial law codes.

However, the lineage is clear. The makers of the *Lawes Divine Morall and Martiall* relied on the Earl of Essex's 1599 articles of war meant to govern his army in Ireland.[77] This is not all that surprising considering that Dale and De La Warre were involved in the making of the *Lawes Divine Morall and Martiall*, and both had served with Essex in Ireland in 1599.[78] The opening paragraph of each code is different: in the *Lawes Divine Morall and Martiall*, the first paragraph stresses that the king's generals and governors perform their tasks for the glory of God, while Essex's code simply addressed his inferior officers. But after the opening paragraph, the two codes are generally consistent through the first four articles. The *Lawes Divine Morall and*

[76] Walter Prince, "The First Criminal Code of Virginia" *American Historical Association, Annual Report*, 1899, I (Washington, 1899), 319-20. Rutman, "Military Regime," 15-6; Flaherty, "Introduction,"xxvi-xxvii. All three scholars have assumed or sought to deny the assumption that the template came from the Dutch wars because Dale and Gates both spent time in the Low Countries. None have looked to the articles that were in operation in Ireland. See below.

[77] *Lawes and Ordinances of Warre, established for the good service in Ireland*, 2-3; *Lawes Divine Morall and Martiall*, 1-3.

[78] Rutman, "The Historian and the Marshal," 290.

Martiall copied with a few modifications the paragraph that argued for the necessity of martial law from Essex's code. Let us compare the two. The justification from Essex's code reads:

> Forasmuch as no good seruice can be perfourmed, or warre well managed where Military discipline is not obserued; and Military discipline cannot be kept where the Rules or chiefe partes thereof bee not certainly set downe and generally knowen: I haue with the aduise of the counsaile of Warre set downe these Lawes and Orders following, and doe now publish them vnder my hand, that all persons in this Armie or Kingdome within my charge, may take knowledge of the saide Lawes, and the penalties set downe for the breakers of them.[79]

While the *Lawes Divine Morall and Martiall* reads:

> And Forasmuch as no good seruice can be perfourmed, or warre well managed where Military discipline is not obserued; and Military discipline cannot be kept where the Rules or chiefe partes thereof bee not certainly set downe and generally knowne, I haue with the aduise and counsel of Sir Thomas Gates Knight, Lieutenant Generall) adhered vnto the lawes diuine, and orders politique, and martiall of his Lordship (the same exemplified) an addition of such others, as I haue found either the necessitie of the present state of the Colonie to require, or the infancie, and weaknesse of the bodie thereof, as yet able to digest, and doe now publish them to all persons in the Colonie, that they may as well take knowledge of the Lawes themselues, as of the penaltie and punishment, which without partialitie shall be inflicted vpon the breakers of the same.[80]

The two paragraphs start out exactly the same. But about halfway through Dale or Gates diverged from Essex when he felt it necessary to address problems specific to Jamestown. We can detect the same pattern throughout the rest of the code. The first four articles of the *Lawes Divine Morall and Martiall*, for example, are identical to the first four articles in Essex's articles, which addressed church attendance, speaking "impiously" against God, the Trinity, or the Christian faith, blasphemy, and treason against the monarch of England.[81] After those

[79] *Lawes and Ordinances of Warre, established for the good service in Ireland,* 2.

[80] *Lawes Divine Morall and Martiall,* 2.

[81] *Lawes and Ordinances of Warre, established for the good conduct of the service in Ireland,* 2-3; *Lawes Divine Morall and Martiall*, 1-3.

prescriptions, Gates and Dale diverged significantly from Essex. Dale and Gates combined imitation with creation when making the *Lawes Divine Morall and Martiall.*

Just like Essex in the 1590s, Gates and Dale made laws specific to their polity after having initially copied from a template. Some of the laws they came up with were clearly adapted laws that one could find in any code of war. For example, the *Lawes Divine Morall and Martiall* prohibited anyone without a license from trading with Indians or sailors on ships calling on Jamestown.[82] The code also forbade anyone from attacking "any Indian coming to trade." These market regulations were typical of articles of war in this period, which banned the threatening of army suppliers.[83] Other laws were clearly innovations. The *Lawes Divine Morall and Martial* regulated the cleanliness and work regime of Jamestown at a level of detail not found in other army articles of war. These regulations included detailed instructions for the laundresses of Jamestown, the plantation's tradesmen, and the overseers of workmen.[84] The same could be said for the regulations on religious observance.[85] Even the end of the code, which listed articles that outlined the military duties of the colonists, was far more detailed than most articles of war.[86]

Perhaps the most notable aspect of the *Lawes Divine Morall and Martiall* were the unique punishments Gates and Dale prescribed for those who transgressed their laws.[87] For

[82] Ibid., 7.

[83] Ibid.

[84] Ibid., 13; Diamond, "From Organization to Society," 459.

[85] Ibid., 1-5.

[86] Ibid., 20-89 (wrongly paginated as 41).

[87] Unfortunately, we have no courts martial records from Virginia in this period. The only extant records are several warrants for the deposing of witnesses and four pardons granted in 1617. *Records of the Virginia Company of London*, iii. 69-70, 74, 79.

example, Dale punished a man caught stealing by tying him to a tree and allowing him to starve to death.[88] Apparently a pregnant laundress who failed in her duty was whipped so badly that she miscarried her child.[89] Perhaps the most unusual punishment was galley duty, which Dale prescribed for all sorts of indiscretions.[90] These corporal experiments were effective for a time in disciplining the planters. But quickly, those living in Jamestown began to express their displeasure about living under a martial regime to family members and friends back home. While the Virginia Company attempted to justify its governance in its printed apologies, its governors eventually realized that they could not attract new colonists due to Jamestown's poor reputation.[91] In 1618, the Company, now governed by Sir Edwin Sandys, ended the use of martial law.

The creativity of martial law making made it an attractive option for the Virginia Company in 1609 who sought to reform the behavior of its planters in Jamestown. While lawmaking in English dominions abroad would come to be dominated by colonial assemblies, we can see why the Virginia Company turned to the substantive law of martial law to generate laws specific to the needs of their plantation. Unencumbered by common law customs, the commander could make laws to address specific problems on the spot while also relying on a bevy of past laws created by former generals for their campaigns. Combined with the terror

[88] "A Brief Declaration of the Plantation of Virginia during the first twelve years, when Sir Thomas Smith was Governor of the Company" in *Colonial Records of Virginia* (Richmond: R.F. Waller Superintendent Public Printing, 1874), 75.

[89] Diamond, "From Organization to Society," 459.

[90] See for example *Lawes Divine Morall and Martiall*, 6. The Crown experimented with galleys on the Thames in the late sixteenth century in lieu of capital punishment. See J.S. Cockburn, *A History of English Assizes, 1558-1714* (Cambridge: Cambridge University Press, 1972), 129.

[91] Ralph Hamor, *A True Discourse of the Present State of Virginia* (London, 1615), 27. Craven, *Dissolution*, 48-9.

inspired by summary procedure, the *Lawes Divine Morall and Martiall* at least initially transformed planters into industrious laborers and disciplined soldiers.[92]

Arundel's Code

The *Lawes Divine Morall and Martial*, while in many ways extraordinary, was part of a larger trend of experimentation with martial laws. This creative impulse continued into the seventeenth century and culminated in the making of the Earl of Arundel's 1639 articles of war made for Charles' campaign against the rebellious Scots – now known as the first Bishops' War.[93] Arundel's code incorporated many of the innovations English commanders and jurists had been making since 1585. Through an examination of this code, we can trace English martial law making's place within a wider European military law tradition.

In common with the articles of war of French and Spanish armies, Arundel allowed his martial courts discretion to impose penalties for non-capital cases. Often, he dubbed this latitude either discretionary or arbitrary punishment. This discretion in Roman Civil Law authorized courts to sentence convicts to whatever corporal punishment or imprisonment it desired provided that did not involve life or limb.[94] This idea had been present since the middle ages when it was often used to imprison convicts instead of executing, maiming, or banishing them. By the sixteenth century, jurists began using *poena extraordinaria* more often because a court could

[92] The prevailing opinion of most historians of Jamestown was that the martial law code was initially a successful policy. Horn, *A Land as God Made it*, 193-207. Rutman, "The Virginia Company's Military Regime," 19-20.

[93] *Lawes and Ordinances of Warre, for the Better Government of his Majesties Army Royall* (London, 1639). Barbara Donagan has argued for the originality of Arundel's code. Donagan, *War in England*, 146. However, Arundel's code is interesting not for its originality but instead for the sheer variety of sources he used to make it. For the Bishop's Wars, see Charles Mark Fissel, *The Bishops' Wars: Charles I's Campaigns against Scotland, 1638-1640* (Cambridge: Cambridge University Press, 1994).

[94] John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago, 2006), 45-60.

convict punish extraordinarily without first obtaining "full proof:" two eyewitnesses or a confession without restraint. Alongside this "revolution in the laws of proof" came a flourishing of new and inventive forms of punishment, the most notable of which was galley slavery.

A similar transformation happened in some military courts. Articles of war in the middle ages prescribed extraordinary punishment but usually only in the form of imprisonment.[95] And we can guess that imprisonment was not all that useful as a form of punishment for commanders. First it was expensive to keep long-term holding facilities. Second, those facilities tended to be poorly guarded. Third, imprisonment prevented a soldier from returning to active military service. And fourth, imprisonment was private: a commander could not teach his other soldiers through humiliating public punishment. Imprisonment was still prescribed as a form of punishment. But, especially for common soldiers, commanders employed more useful and expedient corporal punishments, or galley slavery, which still obtained labor from the convict. Over the course of the sixteenth century, commanders left precisely how these offenders would be punished to the discretion of the court.

We can trace the beginnings of this punitive creativity with Londono's articles of war.[96] While the French and English still mandated chivalric degradation, the Spanish were beginning

[95] See for example the articles of war of the army of Richard II, which only prescribed imprisonment, loss of horse and armor, death, and in one instance, the loss of an ear. Francis Grose, *Military Antiquities respecting a History of the English Army from the Conquest to the Present Time* 2 vols. (London: Stockdale, 1812), ii. 63-8.

[96] Londono, *Discurso sobre la forma de reducer la disciplina military a mejor y antique estado*. On the continent, jurists would have adopted *poena extraordianaria* out of concerns that military courts were not mandating full proof for conviction. In France, this reservation amongst jurists in granting military courts powers of life and limb, and for some within the army to convict, led to the de-capitalization of some offences, including desertion, which was by far the most common capital offense in English courts martial. See David Parrott, *Richelieu's Army: War, Government, and Society in France, 1624-1642* (Cambridge: Cambridge University Press, 2001), 528; John A. Lynn, *Giant of the Grand Siècle: The French Army, 1610-1715* (Cambridge: Cambridge University Press, 1997), 405-08.

to prescribe galley slavery and other "arbitrary punishments" for their soldiers.[97] Leicester in his code began granting more discretion to his courts martial on how precisely to punish offenders. We have already seen some of the creative punishments the Virginia Company mandated, including galley slavery, for offenders. By the time of the English Civil War, articles of war for English armies granted courts martial discretion, provided the penalty was not capital, for almost 30% of all its offences.

Poena Extraordinaria was not used in all European military courts. Indeed, in the Dutch and in the military courts of the Holy Roman Emperor, extraordinary punishments were either banned or used sparingly.[98] Thus the Dutch code of war, published by Prince Maurits in 1590, was even by the standards of military substantive law unbelievably brutal.[99] While French and English codes often prescribed death for half of the articles, the Dutch code mandated death for over 75% of its offences, and used corporal punishments rarely.[100] The rationale for this severity probably lies in the closer adherence of those in Holy Roman Empire and the Dutch to the *Carolina*, the great Holy Roman criminal law code passed in the sixteenth century. The *Carolina* banned extraordinary punishments and mandated full proof for offences.[101] Thus, while the

[97] 44% of the offences in Londono's code granted some kind of discretion to the court with language like "as the court shall see fit" or "upon pain of arbitrary punishment" or "at the court's discretion. Londono, *Discurso sobre la forma de reducer la disciplina military a mejor y antique estado*.

[98] The military courts of the Holy Roman Empire had to follow civilian court procedure, which would have precluded them from using *poena extraordinaria*. "Of the Military Judicature and Method of Proceeding both in Criminal and Civil Causes in the Modern Imperial Armies," TNA, WO 93/6.

[99] *Lawes and Ordinances touching military discipline. Set down and established the 13 of August. 1590 tr. By I.D.* (The Hague, 1631). I.D. is almost certainly Isaac Dorislaus, the Dutch jurist who would become the judge advocate general of parliament's armies in the 1640s and future regicide. The Dutch code was translated into English a second time by Henry Hexham in his, *Principles of the Art Militarie* (London, 1637), 9-15.

[100] Corporal punishments were prescribed for blasphemy, derision of God's word, and for minor embezzlement. *Lawes and Ordinances touching military discipline*, A2, B2v.

[101] For the Carolina, see Langbein, *Torture and the Law of Proof*, 49-50; Langbein, *Punishing Crime in the Renaissance: England, Germany, France* (Cambridge, MA: Harvard University Press, 1974), 261-308.

Dutch prescribed death more often, they also probably had to exert more energy in proving cases than the Spanish, Dutch, or English. This divergence again means that English martial laws were more influenced by Spanish and French practice and less by Dutch practice.

By the end of the 1630s, an English commander like Arundel would have possessed English translations of codes of war from most continental armies. From 1618, the continental polities had been drawn into what is now known as the Thirty Years War. Just like the wars between the Dutch and the Spanish in the sixteenth century, commanders of armies in the Thirty Years war were deeply concerned about the discipline of their large, often underpaid and underfed armies. The Crown only officially intervened in these conflicts from 1625 through 1629. But into the 1630s, onlookers in England were deeply concerned about martial practices on the continent, and several military theorists translated articles of war into English. By 1639, the codes of the Dutch, Swedish, French, and Spanish were all available to English commanders.[102]

In Arundel's code, we can find once again jurists combining, adapting, imitating, and innovating when they wrote the articles of war. His article against blasphemy was copied from the Dutch code of 1590.[103] Several articles were copied from the code of Gustavus Adolphus, the great protestant military hero and king of Sweden. He had laws that can be traced all the way back to English codes of the middle ages. And he made new laws for the perceived dangers his soldiers might experience during the Scottish campaign. The Scots had rebelled against Charles because he had attempted to force ecclesiological innovations, in the form of a prelacy, into the Church of Scotland. Many of the hotter sorts of Protestants within England agreed with the Scots that Charles' innovations were harmful to the Church, and believed the war was unnecessary.

[102] The Swedish code was translated in William Watts, *The Swedish Discipline, Religious, Civile, and Military* (London, 1632), 39-69.

[103] Compare *Lawes and Ordinances of Warre*, 3 with *Lawes and Ordinances touching Military Discipline*, A2.

Therefore Arundel ordered that, "[W]hoever in favor of the enemy, or other pretence whatsoever, shall presume to say or secretly insinuate to any, that His Majesties Forces or *Army Royall* is unlawfull or not *necessary*, shall suffer as an enemy and rebell."[104] This article was not obeyed.

The writers of Arundel's code were most influenced by Matthew Sutcliffe. They copied several ordinances directly from his work. More importantly, they copied his categories: religion and moral matters, the safety of the state and garrison, duties of captains and soldiers, laws relating to the camp, laws relating to spoil, and laws relating to the administration of justice were all copied into Arundel's code. While they left out those relating to the navy, all the others were incorporated. These categories would structure many of the English articles of war for the rest of the century.[105]

Often over 100 articles in length by the middle of the seventeenth century, the juris-generative impulse lessened after the English Civil War. But by the middle of the seventeenth century, jurists and commanders transformed the articles of war that had focused on ransom and prisoners of war to a code that detailed duties relating to camp, the safety of the garrison, and to superiors. The codes of the Civil War were a product of experimentation in law making. Adaptation, imitation, and innovation were the strategies jurists adopted when they transformed the articles of war. Much of the energy was spent on experiment after experiment by commanders and governors who strove to find the right combination of laws that might help them create a perfectly disciplined polity. The *Lawes Divine Morall and Martiall* were one of these experiments.

[104] *Lawes and Ordinances of War*, 7. Arundel's italics.

[105] Sutcliffe, *Practice, Proceedings, and Lawes of Armes*, 304-42; *Lawes and Ordinances of War*.

Chapter Four:
Transformations in Administration

Along with transforming the articles of war, Crown officers sought to improve the administrative apparatus of the army and navy. Long governed by the king's household officers, the weight of business associated with war by the sixteenth century had grown beyond their administrative capacities. Starting with the Privy Council, continuing with the Council of War, and ending with the War Office at the end of the seventeenth century, Crown officers created a permanent, specialized bureaucracy to handle the business of war. The end product of this process was the survival of more records. Due to their supervision of army and navy courts martial, the Crown's martial and naval administrations have left behind an abundance of evidence relating to the practice and proceedings of seventeenth century courts martial.

The literature on the rise of the English fiscal-military state has in large measure focused on the Crown's ability to raise enough revenue to support a standing army and an enlarged navy.[1] It has focused on the English government's ability – or inability - to financially support armies and navies on a scale that could compete with those possessed by European monarchs, while ignoring the reception of new technologies and military methods often associated with the military revolution. English military historians have increasingly recognized how much continental military prescriptive literature influenced English martial culture prior to the Civil Wars. But these scholars have neglected the experiments the Crown and parliament made

[1] J.S. Brewer, *The Sinews of Power: War, Money and the English State, 1688-1783* (Cambridge, MA: Harvard University Press, 1988), 7-14. A much more balanced picture of England's war capabilities in the seventeenth century, but one that still focuses on finance is James Scott Wheeler, *The Making of a World Power: War and the Military Revolution in Seventeenth Century England* (Phoenix Mill, Gloucestershire: Sutton Publishing, 1999). Also see Michael J. Braddick, *State Formation in Early Modern England, c. 1550-1700* (Cambridge: Cambridge University Press, 2000), 177-284.

regarding the administration of its armed forces.[2] In order to better understand the record-keeping of courts-martial, we need to move away from both of these historiographies. We must understand the self-conscience attempts by the Crown to build a bureaucracy.

The English Crown and its administrators were aware of their comparative administrative deficiencies well before the English Civil War. In response, they made administrative structures that they hoped would more effectively supervise Crown war efforts. This process was undertaken by the Privy Council and by various parliaments. Just like martial law making, English Privy Councilors, well before they had the ability to compete financially with European monarchies, implemented the structures of martial administration that would eventually oversee England's more successful war efforts in the later seventeenth and eighteenth centuries.

From the Household to the War Office

Like most other aspects of the Crown's military at the end of the sixteenth century, its administration lagged behind in complexity to those of its continental rivals. In Spain, the king's Council of War administered justice to those in the king's armies serving in Spain and in North Africa. It also handled billeting, strategic planning, the building of fortifications, and the requisitioning of foodstuffs.[3] The Dutch Republic likewise built centralized administrative organs to supervise the discipline, foodstuffs, and ordnance of the Republic's armies.[4] The English Crown, in contrast, had little specialized military bureaucracy. In the middle ages, we shall recall, the king's household ministers administrated his armies. Once the king's banner was

[2] This might be done somewhere else.

[3] For these, see I.A.A. Thompson, *War and Government in Habsburg Spain, 1560-1620* (London: Athlone Press, 1976).

[4] Olaf van Nimwegen, *The Dutch Army and the Military Revolutions, 1588-1688* trans. Andrew May (Woodbridge: The Boydell Press, 2010), 21-84.

unfurled, and his forces awakened, they turned to the business of war. Even at the end of the sixteenth century, the queen's household staff continued to take on some of the administrative tasks of her armies.[5]

Increasingly over the course of the sixteenth century, the Privy Council took on the responsibility of war administration.[6] The council, a collection of the Queen's most important noblemen and ministers, had developed from the great medieval councils of English monarchs, which sat irregularly, into a smaller advisory council which attended the monarch's itinerant court.[7] The Privy Council contracted out recruiters who impressed men for service, and established commissioners who mustered the men in the port towns on their way to Ireland.[8] It kept track of the amount of victuals and clothing sent to the Crown's armies; it commented upon many of the strategic decisions made by the Crown's lord generals in Ireland and in the Low Countries, and kept track of the progress of the wars. It made sure the militias of the counties were prepared should the Spanish land in 1588.[9] But war was hardly the only task assigned to the Privy Council: its members must have felt overburdened by the sheer variety of business it had to conduct by the end of the sixteenth century.

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[5] Mark Charles Fissel, *English Warfare, 1511-1642* (London and New York: Routledge, 2001), 284.

[6] Wallace T. MacCaffrey, *Elizabeth I: War and Politics, 1585-1603* (Princeton: Princeton University Press, 1992), 17-45. John S. Nolan, "The Militarization of the Elizabethan State," *Journal of Military History* 58:3 (July, 1994): 391-420.

[7] The making of the Privy Council in the sixteenth century has attracted a lot of scholarly attention. Previously, it was thought that the council was made to replace household governance in the 1530s by Thomas Cromwell. Now scholars either place the making of the Privy Council in 1540, after Cromwell's death, or in the reign of Queen Mary. Sir Geoffrey Elton, *The Tudor Revolution in Government*: Administrative *Changes in the Reign of Henry VIII* (Cambridge: Cambridge University Press, 1953), 60-65, 316-69; John Guy "The Privy Council: Revolution or Evolution?" in *Revolution Reassessed*: *Revisions in the History of Tudor Government and Administration* ed. Christopher Coleman and David Starkey (Oxford: Clarendon Press, 1986), 59-86; Dale Hoak, "Two Revolutions in Tudor Government: The Formation and Organization of Mary I's Privy Council" in *Revolution Reassessed*, 87-116; Hoak, *The King's Council in the Reign of Edward VI* (Cambridge: Cambridge University Press, 1976); M.B. Pulman, *The Elizabethan Privy Council in the Fifteen-Seventies* (Berkeley: University of California Press, 1971).

[8] The best work on this process is John McGurk, *The Elizabethan Conquest of Ireland: The 1590s Crisis* (Manchester: Manchester University Press, 1997). For recruitment see Fissel, *English Warfare*, 85-114.

Three other administrative organs complemented the Privy Council's supervision of the Crown's war effort in the sixteenth century: the Lord Admiral and his assistants administered the royal navy, the ordnance office administered firearms and looked after fortifications, and various ad hoc councils of war advised the Crown on military strategy. We will explore the navy momentarily, so let us focus for now on the other two bodies. The ordnance office –a small cadre of officers led by the lieutenant of the ordnance – kept track of the monarch's artillery, issued out weaponry to commanders as they needed it, and ordered more if necessary.[10] Councils of war, comprised of the leading military officers of a particular army, were not permanent administrative bodies. Usually, councils of war only discussed and debated grand strategy. Our most prominent records from the sixteenth century come from 1588, when the council of war convened in Westminster to debate how Elizabeth's forces should combat the Spanish should they successfully land in England.[11]

Over the course of the 1620s, the Crown attempted to transform councils of war from a temporary advisory body into a more permanent institution that supervised most of the business of war. This transformation began when James I contemplated intervening in the wars raging in Germany between European powers in the early 1620s. James began preparing for war in 1621 because Frederick, the elector of the Palatinate and James' son-in-law, had been forcibly removed from his throne in Bohemia by the Hapsburgs, who pursued the former prince into his traditional domains. Considering it might be necessary to intervene on his son-in-law's behalf, James in 1621 convened the Council of War to estimate the price of an expeditionary force to the

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[9] For the militia, see Lindsay Boynton, *The Elizabethan Militia, 1558-1638* (London: Routledge & Paul, 1967).
[10] Richard W. Stewart, *The English Ordnance Office: A Case-Study in Bureaucracy, 1585-1625* (Woodbridge, Suffolk: The Boydell Press, 1996), 6-32.

[11] "Minutes of the Council of War," BL, Harley Ms. 444.

Palatinate. Once it had made its report – which ultimately dissuaded James from military action – the Council of War once again ceased to exist.[12] It was re-formed in 1624, after three years of divisive debate and maneuvering within the various parliaments that sat over whether England should enter into the wars taking place in Germany. The House of Commons in that year sought to use the revived Council of War to make sure that the subsidy it promised a king still hesitant to commit to military engagement that he would only use the new funds for the preparation and execution of a new war strategy and not to pay off his substantial debts.[13] For the next two years, the Council of War –re-commissioned upon James' death in 1625 by his son, the newly crowned Charles I – supervised the disbursal of parliamentary subsidies for the war effort and advised the Crown on military strategy.[14]

Failures, often humiliating failures, in these war efforts led to painful meditations.[15] These in turn produced administrative reforms. In 1626, after two disastrous expeditions – one led by Count Mansfeld that was supposed to relieve the Palatinate, the other an attempt to sack the Spanish port of Cadiz – Charles re-authorized the Council of War to sit but this time gave the body more administrative duties.[16] This Council of War, comprised of veteran military officers

[12] Stephen A. Stearns, "The Caroline Military System, 1625-1627: The Expeditions to Cadiz and Ré" (unpublished PhD dissertation, University of California, Berkeley, 1968), 129-30. S.R. Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War, 1603-1642* 10 vols. (London: Longmans, 1884-6), iv. 25-32.

[13] Stearns, "The Caroline Military System," 132-3; MB Young, "Revisionism and the Council of War" *Parliamentary History* 8 pt. 1 (1989): 1-27. For the politics of the parliaments of 1621-4, see Thomas Cogswell, *The Blessed Revolution: English Politics and the Coming of War, 1621-24* (Cambridge: Cambridge University Press, 1989).Compare this work with Conrad Russell, *Parliaments and English Politics, 1621-29* (Oxford: Clarendon Press, 1979), 1-145.

[14] Stearns, "The Caroline Military System," 139-42.

[15] Stearns' account of the council of war in general is excellent. In order to write its history, he relied on TNA, SP 16/28, the minute book for the Council of War starting in 1626. However, he was not aware of, or did not use, the notes made by one of its clerks, William Trumbull. These can be found in BL, Add. Ms. 72,422. I will supplement Stearns' account with these.

[16] Gardiner, *History of England*, v. 249-86; vi. 1-24.

and important Privy Councilors, had responsibilities over the security of the realm, the furnishing of naval ships, assisting the king's allies, rewarding good military service, and to offer other relevant advice to the king relating to war. It considered any business delegated to it by the king or by his Privy Council.[17] The Council of War thus took on the responsibilities the Privy Council gave to it, including the hearing of petitions. However, they did not have martial law jurisdiction.[18] But they did make ordinances of war.[19] Continued failures led to further re-examinations. Charles had declared war on France in 1626 in order to protect protestant dissidents who had rebelled against Louis XIII. In 1627, under the lord admiral, the Duke of Buckingham, Charles launched an expedition to the Isle of Rhé, which was located off the coast of France near La Rochelle, to help protect Huguenot rebels who had occupied the port-town.[20] The expedition was a disaster. Another attempt to relieve La Rochelle in 1628 also failed.[21] By the end of 1628, Charles and his ministers once again considered adapting the Council of War.

This time, they looked to the continent for aid. Within the notes of William Trumbull, the secretary to the Privy Council and secretary to the council of war, we find an examination of the duties and responsibilities of the Spanish Council of War. Apparently the Council was reading

[17] TNA, SP 16/525, fos.104-5; TNA 16/35, f. 84; TNA, SP 31, f. 24; TNA, SP 16/540, f. 1; TNA SP 16/522, f. 163; TNA, SP 63/244, fos. 44, 296.

[18] The responsibilities are outlined in the privy seal commission. TNA, C 82/2006. A draft of this commission can be found in TNA, SP 16/26 no. 33. A commission under the great seal was apparently dated 14 April, 1626. The responsibilities are also outlined in Trumbull's notebook, BL Add. Ms. 72,422, fos. 3-4. Minutes of the meetings show that the Council was primarily concerned with financing and provisioning the ships for the upcoming expedition to the Isle of Rhé. See TNA, SP 16/28, fos. 1ff. The council of war debated a proclamation eventually made by Charles I that demanded those mariners who had on furlough entered London or other towns return to their ships on pain of martial law. BL, Add. Ms. 72, 422, f. 17. *Stuart Royal Proclamations* (hereafter *SRP*) ed. James F. Larkin and Paul F. Hughes 2 vols. (Oxford: Clarendon Press, 1973), ii. no. 81. *APC*, xliii., 243.

[19] TNA, SP 16/13, f. 77; TNA, SP 9/28.

[20] Gardiner, *A History of England v.* 328-93; Roger Lockyer, *Buckingham: The Life and Political Career of George Villiers, First Duke of Buckingham, 1592-1628* (London: Longman, 1981), 290-384. For the military expedition see Stearns "Caroline Military System" 77-114; Fissel *English Warfare*, 261-69.

[21] Gardiner, *History of England*, vi. 363-5.

notes taken by Gonzalo D'Avila, who had written a tract on the Spanish government.[22] The notes discuss the Spanish Council of War's jurisdiction over all concerns relevant to wars outside of Spain. It, according to the notes, managed all garrisons as well as the king's fleets. The Council also had powers to levy men and requisition victuals for overseas campaigns, and it nominated men to be generals and admirals. Although Trumbull did not record this fact down in his notes, the Council of War had powers to discipline soldiers, and to hear petitions. Trumbull kept these powers in mind when he, probably at the direction of the Council of War and Charles, wrote up a privy seal warrant for a Council of War that possessed more expanded powers than that of its predecessors. Like the articles of war, the makers of the 1629 Council of War were broadly influenced by continental developments, but did not simply imitate their example.[23] The new commission gave the Council powers to gather intelligence about the king's enemies, to price victuals, to have authority over promotions and retentions within the army, and most importantly for our purposes, the Council was to have judicial responsibilities. These included examinations into abuses made by martial law commissioners and the hearing and determining of grievances.[24]

The commission declared that the Council of War, with a quorum of seven, had the ability to "take due examinacon vppon oath or otherwise as needs and occasion shall require of all such misdemeanors abuses and offences touching martiall affaires or prisoners of warr, as shall come to yor knowledge by information or otherwise…"[25] The Council did not have powers

[22] BL, Add. Ms. 72,422, f. 88.

[23]A copy of the commission can be found in TNA, SP 16/28 f. 59v. Stearns, "Caroline Military System," 148.

[24] The Council's power to displace office-holders meant that its recommendations could sometimes be supervised at the Court of Star Chamber. See TNA, SP 16/218, f. 178. The attorney general, on the advice of the Council would write out a grant for a new officeholder. TNA, SP 16/214 f. 165. For an order to remove an officer see TNA, SP 16/214 f. 125.

[25] TNA, SP 16/28, f. 56v.

to take life and limb.[26] But over the next four years, the Council of War engaged in a variety of judicial adjudication over matters relating to war. They did so as a substitute for the Privy Council, which in years past would have had to address all these petitions. The clerks of the Council of War, while it sat over the next three years, kept regular records of its meetings and decisions.[27]

The legal business the Council heard related to supposed wrongs committed upon or by soldiers during the wars of the 1620s.[28] The Council heard petitions from wounded veterans for places in the hospitals for wounded soldiers.[29] It disciplined officers for poor performance.[30] It also heard petitions from widows for the pay of their late husbands. Magarett Le Home, for example, came before the Council of War in March 1629 in order that she might obtain the pay owed to her deceased husband, John Le Home, who had died while participating in the La Rochelle expedition. Margarett's petition was successful, and the Council ordered the Exchequer to pay her for her husband's service.[31] Others, like Captain Lancelot Alford who claimed that he

[26] The council essentially had cognizance over the civil, or private, claims of army members during this period. The criminal, or public, disputes were delegated to local officials. See chapter five.

[27] These can be found in the minute book of the council of war, TNA SP 16/28 and scattered throughout the State Papers Domestic general series for Charles' reign, TNA, SP 16. For minutes of its meetings see, TNA, SP 16/176 f.37-9. TNA, SP 16/193 f. 96; TNA, SP 16/188 f. 173ff; TNA, SP 16/186 f. 57; TNA, 16/185 f. 93ff. TNA, SP 16/184 f. 93ff. TNA, SP 16/184 f. 66ff. TNA, SP 16/166 f.7ff. We also possess some formal answers to the petitions. Formal answers to some petitions can be found in TNA, SP 16/136 f. 44ff; 176 f. 37. TNA, SP 16/182 f. 112ff. TNA, SP 16/170 f. 57. TNA, SP 16/146 f. 21. TNA, SP 16/144 fos. 8ff.

[28] The Council divided petitions into five categories: for reimbursement for monies spent in recruitment, for accounts between captains and their officers where the captain was not recompensed, for repayment of disbursements that were only "pretended" to be necessary, recompense of service, and petitions of maimed soldiers. TNA, SP 16/146 f. 25. The Council also attempted to regulate how soldiers were to be reimbursed, so that they did not need to hear petitions from every single veteran. TNA, SP 16/145 f. 100.

[29] There are over 65 such petitions. TNA, SP 16/28 fos. 65v-70v.

[30] TNA, SP 16/28 f. 55-v. TNA, SP 16/144 f. 1.

[31] TNA, SP 16/28, fo. 65v. TNA, SP 16/226 fo. 15. See also the two petitions of the widow Mary Turnour, TNA, SP 16/215 f. 90 and TNA, SP 16/224 f. 127. TNA, SP 16/162 f. 105. TNA, SP 16/142 f.129. Other executors, aside from widows, petitioned the Council. "The Petition of Jacob Peadle, administrator of his brother, Abraham Peadle"

was exposed to "vtter ruine" petitioned the Council of War for the salary he would have received as a captain in the armies of the Dutch Republic, which he abandoned at the request of Charles to serve the king in his armies.[32] Others petitioned for arrears.[33] Some former military officers petitioned for pensions.[34] Others complained of fraud or neglect by their superiors which prevented them from being paid their full salary.[35] Often, these requests were made in combination with some claim of financial trouble.[36] The Council of War spent most of its time from 1629 to 1633 adjudicating cases such as these. The Council, after hearing the petition, often

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TNA, SP 16/184 f. 52. "Petition of William Radcliffe" TNA, SP 16/181 f. 127. Sometimes these payments were stayed from disbursement to surviving relatives so that debts could be collected. TNA, SP 16/192 f. 66.

[32] TNA, SP 16/136 f. 99;TNA, SP 16/220 fo. 109; TNA, SP 16/219 f. 73; TNA SP 16/138 f. 76. The same can be said for a Seargent Major Taylor. TNA, SP 16/218 f. 180. And for Captain Emanuel Gilpin. TNA, SP 16/155 f. 55. The Council of War investigated similar claims in March 1632. TNA, SP 16/214 f. 127. The preacher William Cradock, who participated in the expedition to Cadiz, made a complaint that he had lost his chance at preferment due to his military service and deserved compensation. TNA, SP 16/219 f. 17. Also see TNA SP 16/187 f. 131-2. Charles commanded the Council of War to hear these petitions on 4 March 163, which was written on the bottom of the petition of several officers, including one Captain Powell. TNA, SP 16/186 f. 29. Powell seems to have been successful in obtaining some satisfaction. TNA, SP 16/184 f. 96. Also see, TNA, SP 16/142 f. 11. TNA, SP 16/140 f. 41. TNA, 16/139 f. 149.

[33] TNA, SP 16/136 f. 89, 91-5; TNA, SP 16/138 f. 61; TNA, SP 16/138 f. 65; TNA, SP 138 f.67; TNA SP 16/139 f. 150; TNA, SP 16/179 f. 17; TNA, SP 16/138 f. 136; TNA, SP 16/138 f. 70. TNA, SP 16/138 f. 68 A similar petition was delivered by several captains who went to Denmark. TNA, SP 16/179 f. 9. See also TNA, SP 16/206 f. 109 and TNA, SP 16/28 fo. 64v. TNA, SP 16/145 f. 63. A similar petition came from a captain Richard Bolle who was imprisoned for debt. TNA, SP 16/179 f. 2. Also TNA, SP 16/179 f. 45 and SP 16/155 f. 54. Thomas Lowther sought arrears which he was owed by his captain who died in the expedition to Rhé. TNA, SP 16/187 f. 133. He petitioned again a year later. TNA, SP 16/206 f. 108. TNA, SP 16/153 f. 15.

[34] TNA, SP 16/218 f. 162; TNA, SP 16/195, f. 102. TNA, SP 16/183 f. 68. TNA, SP 16/139 f. 94.

[35] This was a particular problem on the Denmark expedition. TNA, SP 16/145 f. 61. "Petition of Henry Skipwith" TNA, SP 16/187, f. 148. Skipwith was the executor of John Radcliffe, a soldier owed back-pay. The case was decided in his favor. Sir John Bingley and Philip Burlamachi to the Council of War, TNA, SP 16/184 f. 81. "Petition of Thomas Heskett" TNA, SP 16/186 f. 57. "Petition of Lieut. John Disney" TNA, SP 16/184 f. 59. "Petition of Thomas Slough, Suttler" TNA, SP 16/184 f. 57. TNA SP 16/139 f. 119. TNA SP 16/138 f. 73. "The Petition of William Hide the Younger" TNA, SP 16/184 f. 50. In at least one instance, the petitioner succeeded. William Hide, a provost marshal during the 1620s and went on the expedition to Denmark successfully lobbied for pay which was taken out of the salary of the general who commanded him. TNA, SP 16/185 f. 98. "Petition of John Paul," TNA, SP 16/184 f. 95. "Petition of Henry Wright" TNA, SP 16/184 f. 54. "Petition of Capt. Richard Ouseley" TNA, SP 16/183 f. 102. His officers protested this petition, Philip Burlamachi to William Boswell, TNA, SP 16/182 f. 123. "Petition of James Jeffreys" TNA, SP 16/531 f. 137. TNA, SP 16/139 f. 22. Those accused responded. "The Petition of Julian Calandrini, paymaster" TNA, SP 16/144 f.5. One superior accused his servant of stealing from him. TNA, SP 16/138 f. 96.

[36] "The Petition of James Gower" TNA, SP 16/139 f. 151.

sought official approval to act, probably after voicing a recommendation based upon the evidence they obtained, from upwards in the chain of command – either from Charles I directly, the Privy Council, or from one of his secretaries of state. If the petitions were not all that important, the Council delegated them to others – usually officers of the army.[37] The Council possessed a specialized and distinctively martial jurisdiction. Its records were maintained by professional clerks who were charged with the task of maintaining the council's records for posterity.

The Council of War was more specialized than the previous administrative bodies that governed the Crown's war effort, but it still did not sit permanently. After it finished handling the business relating to war in 1632, the Council went into abeyance. It was only revived in 1637, and councilors began meeting in 1638 to discuss the impending invasion of Scotland.[38] Throughout the next three years, the Council of War administered, or tried to administer, the food and munitions necessary for the maintenance of Charles' armies in what are now known as the "Bishops' Wars." A small number of petitions survive from this period; all of them relate to contracts relating to the provisioning of the army.[39] In its minutes, the Council of War drafted a proclamation that banned the removal of arms from the realm without the permission of the Crown.[40] But on the whole, the council did not examine a lot of judicial business. It did not do so

[37]The investigation of these petitions by the Secretary of State is probably why we have extent copies of them, and why the petitions are spread throughout the State Papers Domestic. Minutes by Nicholas of answers directed by Sec. Coke to be given to various petitions, etc." 25 June, 1630 TNA, SP 16/153 f. 29 and 16/169, f. 71. Also, TNA, SP 16/169 f. 55. TNA, SP 16/168 f. 31. The Council often commissioned others to examine evidence in relation to petitions. See TNA SP 16/193 f. 85, and TNA SP 16/185 f. 38. Sometimes it delegated its powers. TNA SP 16/184 f. 68. TNA, SP 16/531, f. 138.

[38] The entry book for the Council of War in this period is TNA, SP 16/396. The work of the Council during the Bishops' Wars has been well handled by Mark Charles Fissel, *The Bishops' Wars: Charles I's Campaigns against Scotland, 1638-1640* (Cambridge: Cambridge University Press, 1994), 62-77.

[39]TNA, SP 16/407 f. 131, 135; TNA, SP 16/438 f. 52-3; TNA, 16/436 f. 112.

[40] TNA, SP 16/396 f. 8.

first because the armies were either in the north of England or in Scotland. Second, it was unclear if commanders could use martial law, and questions relating to its jurisdiction were important enough for commanders to petition directly to the Privy Council.

The Council of War which sat in Oxford during the English Civil War in the following decade, unlike its predecessor which supervised Charles' armies going to Scotland, made law and supervised martial jurisdiction.[41] Its most important duty was to draft the proclamations relating to discipline that Charles would eventually publish for his armies. It also punished officers for neglect of duty.[42] It commanded one of Charles' provosts to execute a detained man declared to be a rebel, and drafted proclamations.[43] It investigated a case against one of its colonels, William Hide, who apparently conducted himself quite poorly and even beat, while drunk, a pregnant woman.[44] It also operated as a court of war for very important cases, where the life and reputation of Charles' officers was at stake.[45] We only have brief snapshots of the Council's work because most of its records were probably destroyed by Royalists before Parliamentary forces entered Oxford in 1646. Nevertheless, even from these surviving records it is clear that the Council of War had a distinctive martial jurisdiction.

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[41] Ian Roy, "The Royalist Council of War, 1642-6" *Bulletin of the Institute of Historical Research* xxv. (1962): 150-68. The Council of War is barely remarked upon by Ronald Hutton, *The Royalist War Effort, 1642-46* (London: Longmans, 1982), 50. The main manuscripts that illustrate the Council of War's administration during the Civil War are the surviving minutes recorded by its secretary, Sir Edward Walker. BL, Harley Ms. 6801-2, 6851-2.

[42] It examined the mayor of Oxford and others over their failure to fortify the city in 1643. BL, Harley Ms. 6851, f. 140.

[43] Ibid., fos. 130v; 167. The Council of War sometimes ordered its generals to execute mutineers and rebels by martial law. Ibid., f. 167.

[44] BL, Harley Ms. 6851, fos. 72, 79, 81-91.

[45] BL, Harley Ms. 6802, fos. 129-31. Roy, "Royalist Council of War," 158.

The administrative structures Parliament erected for the prosecution of its war effort against the king also supervised martial jurisdiction.[46] We will examine the ways in which Parliament supervised courts martial for special cases of treason several chapters from now. Let us for the moment simply state that like the Royalist Council of War, Parliament cared about very important or controversial cases, usually ones which involved its officers. Or, it cared about major or systematic depredations by its soldiers toward civilians. In one case, Parliament in 1646 was interested in obtaining information on how its commanders tried Scottish soldiers accused of abusing civilians in the town of Tickhill, a small town east of Sheffield in Yorkshire.[47] It also, through its Committee of Indemnity established in 1647, adjudicated disputes between civilians and members of its armed forces.[48]

These various councils cared about supervising martial law. But they did not particularly care about keeping track of more minor matters of discipline that came before the various courts martial of their armies in the field. Unlike the Spanish Council of War, or the *hoge kriegstad* of the Dutch Republic, the English Crown or Parliament did not create a centralized military tribunal that governed all matters of discipline. Instead, the various sub-committees Parliament created to supervise its armies delegated control over the discipline of its armies to its generals. In order to understand why detailed courts martial records start appearing in the 1640s, we need

[46] The administrative bodies that had some supervisory powers over Parliament's military were many, the most important being the Committee of Safety, later the Committee of Both Kingdoms and the Committee for the Army. Lotte Glow, "The Committee of Safety" *English Historical Review* 80:315 (Apr., 1965): 289-313; Wallace Notestein, "The Establishment of the Committee of Both Kingdoms" *The American Historical Review* 17:3 (Apr., 1912): 477-95. Mark Kishlansky, *The Rise of the New Model Army* (Cambridge: Cambridge University Press, 1979), 68-70.

[47] "Copy of the Sentence of the Council of War holden at Loughton by the Officers of Colonel Frazier's Regiment" PA, PO/JO/10/1/204. Parliament was petitioned to examine the abuses. See *CJ*, iv. 436, 439, 481, 558-9; *LJ*, vii. 642-3. Ronan Bennett, "War and Disorder: Policing the Soldiery in Civil War Yorkshire" in *War and Government in Britain, 1598*-165 ed. Mark Charles Fissel (Manchester: Manchester University Press, 1991), 253-4.

[48] These voluminous records can be found in TNA, SP 24. For more on the committee of indemnity, see chapter six.

to examine the rise of bureaucratic officials like the secretary of war who kept track of all business relating to military discipline.

The three series of courts martial records we possess from the English Civil War come from the records kept by the clerks and secretaries of the various generals in the field.[49] It was these men who cared about recording justice. The impulse to keep records of justice dates at the latest to the works of Matthew Sutcliffe, who in the 1590s declared that judge marshals had the obligation to record all matters of justice. His rationale was that documentation would aid army officers in maintaining order, particularly when and if disputes arose over the moveable property or back-pay of deceased soldiers. It would also aid courts martial in determining whether or not a defendant had been previously convicted at a court martial and therefore needed a harsher offence. There are only scattered records of courts martial from either provosts or judge marshals from the 1590s through the English Civil War.[50]

However, it does not mean they were not kept. Indeed, especially after the procedural transformation of courts martial that took place in the early seventeenth century, the clerks and judge advocates had to keep records of the courts martial proceedings so they could deliver the findings of the court to the lord general of the army so that he could sign the warrants that executed the prescribed punishments, mercies, and acquittals of the councils of war. During the Civil War secretaries to the lord general kept detailed records of the business of the army. John Rushworth, the first secretary and his assistant, William Clarke who eventually became George

[49] "The Court Martial Papers of Sir William Waller's Army, 1644" ed. John Adair *Journal of the Society for Army Historical Research* 44 (Dec. 1966): 205-27; "Dundee Court Martial Records" ed Godfrey Davies *Miscellany of the Scottish Historical Society* 2nd Ser. 3 (1919): 9-67; and "Minutes of Courts Martial held in Dublin in the years 1651-3" ed. Heather MacLean, Ian Gentles, & Micheál Ó Siochrú *Archivium Hibernicum* 64 (2011): 56-164.

[50] Some of these include HH, CP 168/54. From the 1620s, there is only one record of a court martial proceeding, which took place in January 1627. See HRO, Jervoise Ms. 44M69/G5/38/4. Another copy can be found in BL, Add. Ms. 21,922 f. 88v-89.

Monck's secretary in Scotland, kept extensive records of the army's business.[51] But these records were never deposited into any centralized archive.

In the latter half of the seventeenth century these records became a part of the institutional archive of the newly forming War Office. When Charles II was restored in 1660, he did not re-establish the Council of War. Instead, the administration of the army – which now stood as a permanent if extremely small force retained by the king in order to prevent a new civil war - would run through the lord general, George Monck, the Duke of Albemarle. The general had as his aide William Clarke, an experienced secretary of war, and he also employed a permanent Judge Advocate General who possessed the office for life, a commissary general, a paymaster general, and a muster master general.[52] John Childs, the military historian of Charles' army, has postulated that the administrative structure established by Charles intentionally mirrored that of the French army. The transformation in the administrative structure from a council of war that was often separate from the army high command to one that was carried out by the High Command itself produced more archival records relating to courts martial. This archival bounty exists because the lord general, who was often an important member of the Privy Council, delegated the administrative duties to his secretary, who in turn became increasingly important as a supervisor of the Crown's armed forces.

The administrative structure that the secretary oversaw was hardly more complex or specialized than that of the Council of War in the 1620s. But its officers cared more about discipline and keeping track of the records of the courts martial that operated within England or in the Crown's armies abroad. The secretary of war, for example, archived all of the warrants he

[51] For the duties of the secretary of the general see BL, Add. Ms. 15,856 f. 54v. For the formation of the New Model Army see Kishlansky, *The Rise of the New Model Army*, 26-52.

[52] John Childs, *The Army of Charles II* (London: Routledge and Kegan Paul, 1976), 91-100.

issued in the name of the general.[53] He cared more about keeping track, although still not comprehensively, of the records of individual courts martial that arrived from the field. The increased record keeping from the 1660s onwards was a product of the shift in how the army was to be administered – from committees external to the army established by the Privy Council or by Parliament to administration by the army staff itself who were involved with the responsibilities of martial justice.[54]

Naval Courts Martial Records

The navy by 1680 kept track of all the courts martial that took place on the king's ships. The increased supervision of discipline on board Crown ships was a product of imitating the legal practices of the army. The Admiralty had always been more centralized and more permanent than the Councils of War that governed the Crown's armies. From the 1540s onwards, a permanent Council for Marine Causes convened to administer the king's ships, his ports, and the fortifications that guarded those ports.[55] But these administrative bodies showed little interest in supervising the legal actions of commanders on board their ships. Indeed, it is difficult to understand what if any rules existed on board ships in the sixteenth century. Sometimes, naval commanders had powers of martial law for certain wrongs – mutiny and sometimes murder and theft – as a procedural alternative to common law jury trials. But more often than not, capital

[53] TNA, WO 26.
[54]The courts martial records can be found in TNA, 89/1ff. and in TNA, 71/121. A partial calendar of all courts martial conducted in the late seventeenth century survives. TNA, WO 92/1.

[55] David Loades, *The Elizabethan Navy, 1540-1590: From the Solent to the Armada* (Woodbridge, Suffolk: Boydell Press, 2009), 19-38; Loades, *The Tudor Navy: An Administrative, Political, and Military History* (Aldershot: Scolar Press, 1992), 74-102, 178-208. A good overview of the transformation of the navy can be found in Wheeler, *The Making of a World Power*, 22-42.

cases had to wait until the ship landed.[56] But they did not have a written substantive law tradition like the army. The rules of discipline on board ships went largely unwritten.[57]

Although the Crown attempted and achieved administrative reforms for the navy throughout the early seventeenth century, it was not until the aftermath of the English Civil War that Parliament reformed its disciplinary regime.[58] In the troublesome years of 1648-1649, Parliament considered a series of changes to the navy. It did so because it feared invasions of England by European monarchies that backed the Royalist war effort particularly after 1649 when all the princes and monarchs of Europe gasped in shock after Parliament executed Charles I. Parliament imported some of the administrative and legal concepts from the New Model Army which by 1649 had been enormously successful in battle and had an extraordinary degree of political influence. For our purposes, the most important of these changes was the crafting of articles of war based on, and adapted from, those used to supervise soldiers within the army. The articles, twenty in length in 1649, were slightly expanded in the 1650s, and incorporated into statute by the Restoration Parliament in 1661.[59] The laws were to be administered by the same procedures that we have already seen in operation within the army. This new legal apparatus included the appointment of Judge Advocate Generals within every fleet. Just like their army counterparts, these legal officers kept records of the legal proceedings they attended. Sometimes,

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[56] J.D. Davies, *Gentlemen and Tarpaulins: The Officers and Men of the Restoration Navy* (Oxford: Clarendon Press, 1991), 95.

[57] Loades, *The Tudor Navy*, 199-200.

[58] For early Stuart reforms, see Christopher Dunston Penn, *The Navy under the Early Stuarts and its Influence on English History* (Portsmouth: Grieves, 1920).

[59] Bernard Capp, *Cromwell's Navy: The Fleet and the English Revolution, 1648-1660* (Oxford: Clarendon Press, 1989), 58-9; Michael Oppenheim, *A History of the Administration of the Royal Navy and of Merchant Shipping in relation to the navy* (Hamden, CO: Shoe String Press, 1961), 311; *CJ* vi. 156-7, vii. 235-6. *Lawes of War and Ordinances of the Sea* (London, 1652). 13 Car. II. C.9. This statute has been printed in *Articles of War: The Statutes which governed our Fighting Navies, 1661, 1749, and 1886* ed. N.A.M. Rodger (Havant, Hampshire: K. Mason, 1982), 13-20.

the secretaries of the "generals at sea," also kept track of naval courts martial.[60] By 1680, secretaries of the navy received regular summations of naval courts martial.[61]

The Crown's government by the end of the seventeenth century had become increasingly specialized. The household officers had been replaced first by important privy councilors, then by important martial men who sat on a council of war, then finally by bureaucrats who concentrated on one aspect of army or navy administration. Crown officers made this transformation. And they did so in imitation of, and in response to perceived pressure from, their continental rivals. Further, they had been making these administrative structures in advance of either the English Civil War or the Financial Revolution of the 1690s. The product of this state-building are more archival records which allow a thorough investigation into how courts martial worked in the seventeenth century than the very limited surviving records from the sixteenth century allow.

[60] Our first set of naval courts martial comes from 1655. Bodl. Rawl. A Ms. 295.

[61] These can be located in TNA, ADM 1/5253. Other courts martial records from the period are Bodl Rawl. Ms. A 314.

Chapter Five:
Transformations in Procedure

At the same time that English commanders and jurists were transforming the substance of martial law and its administration, they were also transforming its procedure.[1] Commanders replaced the court of the marshal – where the marshal or judge marshal on his own heard and determined cases – with a council of war, where somewhere between five and twenty officers evaluated charges of wrongdoing. In this transformation, as in the others, commanders and martial jurists were influenced by continental developments. The end product was procedural rules that spread discretion amongst a wider group of officers, more lawyers to interpret those rules, and in all probability longer trials. While councils of war often meted out brutal punishments to those who had committed wrongs, soldiers and sailors could nevertheless expect that their supposed wrongs would be tried through a legal process and not through the sole discretion of their commander.

From the Court of the Marshal to Councils of War

We can spot this transformation by contrasting the Earl of Arundel's code with the instructions laid forth for courts martial in the work of Matthew Sutcliffe. The Earl of Arundel and his council were deeply influenced by Sutcliffe's prescriptions, with one important exception. Here are Sutcliffe's first two commands relating to the administration of justice:

> That the auctours of disorders may be detected, and punishment awarded accordingly, it shalbe lawfull for a judge marshall, or others that haue commission from the Generall, or lorde martiall to do iustice, to enquire of auctours, and circumstance…all causes and

[1] The only historian I know of who realized this procedural transformation is Francis Grose, *Military Antiquities respecting a History of the English Army from the Conquest to the Present Time* (London, 1786-88), II. 54. Grose had read a manuscript history of courts martial which he found in the National Archives. "Descriptions of court martial proceedings in several European countries and various articles of war" [late 18th century] TNA, WO 93/6.

> controversies…shall be heard and discussed summarily and execution done by military laws without appeale or relation[2]

Let us remember what this procedure entailed. Usually by information, a suspect would be brought before a court martial which consisted of one judge: the lord general, the marshal, or the judge marshal, or sometimes a provost marshal general. If the case was not brought before the judge marshal, he would serve as legal counsel to either the general or the marshal. Once the evidence had been gathered and contemplated, the judge of the court would declare the sentence, which would be carried out by the provost marshal or the executioner.

The Earl of Arundel's code prescribed a different procedure which we can glean from the first two articles set down for the administration of justice:

> First, that such as commit disorders, may be detected, and punishment accordingly awarded; it shall be lawful for the Councell of Warre and the Advocate for the Army to enquire of auctours and circumstances of offences committed…all causes and controuersies shall be heard and discussed summarily, and execution done according to the militarie lawes, by the councell of warre, without appeale.[3]

The instructions are nearly identical, except in the place of the "judge marshal and others" was the "council of war." Gone was the court of the marshal and in its stead was the council of war. Gone too was the judge marshal and in his stead was an advocate, who was distinguished in his responsibilities from those who sat on the council of war. By the end of the seventeenth century, each regiment possessed its own council of war, and retained a lawyer to give the council advice. Let us briefly further illuminate the changes that we have detected before we examine why they took place.

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[2] Sutcliffe, *Practice, Proceedings, and Lawes of Arms*, 339.

[3] *Lawes and Ordinances of Warre*, 21-22.

The key difference between the courts martial of the sixteenth century and the councils of war of the seventeenth century was that in lieu of the marshal or general hearing and determining cases on his own, a council of usually between ten and twenty officers heard and determined cases. The commissioners heard all of the evidence, and decided on the charge. At the head of the council was a president, who was supposed to be a person of "integritie of sound iudgement and of ripe knowledge both in ciuil and military lawes before whome all matters ciuil & criminal that haue relation to ye Armye are to be tried."[4] But the president, unlike the lord marshal or general in the sixteenth century, only had slightly more power than the other commissioners on the council. He had the power of a double vote in case the other commissioners were deadlocked.

Conviction at a council of war, unlike a petty jury, only required a plurality. There were no deadlocked councils of war. In this difference, councils of war resembled other conciliar jurisdictions on both the European continent and in England. The Court of Star Chamber, for example, similarly decided cases based upon a plurality; so too did the presidential courts in the north of England, the marches of Wales, Munster, and in Connacht.[5] Like these other tribunals, a council of war decided cases and then punishments by having each officer of the court, starting with the lowest in rank, declare their opinion. The process would end with the lord president making the decision, if the wrong gave the court discretion on how to punish, on what punishment the convict would receive.[6]

The role of the legal officers of the army became more circumscribed in this conciliar jurisdiction. Where before judge marshals often heard and determined cases on their own, now

[4] Sir William Throckmorton, "A Brief Treatise of War, containing ye most essential & circumstantial parts thereof…" BL, Harley Ms. 6008, f. 21.

[5] Thomas Garden Barnes "Due Process and Slow Process in the late Elizabethan-Early Stuart Star Chamber" *American Journal of Legal History* 6:3 (Oct. 1962): 227-31.

[6] For an example of voting, see Worcester College, Oxford, Clarke Ms. 21 fos. 32-3.

the law officers only had powers to obtain evidence and deliver it to the court.[7] According to one prescriptive writer, the officer increasingly known as the "advocate" could not "enter into any debate at ye council table without ye question be put to him & then he ought to answer according to law, conscience & presidents."[8] This "Inquisitor of blood" was the chief detective and prosecutor of the court. It was he who would most often provide informations so the court could prosecute the case. Like his predecessors, he was responsible for keeping track of all the wills and other legal business of the soldiers. Eventually, English armies stopped calling this officer the judge marshal. This transformation began in 1639, when the council of war ordered its auditor to change the title of William Lewin's position from judge marshal to "advocate of the army."[9] The confusing terminology continued. In his commission to George Clark, the advocate general of the army, in 1685, James II granted him all the privileges "any other advocate general or judge marshall advocate general or any other judge marshall by what name soever" had previously possessed.[10] The title of judge marshal, however, was not abandoned but instead combined with "advocate of the army:" hence why we have the title, "judge advocate general" even though the office possesses no judicial capacity.

Conciliar courts were known to the army well before they became normative. In the middle ages, we shall recall, the lord General of the Army at times called a council of war or a

[7] The best history of the office of judge advocate, albeit one that focuses almost exclusively on the eighteenth century, can be found in Frederick Bernays Wiener, *Civilians under Military Justice: The British Practice since 1689, especially in North America* (Chicago: University of Chicago Press, 1967), 165-88.

[8] Sir William Throckmorton, "Commentaries of Caesar" BL, Harley Ms. 4602, f. 84v; this statement conforms to the commissions which judge advocates received after 1660, see the commission to John Henry, who was to be judge advocate general in Tangier in 1661, BL, Harley MS 6844 f. 102.

[9] TNA, SP 16/442, f 224v. Lewin is listed as judge marshal in the declared accounts of the army. TNA, E 351/292. Great examples of the judge advocate general's daily business come from John Luke, a judge advocate who actually kept a journal in Tangier: BL, Additional Ms. 36,528, and from a judge advocate's book on board the Torrington in 1655. Bodl. Rawl. A Ms. 295.

[10] TNA, C 66/3268, m. 1.

tribunal to hear and determine very important cases. It was by this procedure that the Black Prince tried Marshal D'Audreham in 1367 for treason in the aftermath of the battle of Najera. This process was used most commonly for trying civilian traitors. In 1586, a similar tribunal was convened to hear and determine a case against the mayor of Ghent whom the English called "m. Hemert." The mayor and several captains had supposedly given up the city to the Spanish illegally. They were put on trial both for treason and for negligence of duty and cowardice. Rather than trying the case himself Leicester commissioned "Count Hollock and Count Newenar, and divers others, colonels and officers of the field."[11] Suspects were arraigned before the council, who acquitted them of treason, but convicted them of negligence of duty and cowardice. All of them were executed. Thus we need to understand why this special form of tribunal became normative.

At various moments, English commanders opted for a conciliar tribunal as the normative means to try soldiers. By the 1620s, Sir Francis Markham discussed courts martial as if the normative way in which the trial took place was by council. It seems that the Earl of Essex experimented with using the council of war as a judicial body during the 1590s. But it is almost certain that the Virginia Company used the simple martial court. Sir Thomas Gates, as we have seen, in 1609 when he was stranded on Bermuda, tried, convicted, and then pardoned two soldiers for sedition at a traditional court martial. The process of transformation was slow, and the two procedural forms were often used side by side.

In part, English commanders and jurists opted for conciliar procedure because they wanted to imitate the procedural transformations that were taking place within continental military courts. At exactly the same moment English courts martial were becoming councils of

[11] The trial was recounted in various correspondences between English commanders and the Privy Council. *CSPF*, 1587 (part two), 24-8, 32, 48, 73.

war, the same transformation was taking place on the continent. From at least the latter part of the sixteenth century the military courts of the Holy Roman Empire mandated a conciliar jurisdiction. Maximilien II, for example, mandated "three captains, three lieutenants, three cornets and three corporals with one field officer of the Cavalry and with them form the Court."[12] By the 1590s, the Dutch under Prince Maurice of Nassau established the *hoge kriegstad*, a centralized court comprised of between ten and twenty officers who supervised martial cases relating to all of the Republic's soldiers.[13] Spanish monarchs, likewise, formed a council of war that governed all judicial cases within the Iberian Peninsula.[14] The French, undergoing a transition in the same timeframe as the English, used the Court of the *Connétablie* less and less in the seventeenth century, and opted instead for *conseils de guerre*.[15] By the 1630s, the English learned that the military courts of Gustavus Adolphus also used conciliar procedure.[16] Due to the fact that many English martial men fought in continental armies in the

[12] These ordinances were translated by the anonymous author, "of the Military Judicature and Method of Proceeding both in Criminal and Civil Causes in the Modern Imperial Armies" TNA WO 93/6; the author translated these ordinances from the monumental work of Petrus Pappus von Tratzberg, *Corpus Iuris Militaris* (Amsterdam, 1674), a work which had multiple printings and which was orginially written in Dutch in the early seventeenth century and later translated into German. It is believed that Tratzberg played a signal role in the genesis of Dutch martial jurisprudence, Jan Willem Wijn, *Het Krijgswezen in den Tijd Van Prins Maurits* (Utrecht: Drukkerij Hoeijenbos & CO N.V., 1934), 82, 102-03.

[13] Jan Willem Wijn, *Het Krijgswezen in den Tijd Van Prins Maurits, passim* but for military justice see 81-115. This has been briefly summarized in English by Jonathan Isreal, *The Dutch Republic: its rise, greatness, and fall, 1477-1806* (Oxford: Clarendon Press, 1995), 267-8. The English mercenaries were less than pleased by this court's claims to jurisdiction over them. See David Trim, "Fighting Jacob's Wars. The Employment of English and Welsh Mercenaries in the European Wars of Religion: France and the Netherlands, 1562-1610 (unpublished PhD dissertation, University of London, 2002), 191.

[14] I.A.A. Thompson, *War and Government in Habsburg Spain, 1560-1620* (London: Athlone Press, 1976), 42-8.

[15] "Of the Method of Proceeding against Criminals and other Offenders in the French Armies" TNA WO 93/6 (unpaginated, no folio numbers); however, the author here has gotten his dates wrong. He assumed that Louis XIV replaced the provost's court with a "conseil de guerre", but the conseil de guerre as a juridical body was present in French armies at least by the 1630s, see David Parrott, *Richelieu's Army: War, Government and Society in France, 1624-1642* (Cambridge: Cambridge University Press, 2001), 528-33. Also see John A. Lynn, *Giant of the Grand Siècle : The French Army, 1610-1715* (Cambridge: Cambridge University Press, 1997), 397-414.

[16] Watts, *Swedish Discipline, 66-8.* The Swedish court required a unanimous decision.

early seventeenth century, they might have advocated that Arundel transform the court martial into a council of war.

Structural changes also influenced the shift from the martial court to the council of war. Prior to the 1570s, English armies possessed almost no intermediate officers. Instead, with the marshal leading the vanguard, the constable leading the rearguard and the lord general supervising the "battle" or middle, the army only possessed a small high command followed by captains. By the end of the century, English commanders began emulating the Spanish practice of dividing the army into *tercios* – the English would call them regiments – based loosely on the Roman legion. Each *tercio* had its own officer corps, which included *auditors*, commissaries, clerks, quartermasters, and led by the *maestro de campo*.[17] In emulation, the English adopted the officer of colonel.[18] Eventually, the regimental structure of the army caused realignment in the English high command. The lord marshal, who was responsible for discipline as well as the vanguard of the army, disappeared as an army officer by 1639. With the departure of this office came also the departure of the marshal's court.

The structural transformation does not alone explain the shift from a court martial to a council of war. The lord general throughout the seventeenth century could still hear and determine cases on his own without aid of a council. But he almost universally chose not to do so. Part of the reason why was political.[19]

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[17] For an outline of the Spanish army see Parker, *The Army of Flanders*, 91-108. The Spanish in Flanders, however, did not adopt a council of war. Instead, due to the king's fears of corruption, he appointed a special judge as prosecutor who prosecuted military cases in the Low Countries. González de León, *The Road to Rocroi*, 107-20.

[18] *Cruikshank, Elizabeth's Army, 51-2. The French likewise adopted this structure. James B. Wood, The King's Army: Warfare, Soldiers, and Society during the Wars of Religion in France, 1562-1576* (Cambridge: Cambridge University Press, 1996), 106-110.

[19] Common lawyers also probably, had they the opportunity, advocated for this shift. An anonymous tract on the laws of Ireland in the late sixteenth century, declared that all colonels have powers of martial law but the form of

In English political thought, good public counsel moderated arbitrary power. "The end of all doctrine and study" wrote one prominent Henrician political theorist "is good counsel…wherein virtue may be found."[20] The king had the right to choose his own council but he had the duty to listen to that council once it was convened. To some, this counsel should be conducted in open space, where those concerned about the public good of the polity could have their voices heard. This exchange did not completely delimit the monarch's great and almost supernatural powers. Rather, it enabled the king or queen to balance their prerogative powers, which were used only in extraordinary times, with the liberties of their subjects. These ideas were also true of the army, where the lord general was supposed to take counsel. Elizabeth, in her commands to the Earl of Essex in 1596 before his attempt to relieve Calais, for example, instructed him not to take any important measure without first taking counsel with his officers.[21] When it came to law, public counsel would uncover malicious prosecution and spurious information thus saving the innocent from wrongful conviction. It would also exonerate for all to see those who had been wrongly accused.

Increasingly over this period, both soldiers and commanders opted for trial by council. Some avoided private hearings at martial law because they wanted everyone to know the justice of their cause. This was the case for lord Willoughby in 1589. A commander in the Low Countries, Willoughby in January of that year became aware that one of his captains, Thomas Maria Wingfield, had gone to England to complain about Willoughby's delegation of prisoners of war to other soldiers when Wingfield believed they and their potential ransoms belonged to

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martial law "must be by formall tryall by a jury (*sic*) of his fellow soldiers and nott at the will and displeasure of the colonel." NLI, Ms. 3319, f. 23.

[20] Quoted in Guy, "The Rhetoric of Counsel in Early Modern England," 293.

[21] Instructions of the Queen to Essex" TNA, SP 12/257/135.

him. Willoughby stated in his letter to the Privy Council that he bore Wingfield no ill will and that a council of war should decide the matter: "the hearing here may be in public, as the offence was, and by a council of war, as the wrong was done in a kind of council."[22] Willoughby assured the Council that his conduct could easily be defended.

English commanders and governors constantly worried about being undermined. A charge of misconduct, or tyrannical government that found its way to one of the governor's enemies on the Privy Council might mean the end of one's career. Using councils of war were thus a way to preemptively rebut any such charge. Willoughby, as we have seen, performed such a maneuver in 1589. He did it again, this time as governor of Berwick upon Tweed, in 1600. That year, a dispute arose between the master of the ordnance, Sir Richard Musgrave, and Sir William Bowes, the marshal of Berwick, over Willoughby's use of eight guns, which Musgrave claimed were for the town but Willoughby had assigned to his own ship.[23] Musgrave claimed that Willoughby ruled the town by "martial law," a jurisdiction he claimed went unused in the town, and that he had dismissed Musgrave's claim by this arbitrary form of law. In response, Willoughby told Sir Robert Cecil that he had referred the case to a council of war comprised of twenty of the towns "worthiest captains and gentlemen:" hardly in his estimation, an arbitrary form of adjudication.[24]

This same strategy was taken up by Thomas Wentworth, the lord deputy of Ireland, after he had convicted Lord Mountnorris of seditious speech against his commander in the winter of

[22] Willoughby to Privy Council January 1589, *CSPF*, 1589, 55,125, 332 (quote at 55).

[23] Richard Musgrave to the Privy Council, Oct. 1600, TNA, SP 59/39 f. 176.

[24] Willoughby to Cecil, 29 Oct. 1600, CBP, ii. no. 1270.

1635.[25] The trial raised eyebrows because it ultimately gave Wentworth control over the Irish customs revenue, which Mountnorris had been in charge of, a lucrative responsibility in seventeenth century Ireland. In his report to the secretary of state, Sir John Coke, Wentworth stated that nearly twenty men sat on the council of war that tried Mountnorris, including the marshal of the army and the lord president of Connacht. Justice had taken place, according to Wentworth, while he had "sat silent all the while."[26] In another letter to Coke only weeks later, Wentworth repeated that he had remained silent during the whole affair, and had allowed the council of war instead to carry out the judicial business against Mountnorris.[27]

Soldiers by the 1640s expected to have their cases heard before a council of war. If this process was not given to them, complaints, even riots, ensued. In the admittedly radical atmosphere of 1647, the soldiers of Colonel John Poyntz, who were stationed in the north of England as part of Parliament's peacekeeping force in the aftermath of their victory over Charles I, mutinied against their commander. Poyntz, a grizzled veteran of the Thirty Years War who was known to be a disciplinarian, was unpopular for many reasons. The soldiers wrote down charges against the colonel, perhaps unrealistically expecting that the lord general of Parliament's forces, Sir Thomas Fairfax, would try Poyntz at martial law for his wrongs. Their charges included suspected Presbyterian loyalties and his supposed contempt Fairfax. The sixth article charged that Poyntz had "arbitrarily" committed some officers for speaking on behalf of

[25] The article Mountnorris was convicted of violating three articles: "no man shall give any disgraceful words, or commit any act to the Disgrace of any person in the army or garrison or any part thereof upon pain of imprisonment…: No man shall…contemptuously disobey his commander…upon pain of death." "Minutes of the Council of War" 12 Dec 1635, in William Knowler, *The Earl of Strafford's Letters and Dispatches* 2 vols. (London, 1740), i. 501.

[26] Wentworth and Council of War to Coke 15 Dec. 1635, in Knowler, *Strafford Letters* i. 498.

[27]Wentworth to Coke 3 Jan. 1636, in Knowler, *Strafford Letters*, i. 505.

the army's wishes and for "hanging one soldier without a council of warr."[28] In another case, on board the Torrington in 1655, sailors accused one Captain Clarke of multiple offences. One of those including ducking sailors without first having them tried at a council of war.[29] Before discipline could be administered, soldiers and sailors believed that they deserved an opportunity to be heard in court before a council.

Coming Before the Court

These prescriptive rules were put in practice throughout England, Ireland, and in garrisons abroad. Records of their application exist from campaigns in England and the Low Countries, garrisons in Scotland, Ireland, and Tangier, and from ships located in the Caribbean and Mediterranean.[30] It is tempting to collate all of these together and provide a statistical analysis of the types of wrong punished, the conviction rate, the rate of capital punishment sentenced, and then compare those statistics with those of the large literature on crime in early modern England. [31] In doing so, we could make a series of generalizations about rates of conviction, capital punishment, and types of wrong punished. But in making these

[28] "Articles against General Poyntz" in *The Clarke Papers: Selections from the Papers of Sir William Clarke* ed. C.H. Firth, 4 vols. (London: Printed for the Camden Society, 1891-1901) i. 169. John Rushworth *Historical Collections of Private Passages of State* 8 vols. (London, 1721), vi. 620-5.

[29] Bodl. Rawl. A. Ms. 292.

[30] "Dundee Court Martial Records;" "Dublin Court Martial Records," "Waller Court Martial Records;" Bodl. Rawl Ms. A 295, 314; Bodl. Rawl. Ms. C. 972; TNA, WO 71/121; TNA, WO 89/1; TNA, ADM 1/5253; BL, Sloane Ms. 1957, 1959, 1960 and 3514. I have focused on these records. Records from the early 18th century are slightly more extensive. See for example, Churchill College, Cambridge Erle Ms. 4/8/1-2; "Blenheim Court Martial Records," BL, Add. Ms. 61,336; TNA, WO 71/122.

[31] The best analysis by far of the working of courts martial is in Donagan, *War in England*, 134-96; C.H. Firth, *Cromwell's Army* (3rd ed. London: Metheun & Co., 1921), 278-313. John Childs, *The Army of Charles II* (London: Routledge, 1976), 75-89. For naval courts martial, see Robert E. Glass, "Naval courts-martial in seventeenth-century England" *in New interpretations in naval history: selected papers from the twelfth Naval History Symposium held at the United States Naval Academy, 26-27 October 1995* ed. William B. Cogar (Annapolis (MD): Naval Institute, 1997), 53-64.

generalizations we would have to ignore the wide variation that exists amongst the surviving records. This inconsistency is a product of differences between courts martial in geography and time that makes it difficult to compare with the records of the assize sessions or the sessions of the peace.[32] Further, officers of the court took their highly specific environment into account when they deliberated any given case. They did not simply abide by abstract rules.

Nevertheless, there is one constant theme that runs through the courts martial records: common soldiers were different than officers. This distinction was most apparent in the punishment phase. The often brutal and humiliating corporal punishments meted out by courts martial were reserved for the common soldier or sailor. Officers only faced cashiering, imprisonment, and on rare occasions, the death penalty. Nevertheless, courts also protected soldiers and sailors from tyrannical superiors, both in allowing them to accuse their officer of abuses, and also by supervising the punishments of wrongs. Through martial law process, the court supervised their officers, their soldiers, and the relationships between them.

Martial law process began for defendants when they got caught. Thomas Minion, for example, let the wrong man into his conspiracy. Serving in the English army in the Low Countries that was fighting France in 1697, Minion hatched a plan to escape from service. He and several co-conspirators would flee to Brussels, where they would find work until the army departed the area. Then they would make their way back to England. Unfortunately for Thomas, one of his companions "discoursed" the plan with a sergeant, and his superiors caught Minion

[32] The historiography of crime in England has become very large. For an overview, see J.A. Sharpe, *Crime in Early Modern England, 1550-1750* (London: Longman, 1984). Several excellent county studies also exist for the early modern period. J.A. Sharpe, *Crime in Seventeenth Century England: A County Study* (Cambridge: Cambridge University Press, 1983); Joel Samaha, *Law and Order in Historical Perspective: the Case of Elizabethan Essex* (New York: Academic Press, 1973); Herrup, *The Common Peace*. For the eighteenth century, see Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford: Oxford University Press, 2000).

before he had a chance to escape.[33] Others were often captured after a slip of the tongue or a slip of the fist towards an unbearable superior.[34] Former comrades caught some in nearby towns after they had deserted. Provost marshals arrested others after an informant complained to the judge advocate general that they had committed a wrong. For officers, process began when they had been formally accused, usually by inferior officers. After they had been caught, the provost marshal supervised the accused in the jail that the army had constructed.[35]

Martial law process began for those wronged in the office of the judge advocate general. It was he who formalized and registered the complaint, and brought the case before the court. It was to this office that Elizabeth Michelson and Margaret Patterson came to in Dundee in 1651 in the aftermath of one of the most traumatic nights of their life.[36] At midnight, the soldier James Grahame came to their door. He decided to take off all his clothes, and then threw himself at Michelson, who he beat after she attempted to resist him. He then tried with Patterson, who also resisted him. He threatened to burn their house down, but settled for more physical attacks. In response, the two women sought out the judge advocate general. Just as often, the judge advocate wrote up the charge based on his own information he had obtained as an investigator. It was by this method that Dudley Loftus, the judge advocate for the Dublin garrison, in 1651 brought Gerrald and Henry Beagtah before a court martial for spying.[37]

[33] TNA, WO 71/121. These records do not contain page or folio numbers.

[34] See the case against James Hilton for assaulting his superior officer. TNA, WO 89/1, fos. 69-70.

[35] The army generally constructed makeshift jails while on campaign. See TNA, AO 1/299/1137.

[36] This case was not calendared by Godfrey Davies. It can be found in Worcester College, Oxford, Clarke Ms. 21 fos. 32-3. Donagan, *War in England*, 185-6.

[37] "Dublin Court Martial Records," 98.

Information had to be provided to the judge advocate quickly after a suspect was detained. By the English Civil War, the army stipulated that those incarcerated needed to be charged within forty eight hours otherwise they would be released, and the jailor subject to punishment by the court. In the 1650s, this timeframe was reduced to 24 hours.[38] In the armies of the Low Countries, William III likewise lowered the temporal requirement to 24 hours in 1697.[39] In Dundee, the court martial chastised the commanding officer of Phillip Powell for not providing it with an information for why he was imprisoned. The officer eventually submitted a plaint against Powell for swearing, and Powell was sentenced to the ten days imprisonment he had already served.[40] We often now think of martial law as being a site where prisoners could languish seemingly forever before they were charged or came to trial. This perpetual detainment was hardly the case in the seventeenth century.

If a common soldier or a civilian spy was caught, the information alone sufficed. But for an officer, a formal accusation was usually required.[41] The key difference between the two was that the accuser had to put his or her own reputation on the line in prosecuting the officer. If their accusation proved malicious or unnecessary, they could face punishment – what in Roman Canon law was called the *poena talionis*.[42] In 1680, a court martial on board the ship Bristol handed down this penalty to Thomas Woodgreen for making a false accusation against his

[38] "Order of the Court, 1697" TNA WO 71/121, (un-folioed).

[39] TNA, WO 71/121, unfolioed.

[40] "Dundee Court Martial Records," 21.

[41] There are exceptions to this rule. For example George Walsh, a former captain, had abandoned the Commonwealth's armies in Ireland in 1652 for those of the Royalists forces. He was arraigned upon an information by the advocate, convicted, and executed. "Dublin Court Martial," 103.

[42] R.H. Helmholz, *The Oxford History of the Laws of England* : *Volume I The Canon and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press, 2004), 605-08.

commander, captain Richard Dickinson, in two "very abusiue letters."[43] For his wrong, to which he confessed, the court ordered Woodgreen whipped five times on the side of each ship in the fleet with his wrong written on a placard hanging around his neck. In order to avoid this fate, accusers needed to provide detailed charges against officers. This was true even of superior officers desirous to take their inferior officers to court for some perceived wrong. These charges, which often stretched to over ten in number, did not directly reflect the prescriptive ordinances in the articles of war. Instead the charges pointed to highly specific abuses of power or neglect of duty that might prove through accumulation the defendant's guilt of transgressing one of the ordinances of war. Let us examine one such charge, made by Major John Miller against Lieutenant George Lascelles and Ensign Roger Kirkby on 20 November 1672 about wrongs supposedly committed by the two men stationed in England on 14 and 15 November.[44]

The process against Kirkby and Lascelles was continued with a command to commence a court martial. On 15 November Charles I issued a warrant to the commander the Earl of Craven to convene a court martial of twelve captains with the colonel of the Coldstream guards to act as president.[45] The court martial was to abide by the rules set forth by Charles, and to decide the case according to the rules of military discipline. This particular court martial was to meet in the Officer's Room of the guard house at Whitehall.[46] On the same day after the warrant was issued, the Earl of Craven ordered the two men committed to the custody of the marshal. In other courts martial the command to convene a court martial became *pro forma*; commanders issued them on

[43] TNA, ADM 1/5253, f. 3.

[44] Miller V. Lascelles and Kirkeby TNA, WO 71/121. The charge was dated to the 20 November, 1672.

[45] TNA, WO 26/1, f. 446. For other warrants, see Ibid., 23, 356. "Order for a court martiall to examine a complaint of misdemeanor against Lieut. Saddlington, July 1674,"TNA, WO 71/121.

[46] "Judgement of the Court Martiall agt Ensigne Kirkeby" TNA, WO 71/121.

an assigned day for the court martial to convene. At least in Tangier, these forms emulated the spirit of the "gaol delivery" writs at common law, where the commander ordered the court martial to hear and determine all of the cases of those currently incarcerated.[47]

Major Miller, presumably the commander of both Kirkby and Lascelles, made ten charges in writing against the two men for the court which convened on 20 November. According to Miller, the two men began swearing at each other in the guard house, and in the presence of officers, Lascelles struck Kirkby over the head. The second charge related that Lascelles then drew his sword after the officers had parted the two men, and struck one of the men, a sutler of the guard, who tried to hold him back. After he had been disarmed, according to Miller in his third charge, Lascelles continued to swear that he would run the man through with his sword. Yet the commander eventually returned the sword to Lascelles, who had promised to remain quiet, even though Lascelles and Kirkby were still in the same room together. Upon seeing the quarrel begin again, the captain of the guard sent his sergeant to stop it, but before he could Lascelles "bottled" up the door to the guard room – and this was the fourth charge – where he and Kirkby were stationed. By the time the sergeant went around to the other door, Lascelles flew out of the room from the door that had been bottled, and once cornered, drew his sword and ordered the sergeant to obey his commands and not those of the captains: the fifth charge. Lascelles threatened the sergeant that he would kill him should he attempt to disarm him: the sixth charge.

Lascelles then decided to pour some more fuel on the already burning bridges. According to the seventh charge, Lascelles shouted that he was a better man than all of the captains in the regiment, that he cared "nott a Turd" for his commission as a lieutenant, and that he could "liue

[47] BL, Sloane Ms. 3514, f. 8.

better without itt than any of them all."[48] After he had cooled down, according to the eighth charge, Lascelles in a bout of honesty admitted that had anyone attempted to take his sword, he would have struck them in the face with its pommel. Several hours later at midnight, the quarrel was resumed. Ensign Kirkby– who up until this point had been a much less colorful participant in the quarrel – returned to the guard room, and decided to throw a candle at Lascelles' head: this act comprised the ninth charge. The following morning, Captain Miller upon command from the Lord Craven, the colonel of their regiment, ordered both of them to be detained by the marshal. Kirkby complied, but Lascelles claimed that he was too ill to leave his quarters. The tenth charge claimed that after Lascelles made this excuse, he left the barracks, and did not return for two days. The articles were thus a narrative of all the events that had taken place over the course of 14 and 15 November; with each failure by Lascelles and Kirkby to do their duty demarcated as a specific charge.

After Miller submitted the charge, both Lascelles and Kirkby had the opportunity to respond. Lascelles' answers provided the court with an alternate narrative of the night and following morning in question.[49] Lascelles claimed that he was "highly provoked by Kirkby," because the ensign had called him a coward, and therefore had not instigated the fight. He struck the sutler only after the man had beaten him repeatedly. As for threatening the sergeant, Lascelles claimed he had already begged for and received pardon for it so he could not be tried for it. To the accusation that he had bottled up the door, Lascelles claimed that he was simply assuming his duty to be on guard, as it was his time to do so. To the fifth, Lascelles denied he ever denounced the authority of the captains, but simply declared that he had a right to defend

[48] Ibid.

[49] "An Answer to the Articles exhibited against Lieutenant George Lascelles," TNA, WO 71/121.

himself against Kirkby. To the sixth, he blamed the captain for not locking up those men who had attacked him. To the seventh, Lascelles argued that he stated that he "car'd not a turd" for those men who tried to heave him out of his commission, and that it was readily apparent that he always provided good public service to his majesty. To the eighth, Lascelles once again blamed the captain for not detaining those who had provoked him earlier. To the ninth, Lascelles reported that the candle had in fact hit his neck, not his head, but that Kirkby had successfully nailed him in the head with a silver tankard. To the tenth, Lascelles responded that he had been unable to get out of bed in the morning to answer his master's summons – it is not all that difficult to guess why – and an hour later when Lascelles found the ability to rise and make his way to his master's office, he was no longer there. Lascelles claimed that he believed he had done all that was expected of him and the matter to have been over. In a much different strategy, Kirkby responded that he, "as a louer of truth," confessed to his guilt in the first and ninth articles, and submitted to the judgment of the court.[50]

After the answers were provided, the court then sought more information. Captain Miller more than willingly responded to Lascelles.[51] Miller argued that Lascelles had in fact through his answer confessed to many of the charges, that his response to the charge that he had bottled up the guard house door because it was his time to be on guard to be ludicrous, as was his claim that it was the fault of the commanding officers for not locking up his tormentors for him threatening to run through any man who tried to take his sword away. Along with this response, the advocate, John Barron, obtained information from five of the officers in the regiment. Much of the information taken was consistent with the charge made by Miller, although Barron managed to

[50] "The Answer of Roger Kirkeby Ensigne to the Articles exhibited at the Court Martiall." TNA, WO 71/121.

[51] "The Reply of Maj. John Miller to lieut. George Lascelless" TNA, WO 71/121.

obtain a narrative about how the fight began. The court thus had in its possession before it sat information from six officers who had witnessed the altercation as well as two responses from the defendants.

The court interrogated witnesses similarly to that of French confrontation procedure where depositions were taken in advance, but the witnesses were still required to confirm their testimony *viva voce* upon oath.[52] The courts commenced by having the officers swear upon a bible that they would hear and determine the matter truly.[53] It then deposed witnesses who had already provided written depositions so that the court could interrogate the witnesses about the defendants' counter-claims.[54] For example, Searjent Rente, who had signed the information given to the advocate, swore his written information was true, and said nothing more because Lascelles' answers had not challenged Rente's testimony. After a two day adjournment, the court deposed more witnesses, pressing them on whether Lascelles' answers, that he had not instigated either of the two fights, and had only brandished his sword because his tormentor had not been properly detained, were correct. The witnesses thus gave more information on the origins of the fight so the court could investigate Lascelles' claim that he was not the instigator We now know it began after Lascelles won a contest of strength "of their armes by straining hands," the loss of which apparently infuriated Kirkby. They engaged in this competition in the aftermath – let us not be too shocked – of an extensive bout of wine drinking. The court then focused on finding whether the sutler had struck Lascelles first, whether Kirkby had been properly detained (he had not), and how Kirkby managed to return to the guard room later on in the evening in order to re-

[52] John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, MA: Harvard University Press, 1974), 231-9.

[53] For an example of the oath that court martial officers took see, TNA, CO 140/3, 648.

[54] "Examination Taken in Court 20 & 22 Nov. 1672" TNA, WO 71/121.

commence the fight, and if he was responsible for instigating the second round. Kirkby admitted that he was responsible for returning to the guard room.

The confrontation procedure was only one way courts martial could depose witnesses. Just as often, courts martial used a commission comprised of military officers to take written depositions for the court. It was by this process that Isaac Dorislaus, the judge advocate general of the Parliamentary army of the Earl of Essex, facilitated the deposition of witnesses for the 1644-5 case between Thomas Sanders and Sir John Gell, his commanding colonel.[55] Gell had accused, in even more detailed charges, Sanders of disobedience. In order to better make sense of the charges laid by Gell and the responses made by Sanders, Dorislaus commissioned several officers to examine witnesses that were provided from both sides.[56] Along with the commission, Dorislaus issued instructions to his interrogators which gave them very specific questions they needed to ask each witness in order to prove or disprove the charges and responses.[57] Once the depositions had been taken, the court would have examined them and come to a decision on the case.

Meeting in private, the president put questions to the court for each article. These questions included guilt, intent, and if the charge was valid or redundant. Each commissioner would vote on the question given, and the answers would ascend from the lowest ranking officer on the court martial to the president. A simple majority was necessary for affirmation of guilt. The commissioners decided that Kirkby was the aggressor, and that Lascelles was justified in drawing his sword. The third article was deemed irrelevant. Lascelles was guilty of bolting the

[55] The preliminaries of the case survive in Sanders' archive. DRO, 1232M/027-033.

[56] The commission does not survive. But two survive from the period, including one from Dorislaus. See LPL, Ms. 709 (Shrewsbury MS), f. 80, and BL, Add. Ms. 29, 974 f. 371.

[57] "Interrogations to be ministered or whatsoever witnesses that are to be pduced sworne and examined vpon additional articles…"DRO, Ms. D1232M/033.

door against his commander's wishes. He was guilty of running into the guard room with his sword raised, and of commanding the soldiers to follow him instead of the captains. He was also guilty of the sixth charge: threatening to kill the sergeant. He was guilty of rude and unbecoming language. He was acquitted of the eighth charge, of declaring that he would have hit someone with the pommel, because the court did not believe this statement was made as a threat, but instead as a condemnation of his own previous behavior. The ninth charge, that Kirkby hit him with a candle, was not concerned with Lascelles. He was found guilty of the tenth: that he had neglected his duty by not obeying the commands to appear before his superiors on 15 November. We can see that Lascelles's responses worked to a degree, as he was acquitted of several charges based on the arguments he had made.

The judgments came to the officers on 22 November. The court declared that Kirkby was the instigator of all the trouble, and that he was to be suspended from duty and confined until his majesty's pleasure be further known.[58] Lascelles was convicted of continuing the fight, of neglect of duty, and of "mutinous misdemeanors."[59] He, like Kirkby, was suspended and confined indefinitely until Charles decided that his pleasure in the matter be known. We can see that while the court knew the substance of the articles of war, it never exactly matched the charges leveled against the officers with specific articles of war. This was common for trials amongst officers. What the court was attempting ultimately to decide was whether the officer had failed in his duty, either by neglect, incompetence, or by open defiance to his superiors.

So too were the punishments handed down to Kirkby and Lascelles. Officers convicted of non-capital offences, and they were rarely tried for capital offences, usually faced being

[58] "Judgement against Kirkeby" TNA, WO 71/121.

[59] The sentence was recorded on the judge advocate's calendar. TNA, WO 92/1.

cashiered, being fined, or being imprisoned. It was dishonorable to discipline an officer with corporal punishment. Usually, officers faced punishment for fraud or neglect of duty. Major Willett, for example, was convicted of providing false musters –a fraud committed by an officer who claimed a larger number of men enlisted than those that existed in reality and in so doing pocketing the fabricated men's pay – and was cashiered. Naval officers were often punished for grounding ships or not preventing their firing.

The time from the fight to the sentence totaled eight days. The court, in other words, took care of its judicial business fairly quickly. But we can also see through an examination of this process how it might take much longer. Indeed, these trials could drag on for some time, especially if the key witnesses for the trial could not be deposed. This problem arose in a case between Lieutenant Scott, the accuser, and his Captain St. George who was the defendant (we only know their last names) in Ireland in 1652. We do not know a lot about this case, but apparently it involved a controversy over the sale of a gelding by St. George.[60] On 16 June, the court commissioned several officers to examine the witnesses for both sides. Their depositions were not due for six weeks.[61] One week later the court revised this order. It relieved the commissioners of their duties and instead ordered the advocate of the army stationed in Connacht, the far western province of Ireland, to depose the witnesses instead. Apparently, the case required the deposition of men stationed on the other side of the island.[62] This was not the best showing for the supposedly speedy and terrifying court martial.

[60] "Dublin Court Martial," 110.

[61] Ibid., 106.

[62] Ibid., 108.

Common soldiers, just like their commanders, had their day in court. And jurists cared just as much about obtaining proof of the wrong they committed as they did in cases involving officers. Granted, if a soldier was brought up on charges of insubordination or blasphemy, his trial was not nearly as complicated or as long as that of an officer. The chances of a soldier being acquitted of a misdemeanor were almost zero. Nevertheless, judge advocates insisted on deposing witnesses, and obtaining information.[63]

By the middle of the seventeenth century, martial jurists and commanders had invented a variety of creative, painful, and intensely humiliating punishments for soldiers who in one way or another neglected their military duties. These punishments were always carried out by the provost marshal and his assistants on "parade day" or muster day, where the regiment gathered together in an open space to learn the gruesome lesson. By far the most common punishment was whipping. Philip Boggis, a soldier serving in Dublin in 1652, was convicted by the court martial of stealing; the court martial sentenced him to be "whipt from the castle gate to the gallows," and to receive 40 lashes.[64] Likewise, a naval court martial convicted Herbert Boyle, of leaving his station without authorization. It sentenced him to be whipped while tied to the mast of his ship.[65] Peter Thorne, a soldier, and Elizabeth Anderson were convicted of fornication in 1651 in Dundee. The court sentenced them to be whipped from the east gate of the city through to the west gate, all the while wearing irons.[66]

[63] See for example, a case of John Bayly on board the Torrington for blasphemy. The advocate deposed multiple witnesses in order to prove the case against Bayly. Bodl. Rawl. Ms. A 295.

[64] Ibid., 73.

[65] TNA, ADM 1/5253, fos. 27-v.

[66] "Dundee Court Martial," 14.

Whipping was the least original of the corporal punishments. Another common punishment, which probably came out of the armies of the Holy Roman Empire, was "loping the gantlope." The culprit had to run through a narrow opening with his company members on either side, who whipped him with sharpened reeds. The gantlope, or eventually, gauntlet, would become a staple punishment within English armies from the 1640s onwards.[67] So too would "riding the horse."[68] The convict would have to sit on a wooden horse, with his hands tied behind his back and often with weights attached to his feet. Another was "picketing", where, according to Francis Grose, an expert on military antiquity:

> A long post being driven into the ground, the delinquent was ordered to mount a stool near it, then his right hand was fastened to a hook in the post by a noose round his wrist, drawn up as high as it could be stretched.[69]

Along with these, courts martial often sentenced convicts to lie "neck and heels tied together," where one's arms and legs were stretched backwards into a bow like shape and tied together. Convicts usually had to maintain this position publicly for an hours' time. Others were tied up until they stood on their "tip-toes" for a time. Some faced short periods of imprisonment chained in irons with only bread and water for sustenance. Many, after these punishments had been enacted, were dismissed from service.[70]

Those who were punished had a lesson to teach their colleagues. At martial law, commanders understood the court and the subsequent punishments it meted out as a part of a

[67] William Watts, *The Swedish Discipline, religious, civile, and military*, 59; Firth, *Cromwell's Army*, 289; James Turner, *Pallas Armata* (London, 1683), 348.

[68] Firth, *Cromwell's Army*, 290-1.

[69] Francis Grose, *Military Antiquities respecting a History of the English Army from the Conquest to the Present Time* 2 vols. (London: Stockdale, 1812), ii. 105.

[70] Ibid., 101-09.

classroom lesson. Councils of war taught their men visually, what perhaps they had not fully learned from reading or listening to the articles of war, how to behave, and the consequences for misbehavior. The soldier, who had been convicted of drunkenness, or of fighting, or of some breach of his moral duties, ultimately played a vital role in this course on discipline. It was through his example, and hopefully he taught his lesson well by taking his punishment obediently, that his colleagues learned how to be better soldiers.[71]

Acquittal was much more likely for cases that involved life and limb. Courts desired either eyewitnesses or a confession before they sent down a capital conviction.[72] In the murder case against Corporal Joshua Waddington in 1688 onboard the Ship Mary, for example, the court deposed multiple witnesses and obtained a confession from the defendant before it sentenced him to death.[73] When it came to desertion, the perpetrators were often caught red-handed, and confessed to their crime. The court acquitted defendants based upon declarations of insufficient evidence. John Fryer, a soldier in William III's army, got off for this reason in 1697. At his court martial in Bruges, Fryer stood accused of kicking one of the burghers of the town, and of taking his sword.[74] The court declared Fryer to be not guilty because the evidence provided was

[71] The best work on the spectacle of punishments is Petrus Cornelius Spierenberg, *The Spectacle of Suffering: Executions and the Evolution of Repression: from a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984). For the ways in which public punishments simultaneously undercut and transmitted Crown authority, see P. Lake and M. Questier, "Agency, Appropriation and Rhetoric under the Gallows: Puritans, Romanists and the State in Early Modern England," *Past and Present* 153 (1996): 64-107. For the public performance of pardons, see K.J. Kesselring, *Mercy and Authority in the Tudor State* (Cambridge: Cambridge University Press, 2003), 136-62.

[72] In one naval court martial case, a murder suspect was acquitted even after the murder weapon was found in his room, and after the dying person implicated him as the murderer. Bodl. Rawl. Ms. A 295 (un-folioed).

[73] TNA, ADM 1/5253, fos. 67-8.

[74] TNA, WO 71/121.

insufficient. The soldiers John Still and John Ware in 1697 likewise were acquitted on a desertion charge due to the insufficiency of the evidence brought against them.[75]

The court's concern over evidence extended even to supposed "Irish spies" in the 1650s: a period in history where we might expect the English to arbitrarily execute Irish men and women. Let us examine the case of Rowland Eustace heard before the Dublin Court Martial in 1651. In that year, the judge advocate submitted information against Eustace, an inhabitant of County Kildare, which accused him of spying and of aiding the enemy against the Commonwealth's forces. We do not know what the information contained. But a short record of the Court's decision to not punish Eustace with death reveals its concerns about evidence. The court declared that after hearing the evidence against Eustace, there were "strong and pregnant presumpcions" that he was guilty.[76] A presumption, we shall recall, was an assumed truth that could be used as a half-proof in continental or English ecclesiastical courts. But a presumption was not enough to convict capitally for this court martial. The court voted against conviction based on insufficiency of evidence.

But the court did not acquit Eustace. Instead he was punished at the discretion of the court, and banished into the province of Connacht. The court martial convicted Eustace by what Barbara Donagan has labeled "the devils article."[77] This was the last article of the "Administration of Iustice," which stipulated that all "other Faults, Disorders, and Offences not mentioned in these articles, shall be punished according to the general Customs and Laws of War."[78] The naval articles of war possessed a similar ordinance.[79] From the example of Eustace,

[75] Ibid.

[76] "Dublin Court Martial," 139.

[77] Donagan, *War in England,* 146.

[78] Firth, *Cromwell's Army*, 422.

we can see that the court used this article to convict those who it could not convict of capital offences of a misdemeanor offence. The devil's article, it would seem, was enormously unfair to defendants.

Yet much more often than not, defendants found salvation, and not damnation, through the devil's article. For it was through this article that the court mitigated punishment for defendants. For example, in 1652, John Bayly appeared before a Dublin court martial for "running away from his colours at Killencarick," an offense punishable "upon paine of death."[80] Yet Bayly was not convicted on this article. Instead the court tried and convicted him upon "the last article of the administracion of justice."[81] The court ordered Bayly to "lope the gantlope" through his entire regiment, a humiliating and painful punishment, but a non-capital one. The Dublin court convicted 18 people on the last article of the administration of justice.[82] The Dundee court convicted thirteen offenders by the same article.[83] In these cases, they borrowed language from common law. The navy conducted a similar practice. During 1689-90, naval courts martial convicted four men by the devil's article, thus saving their life.[84]

Our best evidence of this process comes from the courts martial sitting in Dundee in 1651. Here the court glossed the article as the "article of misdemeanor." For example, in a case against Richard Boulton for mutiny in a market, a crime punishable by death only, the court deliberated:

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[79] 13 Car. II. C.9.

[80] Ibid., 78. The articles Bayly's act would most likely have fallen under or the second article of In Duties in Action: "No man shall abandon his Colours, or flye away in Battail, upon pain of death": another possibility would have either been number 3 in Duties towards superiours and Commanders: "No Souldier shall depart from his Captaine, nor Servant from his Master, without license, though he serve still in the Army, upon paine of death."

[81] Firth, *Cromwell's Army*, 422.

[82] "Dublin Court Martial Records."

[83] "Dundee Court Martial Records."

[84] TNA, ADM 1/5253.

> Question. Whether Richard Bolter shall bee tried uppon the Article of Mutinie or disorder, or of theft, and offering violence to those that bringe victuals to the campe where the penalty is death, or uppon the Article of Misdemeanour?
> Carried to try him for misdemeanor.[85]

The court in these instances acted as translator. A specific breach of duty was brought to its attention, and the court decided how that specific information related to the broad abstract rules written into the articles of war. The specifics of the case were taken into account. Was the soldier trying to leave the army altogether, or did he leave for a short period of time and plan on coming back? Did the mutinous riot in the marketplace actually threaten the authority of the high command? The court mulled whether or not soldiers needed to be taught a capital lesson from a specific offence. And it also considered the disposition of its polity. Perhaps, if the garrison was underpaid or underfed, severe punishment might lead to mutiny from the soldiery. All of these background facts were taken into account when the court made judgments.

In some instances, the court used rules from other forms of law to justify moving from a capital offence to a misdemeanor offence. In Scotland, for example, the court heard a case against John Dodd, a soldier who had killed another soldier, Henry Thompson.[86] When examined before the court, Dodd claimed that he had struck Thompson because the two had gotten into a fight, but he had not intended to kill him. Therefore, he should not be convicted of capital or willful murder, but instead of manslaughter. The court, in particular the president, Colonel Cobbett, believed Dodd. But the articles of war did not differentiate between willful murder and manslaughter. So the court instead of looking to the rules embedded in the articles of war, looked to the bible. Cobbett had the clerk of the court read Numbers 35.22:

[85] "Dundee Court Martial Records," 59.

[86] Ibid., 65.

> But if hee thrust him suddenly without enmity, or have cast uppon him any thinge without laying of any waite, or with any stone wherewith a man may die, see him nott and cast itt uppon him that hee may die, and was nott his enemy neither sought his harme, then the congregation shall judge between the slayer and the revenger of bloud according to these judgments.[87]

If the congregration found that it was not a purposeful murder, they "shall deliver the slayer out of the hand of the revenger of bloud."[88] The court, analogizing these rules into martial law, delivered Dodd. Instead of killing him, it voted him to be imprisoned for two months, and to pay Thompson's widow twenty pounds for his wrong. Through analogy, the court saved Dodd's life.

In some instances, the court's rulings must have caused anguish for those seeking justice. Surely Susan Holmes and her father came away from their experience with the court martial that met in Tickhill in 1646 feeling that they had not received justice.[89] According to the court, Holmes accused a soldier by the name of Andros of "ravishing" her. But the court, upon examining evidence taken from her minister to whom she first confessed the incident, declared that Andros was not guilty of rape. He escaped conviction of this capital crime because the court said that he threatened Holmes' father unless he command Holmes to attend Andros in his quarters. Because Holmes obeyed her father's command, she had not been raped. The court punished Andros through the article of misdemeanor. He was to hang by his hands, with no part of his body touching the ground, for two hours every day except for the Sabbath. Andros was also to appear before an ecclesiastical court, which had the ability to apply further punishments to Andros. But he survived with his life.

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[87] Ibid.

[88] Ibid.

[89] PA, HL/PO/JO/10/1/204.

Along with informal mercy, commanders had the power to grant mercy for certain wrongs.[90] However, this formal power was used less often than at common law. At common law, a pardon from the monarch was always a possibility. More importantly, particularly for the unimportant and un-influential men and women of the world, common law in the seventeenth century had two forms of structured mercy: benefit of the belly and benefit of clergy. Benefit of the belly meant that a woman carrying child could obtain a respite from execution, at least until she gave birth. Benefit of clergy allowed a convict who had the ability to read obtain a pardon for some felony offences, if it was his first offence, by claiming the fiction that he was a member of the clergy. While there is one instance of benefit of the belly at courts martial, there is no evidence that the court allowed benefit of clergy.[91]

Instead, those who desired mercy depended on the whim of the commander. In one instance in 1697, the court martial sitting in Bruges managed to convince the general that Thomas Pew, a soldier in the army, was worth saving.[92] Convicted of murder, Thomas had confessed that he was so drunk he could not even remember that he had taken another's life. Inebriation was no excuse for committing wrongs at an English court martial. However, the court learned that Thomas' father, a sergeant in the regiment, had just been killed on the campaign. It decided to petition the general to grant him his life; the commander agreed that he should be spared. Others drew lots for their lives. William III charged one of his companies with mutiny in 1694, and the court martial capitally convicted them. The king ordered that all but four of them and the ringleader be pardoned: which four depended on luck.[93]

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[90] Herrup, *The Common Peace*, 163-92.

[91] "Dublin Court Martial Records," 115.

[92] TNA, WO 71/121.

[93] Ibid.

Between sentence and execution, specialists administered to the needs of the condemned. The provost earned one pound, two shillings, and six pence for giving the bad news to the defendant. After, the condemned received several forms of solace: first he or she received an "extraordinary treat," which included several pots of beer and a couple of pounds of meat. In those lonely hours, paid servants "did sit up with and wait upon the patients after ther condemnation to death," and provided them with comfort and company.[94] They earned half a crown per day for their efforts. The machinery of death – the rope, the ladder, and the bolts required for execution by hanging – put the army back three shillings. The executioner earned one pound for raising the condemned and for taking down the corpse. The provost received ten shillings for assistance in the execution, and another of his assistants received four. The two servants assigned to bury the deceased each earned 5 shillings.[95] The legal machinery of courts martial by the end of the seventeenth century was complex, and included many participants who had specialized duties.[96]

If courts martial in the sixteenth century were extraordinary for the amount of judicial discretion granted to the marshal or the lord general, by the end of the seventeenth century they had regressed to the mean. The court possessed discretion as the translators of wrongs; through this power it supervised the disciplinary regime of the army. This power, however, was fairly normal. Judges throughout English law courts possessed similar powers. And the discretion of the courts should not blind us to the fairly extensive set of rules which organized martial justice at the end of the seventeenth century. Through this combination of equity and law, martial law

[94] BL, Harley Ms. 6844, f. 275.

[95] Ibid.

[96] In another account, the army paid out for the setting up of a gibbet, and for the burial of two men, who presumably had been hanged. TNA, AO 1/300/1140.

commissioners regulated the relationships between members of the army and navy. Soldiers had to obey their commanders in the ways outlined by the articles of war; officers likewise had to obey their superiors. Failure in these or other areas led to an orderly examination by court officers, not by those wronged. Legal officers took down depositions and established charges. Defendants responded. Witnesses answered the court's questions. Debates were structured based on the hierarchy of the council, and attempted to establish the right decision given the specific context of the case and of the state of the army or navy. Punishments were regulated by the court, which it used in an attempt to teach soldiers right behavior. Courts martial were not the arbitrary and capricious tribunals nineteenth century scholars made them out to be.

Conclusion to Part Two

With their minds fixated on the practices and proceedings of the armed forces of European monarchs and the ancient practices of the Romans, the Crown and its council transformed martial law. They expanded and experimented with the articles of war. They transformed martial law procedure. And they created administrative structures that supervised martial law proceedings. These practices by the end of the seventeenth century shared few similarities with those practices in the sixteenth century that had once collectively defined martial law.

These transformations all included the creation of more rules. By the end of the seventeenth century, the procedures of courts martial were more elaborate than their sixteenth century predecessors. Every regiment had its own council of war, or regimental court martial, which could try any case that did not involve punishment by life and limb. Accompanying these new courts were regimental advocates who answered to the judge advocate general of the army. Regimental provost marshals likewise policed and jailed soldiers for their colonels. They answered to the provost marshal general. The general court martial of the army sat regularly and heard all offences relating to the army's officers, and those that involved capital punishment. English armies adopted rules relating to arraignment. Soldiers could only be imprisoned, depending on the general, for twenty-four or forty-eight hours before a formal charge in writing had to be delivered to the judge advocate general of the army. Otherwise the soldier could go free and his captor might in turn be charged. Meetings of courts martial became more regularized. Its cognizance over wrongs became laid down much more thoroughly in writing than the codes of the early sixteenth century.

These judicial bodies had cognizance over just about every aspect of a soldier's, or in the case of Virginia, planter's life. This reforming attempt meant more rules relating to behavior in camp, to treason, to obeying superiors, and to religious observance. The marketplace fell under the court's purview. In Virginia, each planter's occupational responsibilities were outlined in full. How soldiers conducted themselves in battle and while on guard duty were outlined in detail. If any person failed in any of these duties the court could punish him. Through this increased supervision, martial lawmakers aspired to create a highly disciplined polity that could triumph on the battlefield or in the wilds of Virginia.

We have an opportunity to understand the application of these new rules because courts martial records were increasingly kept and archived: a product of the attempts at improvement in military and naval administration that the Crown and Parliament had been in fits and starts engaging in over the course of the seventeenth century. These attempts, further, were part of general desires stretching back to 1585 to improve the Crown's war capabilities so that it could compete with the armies of continental monarchs. Strategy, tactics, discipline, the hierarchy of the army, the organization of the army and navy and record-keeping all underwent transformations over the course of the seventeenth century.

We cannot help but note unintended consequences of the end product. For in making all of these changes that supposedly were to increase martial discipline, commanders neglected one of the core values, if not the core value, or martial law process: its speed. On campaign or in uncertain times, when matters of law supposedly could not be decided by normal process, commanders opted for martial law. But by the end of the seventeenth century, courts martial looked remarkably similar to Roman Civil law tribunals. The supposedly exceptional process of martial law looked downright normal.

Part Three
Restriction: Martial Law and Time

In the spring of 1628, Charles I consented to Parliament's "Petition of Right," which concerned "divers Rights and Liberties of the Subjects." Almost immediately after the petition was granted, it joined the canon of English legal documents – Magna Carta, 25 Edward III, and later, the Bill of Rights – that have been thought to protect the rights and liberties of English men and women.[1] But like Magna Carta, the Petition of Right dealt not in abstract universals, but in highly specific grievances Parliament desired redressed. One of these were commissions of martial law Charles had given to local officers so that they might hear and determine cases against soldiers stationed throughout the south of England. Complaining that these commissions authorized trial by life and limb by procedures other than those of the laws of the realm, and that they authorized exemption for soldiers from the laws of the realm, Parliament asked that those commissions:

> may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by color of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.[2]

In trying to make sense of this clause, jurists looked to the laws of martial law crafted by those directly involved in the making of the Petition of Right. All of these texts argued that Charles had erred because he had violated the temporal restrictions on martial law jurisdiction. Martial law for these jurists was only legal in states of war. But what defined a state of war was

[1] Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Belknap Press, 2010), 15.

[2] *The Constitutional Documents of the Puritan Revolution, 1625-1660* (Oxford: Clarendon Press, 1906), 69.

contested amongst these writers. These various interpretations would be used, adapted, and debated across the English speaking world in the seventeenth century.

The Petition of Right had such a strong hold on the imagination of English men and women. But it was such a weak barrier to the mighty law making power of Parliament. Through ordinance, and later, through statute, MPs overturned the various constraints the lawmakers had constructed in 1628. Through Parliament, martial law remained one of the many laws of the realm.

Chapter Six:
Into the Hands of the Enemy:
Time, Martial Law, and the Petition of Right

In the spring of 1628, some of the most prominent jurists of the realm were contemplating time. They did so in the aftermath of a Crown experiment to issue martial law commissions to its county officers in order to discipline garrisoned soldiers. Their purpose was to restrain the jurisdiction of martial law in England. These jurists wanted to restrict trials by life and limb to those processes clause 29 of Magna Charta authorized – what many were now claiming should be interpreted as trial by indictment or presentment and trial by peers.[1] But this claim came with significant historical problems. The laws of the realm were many, and the Crown had used martial law in the past in England to try by life and limb. Their solution was to freely admit that martial law was one of many English laws, but that it was temporally restricted to states of war. Time would act as a barrier against its usage. Martial law was now an exceptional jurisdiction. But what signified a temporal shift into a state of war, and who interpreted these changes? Traditionally, we know that it was the king who controlled it, through the raising and lowering of his banner. Through a careful selection of past English legal discourse relating to the Court of the Verge, the jurists sitting in parliament removed the powers of time from their sovereign, and gave them to the enemy.

The common lawyers wrested the control of time away from the king because they connected the martial law commissions with other Crown policies they believed to be arbitrary or even tyrannical. In these years, the king had maintained standing forces in parts of the realm – a policy that was unusual in England – and billeted them in the homes of his subjects in the

[1] For a discussion of how jurists had read clause 29 prior to the Petition of Right, see Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Belknap, 2010), 137-40. Christopher Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008), 162-89.

countryside.[2] Charles did so because in 1624 his father had finally consented to military intervention in the wars on the European continent. From that time through the spring of 1628, Charles continued to pursue wars against the Spanish and against the French. Billeting was by far the most unpopular policy of the Crown. Others included the so-called "forced loan:" a form of taxation implemented by the Privy Council in 1626 that assessed landholders so that the Crown could pay its soldiers without resorting to parliament.[3] Finally, jurists were concerned over what they considered to be the arbitrary imprisonment of the "five knights" who refused to pay the loan and sued for habeas corpus.[4] They no longer trusted the Crown with the powers of exception.

The irony of the whole affair was that the Crown made the commissions of martial law to appease local officers.[5] The south of England was not, as has so often has been stated, "placed under martial law" or put in a "state of siege:" an allusion to the way in which we now think of martial law as a form of military rule.[6] Instead, the Crown accommodated its local officers by

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[2] S.R. Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War, 1603-1642* 10 vols. (new ed. London: Longmans, 1896), v, vi.; Conrad Russell, *Parliaments and Politics, 1621-1629* (Oxford: Clarendon Press, 1979), 31-103; Roger Lockyer, *Buckingham: The Life and Political Career of George Villiers, First Duke of Buckingham, 1592-1628* (London: Longman, 1981), 222-457.

[2] Lindsay Boynton, "Billeting: the Example of the Isle of Wight" *English Historical Review* 74:290 (Jan., 1959): 23-40. Paul Christianson, "Arguments on Billeting and Martial Law in the Parliament of 1628" *The Historical Journal* 37, no. 3 (Sep., 1994): 539-567.

[3] Richard Cust, *The Forced Loan and English Politics, 1626-1628* (Oxford: Clarendon Press, 1987).

[4] Mark Kishlansky, "Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights Case" *The Historical Journal* 42, 1 (Mar., 1999): 53-83; J.A. Guy, "The Origins of the Petition of Right Reconsidered" *Historical Journal* 25 (1982): 289-312.

[5] This point was well made by Lindsay Boynton in his seminal article on martial law and the Petition of Right. Boynton, "Martial Law and the Petition of Right" *English Historical Review* 79:311 (Apr., 1964): 255-84.

[6] This language is often used by historians writing narratives of this period. See for example, Kevin Sharpe, *The Personal Rule of Charles I* (New Haven: Yale University Press, 1992), 35. Stephen Stearns has recently shown how little martial law was actually used in this period, a point that I also want to emphasize. Stephen J. Stearns, "Military Disorder and Martial Law in Early Stuart England" in Buchanan Sharp and Mark Charles Fissel eds. *Law and*

granting them commissions of martial law. No civilians were executed at martial law; the commissioners only executed a handful of soldiers. The Privy Council meant these commissions to be used in conjunction with other forms of law to discipline soldiers and protect civilians living in garrisoned areas. It was the failure of these local officers – mostly mayors and deputy lieutenants – to control the outrages committed by soldiers that led to the complaints by MPs who represented the areas where soldiers were billeted.

But when it came to martial law, jurists were more concerned with what could be than what was. As the lawyer and MP Robert Mason put it, "all innovation comes in gently at first and it grows strong by degrees."[7] In order to prevent the further expansion of martial law jurisdiction, they looked to what had been. While scholars have often noted the propensity of lawyers to draw on history, they have often failed to understand how jurists were using the history of medieval English law creatively and selectively to generate new legal discourse. Often hidden behind claims of "old law" were omissions, selections, and creative re-imaginings of medieval English legal discourse. In ignoring this creativity, scholars have failed to understand the importance of the Court of the Verge, and the vital role William Noy played in re-shaping the law of martial law.[8] Further, they have often conflated these discourses as one more instance of an ongoing battle between Crown and parliament over sovereign power. These lawyers, while

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Authority in Early Modern England: Essays Presented to Thomas Garden Barnes (Newark: University of Delaware Press, 2007), 106-35.

[7] *Proceedings in Parliament 1628* ed. Mary Freer Keeler, Maija Jansson Cole, and William B. Bidwell 6 vols. (New Haven: Yale University Press, 1983), ii. 461 (P&D).

[8] The few scholarly treatments of the arguments relating to martial law have missed this creativity. Paul Christianson, "Billeting and Martial Law;" Boynton, "Martial Law and the Petition of Right;" J.V. Capua, "The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right" *The Cambridge Law Journal* 36, no. 1 (Apr. 1977): 152-73.

they debated in parliament, gave no sovereign power to the high court. Instead, they granted the powers of time to the enemy.

Life and Limb by Martial Law

Before we examine the commissions of martial law the Crown crafted starting in December 1624, let us review how jurists understood the law of martial law in the early seventeenth century. Very few jurists touched on martial law; those who wrote on it did so only briefly. But there were some commonly held ideas. First, the law of martial law was part of the monarchical prerogative, and only the Crown could delegate martial law jurisdiction. Second, some jurists, starting with Sir Thomas Smith in the 1560s, attempted to confine the law of martial law to soldiers only. Smith, in his widely read tract *de Republica Anglorum,* argued that martial law formed part of the monarch's "absolute prerogative." However, Smith claimed that it should only be used on the Crown's soldiers in pay.[9] William Fleetwood, in his *itinerarium ad Windsor*, came to a similar conclusion. Martial law was one of the many laws of the Crown, who used it in armed camps to discipline soldiers.[10] Third, some jurists and statesmen claimed that martial law was bound temporally. We have already seen that in certain contexts Henry VIII confined martial law to the verge of his banner. William Cecil had desired martial law to be confined to states of war or tumult. And in 1616, Sir Francis Ashley, a Dorset lawyer, in a reading on chapter 29 of Magna Charta, claimed that martial law was the law during states of

[9] Sir Thomas Smith, *De Republica Anglorum* (London, 1583), 44.

[10] "Itinerarium ad Windsor," BL, Harley Ms. 168 f. 4v. There is another, anonymous, treatise from the early seventeenth century that discussed martial law more broadly as all those laws relating to military action and defense. This treatise focused on impressment. But this interpretation was an outlier in the seventeenth century. BL, Add. Ms. 41, 613, fos. 82v-83v.

rebellion or invasion.[11] But as we have seen, these ideas were perspectival, and never inhibited the Crown or Crown officers from creatively using martial law to solve legal problems.

The commissions of martial law that the Crown issued in this period were part of the latest experiment with martial law. Through them, the Crown commanded a different form of martial law procedure and to different personnel from those martial law experiments that either preceded or followed them. They were meant to accommodate local officers who had to supervise soldiers stationed in England. James and then Charles were handing control of the discipline of the army to civilian authorities at their request so that they might better maintain order. Civilians became part of the high command of the army.

In 1624, war was raging on the European continent. Many, including the Crown prince and the Crown favorite, the Duke of Buckingham, wanted their king to join in the war effort on the side of the Protestant princes of Germany, and recover the Palatinate for Frederick, the king's son-in-law, from the control of the Austrian Hapsburgs. James, likewise, wanted Frederick restored, but he was still cautious, and wanted to avoid war if he could with the king of Spain. This caution proved problematic because the Crown had over the course of the year engaged in negotiations with the king of France, who desired English aid in his war against the king of Spain, for a military alliance. By November, James had come to tentative agreements with the king of France, and had agreed to allow Charles to marry the king's daughter, Henrietta Maria. That same month, the king of France entered into an alliance with the Dutch Republic against Spain. However, this new pact formed problems for James, because the two kings had tentatively been planning a joint military enterprise, to be commanded by the German mercenary Ernst Von Mansfeld. The plans had accelerated in England to the extent that by the end of November,

[11] Halliday, *Habeas Corpus*, 145-6.

Mansfeld had recruited roughly 10,000 troops in England for the expedition. But by December, James and Louis XIII could not agree on where the expedition should go: James wanted Mansfeld to relieve the Palatinate, while Louis wanted the soldiers to land in Flushing so that they could fight against the Spanish alongside the Dutch. In order to achieve this aim, Louis refused Mansfeld entry into any port in France.[12]

The impasse meant that more than 8,000 soldiers – and by contemporary observations, these men were not particularly happy to be serving in the army – were stuck in Dover in the south-east of England.[13] By the middle of December, the funds that the Council of War authorized for disbursement in November had run out. The soldiers, already unhappy, were now destitute. Further, it appears that Mansfeld cared little about supervising his men. Reports began to come in to the Secretary of State, Sir Edward Conway, and to Buckingham about the chaos the soldiers were creating in Dover. Sir John Hippisely, the deputy warden of the Cinque Ports, reported on 24 December that victuals in Dover were running out, and requested that the soldiers be moved. Two days later, Hippisley reported that the soldiers were "pulling downe…houses and taking away mens cattaile and other goods."[14] After trying to imprison some of them, their colleagues promptly broke them out. Soldiers appropriated any victual that came into the town. Further, a sailor had apparently enraged some of the soldiers, who kidnapped the man and were about to kill him before the mayor and several other officers intervened. Due to these outrages,

[12] Gardiner, *History of England*, v. 249-86.

[13] Boynton, "Martial Law and the Petition of Right," 256-8. Boynton has estimated that between 8,000 and 9,000 men were stationed near Dover in December 1624.

[14] Hippisley to the Privy Council 26 Dec. 1624, TNA, SP 14/177/18. Mayor of Dover and others to the Privy Council, 26 Dec. 1624, TNA, SP 14/177/17; Hippisley to the Privy Council, 24 Dec. 1624, TNA, SP 14/177/16.

the mayor prayed for victuals and for an "order sett downe by yor lops for martiall lawe." Hippisley, in a letter written to Buckingham's secretary on the same day, repeated the request.[15]

The key to the problem, as a correspondent to the Privy Council put it, was that there were no "officers of martiall discipline" in the town.[16] The high command, apparently, was taking their time coming to Dover, or simply avoiding the town altogether while the Crown vacillated over where to send the troops. This problem was not new. Port towns consistently suffered the depredations from soldiers who were waiting to depart on campaign. And the local officers in charge had no good strategies to quell the disorders. Let us examine the ways in which the Crown supervised new recruits on their way to a campaign so that we can better understand the legal problems the mayor of Dover faced in the winter of 1624. In order to do so, we will need to briefly return to the 1580s and 1590s, when Elizabeth was recruiting and then transporting soldiers to Ireland through her western ports in order to quell the rebellions in that kingdom.

In order to provide manpower for these conflicts, the Elizabethan regime, through the use of warrants, levied men from the counties of England. Orders went down from the Privy Council to the lords lieutenants in the counties, to the justices of the peace, the high constable, and finally to the petty constables of the parish. Each parish provided several men, which the petty constable "pressed" into service. Often, the men impressed for service were either incredibly poor or they were common criminals. When the quota for the entire county was reached, a "conductor" led the men through the countryside until they reached a port town.[17] The most commonly used port

[15] Hippisley to the Privy Council, 26 Dec. 1624, TNA, SP 14/177/18; The Mayor of Dover and others to the Privy Council 26 Dec. 1626, TNA, SP 14/177/17.

[16] William Jones to Nicholas, 27 Dec. 1624, TNA, SP 14/177/34.

[17] This account is heavily indebted to the work of John McGurk, *The Elizabethan Conquest of Ireland: the 1590s Crisis*, (Manchester: Manchester University Press, 1997), 29-33.

for the Irish wars was Chester, but Bristol and Barnstaple were also used. Less often, the Crown used Plymouth, Portsmouth, Falmouth, and other southern ports.[18]Once they reached the port, the troops were under the command of the mayor of the town, and sometimes a Crown muster master, who aided the mayor in securing ships and munitions for the journey across the sea.

The Crown did not give conductors, mayors, or muster masters powers of martial law. Instead, these officials had to use common law process to discipline the troops. The Privy Council issued instructions to its lieutenants in the counties that when they gathered the new recruits, they were to inform them that once they issued the "conduct money" to them (the stipend that would pay for their uniform and sustenance), they could not run away, upon pain of "death as a felon according to the laws of the Realm."[19] Indeed, desertion had been a crime at common law since the fifteenth century, and the Crown only gave its officers powers to prosecute deserters at common law for their offence. Trying to use common law process on soldiers posed difficulties for local officers who had no professional police, and who possessed lightly guarded jails. Local magistrates also rarely had the means catch and punish runaways. They had to resort to a "hue and cry," an ad hoc posse comprised of community members. As Cynthia Herrup has noted in her work on criminal procedure in Sussex in the sixteenth and seventeenth centuries, this voluntary police force was under strain at the end of the sixteenth century.[20] This method of law enforcement was particularly ineffective in catching deserters who were running away to different parts of the country. Once soldiers escaped the town limits, the mayor and his officials had little ability to search for them. And as the mayor complained to the

[18] Ibid., 137-189.

[19] Ibid., 137.

[20] Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth Century England* (Cambridge: Cambridge University Press, 1989), 70-2.

Privy Council in 1600, the soldiers could easily escape by changing clothes and going into the market.[21] By their own admission, the percentage of deserters caught by the mayor and his commissioners was small.[22]

The mayors of port towns issued special ordinances that regulated the behavior of troops while they awaited embarkation. In 1580, when the Crown was sending over 700 soldiers to fight against the rebellious Earl of Desmond in Munster, Elizabeth allowed the mayor, William Birde, to issue a proclamation, which would help maintain "the good order and due obedience" of the soldiers stationed in the town.[23] The proclamation banned the carrying of weapons within town limits, imposed a curfew, and banned fighting. But this creativity in substance did not translate into creativity in procedure. Local magistrates heard and determined all crimes committed by the soldiers, including mutiny, at common law.[24]

Twice, mayors in this period requested martial law jurisdiction. The first instance came in 1581 in Chester, when a contingent of 300 men from North Wales and Derbyshire became mutinous and demanded a pay increase.[25] Over 40 of the men deserted. Others refused to obey commands and "drewe their weapons against our officers."[26] In order to calm the situation, the mayor asked the Privy Council to have the "chief doers" executed by martial law. The mayor of Bristol had a similar sense of exasperation in 1601. Soldiers waiting to embark for Ireland had mutinied on several occasions. The commissioners attempted to arrest and imprison the

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[21] John McGurk, *The Elizabethan Conquest of Ireland*, 146.

[22] Ibid., 150, 168; *HMC,* Salisbury, x. 268.

[23] BL, Harley MS 2057, f.59. Many thanks to Professor Robert Tittler for this reference.

[24] Privy Council to Sir Henry Docwray, *APC,* xxx. 163-65.

[25] CCR, MMP 3/49.

[26] Ibid.

ringleaders, but they had to continually fight back the recruits who on a nightly basis attacked the jails where their colleagues were held. In one attempt to break up a fight, the mayor was stoned by a group of soldiers. The commissioners then decided to engage in make-believe: "hauing no marshall lawe wee thought good to mack them beleue we had."[27] The commissioners constructed a gibbet in the town, and had guards inform the prisoners to prepare for death the next day. The following morning, they called all the soldiers to the town square, where the jailed had halters on their necks, and were about to climb the gibbet in preparation for execution. Right before they were to be "executed," the commissioners pardoned the men. Apparently, the trick worked, or at least it worked for a while.

But the Privy Council never gave the Bristol commissioners powers of martial law. Nor did they give them to the mayor of Chester. Indeed, the Crown, up until December 1624, had refused to grant civilian authorities powers of martial law over soldiers. We might be surprised, considering all the ways in which the Crown in the sixteenth century experimented with martial law, that it reserved martial law powers over soldiers to its high command. It did so for three reasons. First, the Crown respected the jurisdiction of the lord general. It would be dishonorable to remove martial law powers away from him, and give them to civilians. This arrangement was based on the idea of the medieval host, where the army was gathered together in the field under the auspices of the general. It was less useful for soldiers garrisoned in various towns for extended periods. Second, martial law jurisdiction over soldiers encompassed by the 1620s a large substantive law tradition through the articles of war, which gave the lord general a much wider jurisdiction than the provost marshals and other civilian officers who occasionally received martial law commissions from the Crown. And finally, as we have seen, the Crown was

[27] Commissioners of Bristol to the Privy Council, 29 May 1602, HH, CP 184/30.

concerned about the delegation of martial law power, and increasingly reserved those powers to its important officers.

Thus the dislocation of soldiers from the high command of the army posed challenges for civilian authorities. The Privy Council in late December 1624 attempted to alleviate this burden they had imposed on their civilian authorities in and around Dover, but they were still hesitant to grant powers of life and limb at martial law. The Council of War drafted ordinances of war which the local officers could use to govern the soldiers. The Council decided that three or more "commissioners" who would be the deputy lieutenants, mayors, and other prominent county officers in charge of the area around the billeted troops, could convene a court martial and punish the soldiers by the articles of war. However, they had no powers over life and limb. Instead, for any wrong that required a capital sentence, the court had to report its evidence to the lord general who would decide whether or not the soldier deserved death.[28]

But on 30 December, the Privy Council consented to delegate martial law jurisdiction through a commission under the Great Seal.[29] It did so because of the continued complaints by the officers in and around Dover, and due to the fact that no resolution had yet been reached on when or to where the soldiers were to depart. Within the commission, the Crown referenced the breaking of houses and the robberies that Hippisley and the mayor of Dover had reported to it earlier in the month. In order to stop these outrages from continuing, the mayor of Dover, the deputy warden of the Cinque Ports, several commissioned colonels, and the deputy lieutenants of county Kent were to have martial law jurisdiction over all of the soldiers stationed in and around

[28] There are two copies of these draft ordinances. TNA, SP 9/208; TNA, SP 16/13/41.

[29] TNA, C 66/2327, 7d. The commission was received in Dover on 1 Jan. 1625 Hippisley was upset his title was not stated in the commission. Hippisely to Nicholas 2 Jan. 1625, TNA, SP 14/181/10. These commissions need to be differentiated from those given to lords lieutenants, which always included a martial law provision in times of rebellion or invasion.

Dover. With three making a quorum, these "martial law commissioners" could convene a court martial and try by life and limb any soldier accused of any "robberies felonyes mutinies or other outrages" cognizable at martial law. In a clause that would come back to haunt the Crown in 1628, the commission also authorized the commissioners to try any other "dissolute psons" who joined with the soldiers in committing outrages.[30] It is unclear why the Crown thought this clause was necessary; there is no evidence it was used to try civilians by martial law. Perhaps other non-soldiers had joined in the riots and outrages in Dover throughout the month of December. In any case, the commission was meant to give local officers the power to discipline soldiers.[31]

These martial law commissioners were not simply deputy lieutenants, although they played an important role in administering martial law. In the parliament of 1628, the House of Commons attacked the office of the deputy lieutenancy, and historians ever since have focused on that particular office's role in implementing Crown strategies of martial law and of billeting. As we shall recall, the deputy lieutenants were men assigned by the lord lieutenant of a county – who was invariably an important Privy Councilor and unable to attend to his county duties – to perform his assigned duties. These responsibilities technically were solely martial in nature; the deputy lieutenant was responsible for the training and mustering of the militia and the trained bands in the county. However, by the 1620s, the deputy lieutenants often possessed more ad hoc powers, being entrusted by the Privy Council to execute tasks in the county, and arbitrate disputes between the gentry. These powers, based on the deputy's connections to important Privy Councilors, often generated tension between the more traditional judicial officers in the county:

[30] Boynton, not examining the original commissions on the patent rolls, believed that this clause was only issued in the spring of 1625 after Charles I had assumed the throne. Boynton, "Martial Law and the Petition of Right," 260. This interpretation, however, is inaccurate.

[31] The mayor of Sandwich apparently did not participate in the commission, and received a rebuke by the Privy Council. *APC,* xxxix. 481.

the justices of the peace. These officers were generally excluded from the commissions of martial law.[32]

Through terror, the martial law commissioners attempted to reform the behavior of the soldiers. The Privy Council in the commission ordered that a gallows or a gibbet be constructed in a place the commissioners thought fit. There, they were to execute offenders in open view in front of their peers, "for an example of terror to others and to keepe the rest in due awe and obedience."[33] From these public displays, the soldiers would supposedly learn how to become good subjects, and would abandon their previous outrages, robberies, and riots. And when the commissioners began to implement the commission, they started only with terror. On 3 January, Hippisley reported that the commissioners convicted a soldier of a capital offence, but after bringing him before the gallows, the soldier was pardoned because it was the first case.[34] Hippisley reported that the spectacle had through terror inspired the soldiers to act more obediently to their officers. Future offenders were less fortunate. Several days later, Hippisely reported that they had hanged a soldier, and had caught two others for stealing. One was hanged; the other's life was respited and the offender was sentenced to jail instead. The disorders did not stop in January; but apparently they subsided due to the terror inspired by martial law.[35] One report early in January declared that the martial law commissions had ended the storm that had

[32] Victor Stater, *Noble Government: The Stuart Lord Lieutenancy and the Transformation of English Politics* (Atlanta: University of Georgia Press, 1994), 8-31; Thomas Garden Barnes, "Deputies not Principals, Lieutenants not Captains: the Institutional Failure of Lieutenancy in the 1620s" in Mark Charles Fissel ed. *War and Government in Britain, 1598-1641* (Manchester: Manchester University Press, 1991), 58-86.

[33] TNA, C 66/2327, m. 7d.

[34] Hippisley to Nicholas 3 Jan. 1625 TNA, SP 14/181/11. The gallows were set up in the market place, TNA, SP 14/181/37.

[35] The disorders subsided until the men were put on ships on 23 January. They attempted to break out of the ships and rioted in Dover, apparently because most of the martial law commissioners had departed and once again too few officers had powers of martial discipline. William St. Leger and Ogle to Conway 23 Jan. 1625, TNA, SP 14/182/40.

gone on in December.[36] Another claimed that the martial law commissions ordered the "unruly people."[37] Order, at least to some degree, was maintained through the end of the month. Finally, on 31 January, James allowed Mansfeld to set sail for Flushing but refused to allow him to relieve the Dutch city of Breda, which the king of France had desired. Instead of wasting away in Dover, the army wasted away in Flushing.[38]

The Mansfeld expedition was a disaster, but Crown officers remained determined to participate in the European wars. After the death of James I toward the end of March, the new king Charles I allowed Mansfeld to march toward Breda. But the army could not prevent the city from falling to the king of Spain. Mansfeld's army was in a terrible state without ever having come close to arriving at the Palatinate. Over the course of the next two months, Buckingham and Charles mulled their options on how to further proceed. By May commissions of impressment were dispatched to local officers, with the goal that 10,000 men arrive in Plymouth.[39] On 23 May, Charles sent a commission of martial law to the mayor and deputy lieutenants of Plymouth. The same day, he issued a commission of martial law for the magistrates of Kingston-upon-Hull, in the north of England. The two commissions were issued at almost opposite ends of the kingdom because the Crown had not yet decided upon where, or who, to strike next.[40]

The two commissions were nearly identical to that created for Dover back in December. Once again, local officers were authorized to use martial law upon the soldiers and any other

[36] Sir John Ogle to Dudley Carleton 2 Jan. 1625 TNA, SP 14/181/9.

[37] Sir Thomas Dutton to Lord Chamberlain Pembroke, 7 Jan. 1625, TNA, SP 14/181/12.

[38] Gardiner, *History of England*, v. 286-90.

[39] Ibid., 317-36.

[40] TNA, C 66/235,1 m. 16d-17d.

"dissolute persons" that joined with them for any felony or other wrong according to martial law. Eventually, the soldiers convened near Plymouth as Buckingham and Charles decided that they would, in the tradition of Sir Walter Raleigh and the second Earl of Essex, attempt a strike on the Spanish silver fleet as it returned to Cadiz. But preparations for the expedition went slowly. And throughout the summer, the mayor of Plymouth and the deputy lieutenants in Cornwall had to supervise the soldiers. The soldiers were better behaved than those stationed in Dover, but by mid-August some from London engaged in a mutiny. The ringleaders were convicted at a court martial and were forced to draw lots for their lives.[41] Finally, on 8 October, the long-awaited expedition to Cadiz finally left from Plymouth. Like Mansfeld's expedition, the Cadiz voyage was a disaster.[42]

The remnants of the expedition returned to Ireland and England in mid-December. Charles and Buckingham in the winter of 1625 were concerned that the king of Spain might retaliate through an invasion of either the southern English or Irish coast. Therefore they maintained the returned soldiers in the coastal towns of Ireland, and in the southern counties of England, they billeted the troops upon the countryside.[43] The policy was enormously unpopular. The soldiers were ill-paid, and unwanted by the locals. In Ireland, the mayor of Limerick threatened the Irish Lord Deputy that the townsmen would simply get up and move outside of the jurisdiction of the city so that they would not have to billet the soldiers. The mayor of Cork, likewise, complained about the presence of the soldiers. In 1626, the relations between the town and the soldiers deteriorated to such an extent that a major riot erupted after a small dispute over

[41] "A Letter from the Mayor and Commissioners at Plymouth to the Privy Council," 15 Aug. 1625, TNA, SP 16/5/35.

[42] Gardiner, *A History of England* vi. 10-23.

[43] Boynton, "Martial Law and the Petition of Right," 261-2; Aidan Clarke, "The Army and Politics in Ireland, 1625-1630" *Studia Hibernica* 4 (1964): 28-53.

the use of a road by the soldier's fort. Only in Waterford, where the leading Catholic merchant families, who due to their faith had lost the incorporated privileges the city had traditionally possessed, acquiesced to the billeting. None of these officials in Ireland, because they were Catholic, were granted martial law jurisdiction over the soldiers.[44]

But in England, the Privy Council once again resolved upon granting martial law commissions to its county officers. It did so as a policy of appeasement. On 12 December, the Privy Council made the deputy lieutenants and relevant mayors aware that they would once again have powers of martial law over the returned soldiers.[45] The commissioners in the counties likewise desired martial law commissions and requested the jurisdiction so that they might discipline the soldiers because they were so poor and deprived, they might attempt to "supply themselues by unjust waies."[46] The resulting commission, which passed through the Great Seal on 28 December, was meant to give the mayor and the deputy lieutenants of Devon powers to participate in the disciplining process. The Privy Council likewise gave deputy lieutenants and mayors in the county of Hampshire –located on the southern coast and included the Isle of Wight which was an attractive target for a Spanish raid – powers of martial law over soldiers stationed there.[47] Three months later in March, the Privy Council gave commissioners of Middlesex, the county that encompassed London, powers of martial law because so many soldiers and sailors were leaving their posts and coming to the city in attempts to find sustenance.[48] In the late summer of 1626, when the Crown was trying to organize yet another raid on the Spanish silver

[44] For the riot see TNA, SP 63/213/543.

[45] *APC,* xl. 266-7, 271.

[46] Commissioners at Plymouth to the Privy Council 15 Dec. 1625, TNA, SP 16/11/71.

[47] TNA, C 66/2352, m. 2d, 7d.

[48] TNA, C 66/2356, m.12d.

fleet, this time to be led by Lord Willoughby, it granted martial law commissions to its county officers in Hampshire, Sussex, and in Kent, where mariners and soldiers were waiting for departure.[49] The county of Hampshire received another commission that December, when Willoughby's fleet returned (unsuccessful in its mission to capture the fleet), to discipline the sailors stationed in and around Portsmouth.[50]

During this same period, the Privy Council began to demand that counties hire a provost marshal to catch deserters and "vagrant soldiers." However, they did not grant these provosts powers of martial law.[51] The policy began in the summer of 1626 when the Privy Council wanted to appoint a provost in Hampshire to use martial law, but only in case the Spanish landed in Portsmouth. The policy was expanded when the commander of the Cadiz expedition, the Earl of Wimbledon, wrote to Sir John Coke in March 1627 that provost marshals should be appointed in every county because the constables had failed in their duty to round up deserting soldiers and vagrant and masterless men.[52] Coke agreed and the Privy Council sent out letters to every lord lieutenant that they should appoint a provost marshal for that purpose. However, the Privy Council only empowered these officers to imprison deserters and vagrants so that they might be tried at law. In any event, many counties including Hampshire, refused to appoint the provost

[49] TNA, C 66/2384, m. 3d; TNA, C 66/2385, m. 6d, 12d, 13d, 14d, 21d. The Privy Council initially ordered that a commission be made for Dorset and Surrey also, but I have not found the actual commission. Nor have I found any privy seal warrant for those commissions. Nor can a draft be found in the docquets of Lord Keeper Coventry. See *A Calendar of the Docquets of Lord Keeper Coventry* ed. Jan Broadway, Richard Cust, and Stephen K. Roberts, *List and Index Society* 34 (2004): 26-50. *APC,* xli. 101, 221. Likewise, in November 1626, the Privy Council ordered a commission for martial law for county Berkshire. Ibid., 365. It had still not been made in December. Ibid., 428. The commission was not enrolled, if it was ever actually made.

[50] TNA, C 66/2385, m. 21d.

[51] Boynton, "Martial Law and the Petition of Right," 266. The council of war only intended that they use martial law should the Spanish, or later, the French land in England. See BL, Harley, Ms. 3638, f. 133v.

[52] Wimbledon to Coke, 5 Mar. 1627, BL, Add. Ms. 64,890, f. 92.

because they did not want to pay for his entertainment.[53] Martial law was reserved for those named in the commissions made by the Privy Council.

By 1627, Charles and Buckingham had become frustrated with the king of France to the point where they began considering ending the alliance and declaring war. After the debacle over where to send Mansfeld's army, the two Crowns remained allied, and Charles had married Henrietta Maria in the spring of 1625. The marriage, however, got off to a rocky start. Henrietta Maria, who kept her own household of French advisors, was often dismissive of the king. Meanwhile, Charles had reneged on his promises to the king of France to lighten the recusancy laws against Catholics in England, which also contributed to the alienation of his wife. To further their enmity, Charles had offered parts of his fleet to serve the king of France's navy, only to have him attempt to use English ships to attack French Huguenot dissidents in La Rochelle. Perhaps most importantly, the French navy began seizing English merchant ships off its coasts, and often claimed the goods as prizes, which included the wine fleet which was seized off of Bordeaux late in 1626. The English merchant community was outraged. War with France became inevitable. In 1627, the Crown began preparations to attack the king of France. It decided that it would send an expeditionary force to the Isle of Rhé, which would aid the Huguenot rebels at La Rochelle, before it would continue on to re-capture the English wine fleet and search for Spanish prizes. The expedition set sail in late June 1627.[54]

Like the others, the Isle of Rhé expedition was a disaster. And as in the aftermath of the others, the 3,000 or so soldiers who straggled home in November 1627 were kept in active service. Both Charles and Buckingham were determined in the next year to continue their war

[53] Deputy Lieutenants of Hampshire to the Privy Council, 17 Sept. 1626, "Richard Norton's Lieutenancy Book" BL, Add. Ms. 21,922, f. 77v.

[54] Gardiner, *History of England*, vi. 147-99.

against the king of France. But this time, the Privy Council, recognizing the discontent stationed soldiers had caused in Hampshire, Devon, and in Kent, decided to fan them out throughout the south of England.

Once again, the Privy Council accommodated local officials by granting them martial law commissions. Thus by the end of December the Privy Council ordered the making of three commissions of martial law to county officers in Hampshire and Kent, two commissions to officers in Devon, and commissions to officers in Berkshire, Sussex, and Dorset. Along with these county commissions, the Privy Council ordered martial law commissions to be made for officers in the Cinque Ports, the city of Exeter, the city of Plymouth, and two to officers on the Isle of Wight. [55] By April 1628, the Privy Council had ordered two martial law commissions to county officers in Essex – where soldiers were garrisoned in preparation for an expedition to Denmark where they would fight for that king in northern Germany – Gloucester, and Northhampton.[56] The deputy lieutenants of Essex had complained about the abuses of the soldiery, and asked for martial law commissions.[57] Likewise, the mayor of Gloucester, who complained in November that some of the soldiers recently garrisoned in that town did "sweare that he would cutt ye said maior in peecs and carry his head wth him and would make garters of his guts."[58] The commissioners of Dorset thanked the Privy Council for sending them a

[55] TNA, C 66/2409, m. 6d, 7d, 10-15d, 17d. TNA, C 66/2422, m. 3-4d, 6-9d.

[56] Essex had, since 1627, experienced mass rioting from the soldiers stationed around the port of Harwich. In April, 1627, the Privy Council ordered a commission of martial law to be sent to Essex. *Calendar of Docquets*, 34: 30. It was renewed in 1628.

[57] Sir John Maynard and Others to the Privy Council 19 Jan. 1628, TNA, SP 16/91/6. The deputy lieutenants crafted a smaller code of war to govern the soldiers in Essex. Bodl. Firth C.4, f. 439-40.

[58] Mayor of Gloucester to the Privy Council 12 Nov. 1627, TNA, SP 16/84/61.

commission of martial law at the end of December 1627.[59] The commissions only came to an end in April 1628, after the House of Commons began examining their legality.

Let us take a closer look at how the Crown and Privy Council meant these commissions to be used, and how local officers used them for trial by life and limb.[60] First, none of the mayors, deputy lieutenants, or other civilian officials knew anything about martial law. Sir William St. Leger, one of the colonels retained from the Cadiz expedition to oversee the soldiers, complained that he only had as much power of governance as the town clerk of Plymouth: "without whome I can doe nothing and without mee they know nothing."[61] The Crown and Privy Council did not help alleviate this confusion. It was not until 1627 that the Crown sent ordinances of war to its county officers, and it never instructed its county officials on martial law procedure. Thus, while there are scattered accounts of soldiers being disciplined by martial law from 1626-8, it was much more likely that the martial law commissioners would simply refer soldiers to common law process.

For example, the mayor of Southampton in the summer of 1626 requested that one John Scott, a soldier accused of killing another soldier, be tried at common law. The Privy Council allowed the mayor to remove this case into common law because they thought it was not pressing.[62] Scott was acquitted by the jury in September. The strategy of removing these cases

[59] The Commissioners of Dorset to the Privy Council, 31 Dec. 1627, TNA, SP 16/87/70.

[60] The records I am using generally come from the papers of deputy lieutenants. Unfortunately, in County Devon, one of the most heavily billeted areas of England in this period, these papers have not survived. We only know about martial law in this county from State Paper correspondence and from a reference to the mayor of Exeter holding a martial court in 1627. DROE, "Auncient Letters," no. L290. A copy of the mayor of Exeter's commission of martial law from 1627 is still extant. DROE, Misc rolls. no. 35.

[61] Sir William St. Leger to Buckingham 7 Jan. 1626, TNA, SP 16/18/23. Sir John Hippisley asked Sir John Hippisley in Dover for the opinion of "all the coronells and captens" before deciding on how to act in one of his first cases after he had received the commission. TNA, SP 14/181/26.

[62] *APC* xli. 239. Boynton, "Martial Law and the Petition of Right," 267.

into common law was alarming to some. In 1627, Mary Holland, the mother of Michael Holland, a soldier accused of murdering a town bailiff in Andover, petitioned Edward Conway, one of the deputy lieutenants of Hampshire, to remove the case to a court of war. Presumably, she believed that her son would receive more favorable treatment before a council of war. We do not know the result of this petition, but in most cases the deputy lieutenants in Hampshire had soldiers tried by the assizes, not by a court martial.[63]

The Privy Council, in general, not only accepted this choice but tried to give their county officials powers to hold common law sessions immediately. In the winter of 1626, the Privy Council stated that martial law commissioners "forbeare to make use of the power given for marshall lawe but in cases of great necessitie and extreamitie."[64] They therefore began issuing special commissions of *oyer* and *terminer* with the commissions of martial law so that soldiers could be immediately tried for any wrong they had committed.[65] In Dorset, for example, the Privy Council sent out Sir Francis Ashley with a special commission of *oyer* and *terminer* to try seven soldiers for burglary in January 1627. All were convicted, although only one was executed.[66]

On several occasions, the Privy Council pushed for trial by martial law. In the spring of 1627, the provost marshal of Middlesex caught four soldiers in London who had deserted their regiments. Seeing an opportunity to terrify the many others who had fled their regiments, the Privy Council ordered the marshal to turn the men over to the martial law commissioners of Middlesex who were to try them at martial law. All four were convicted and had to roll dice for

[63] HRO, Jervoise Ms. 44M69/G5/37/5.

[64] *APC,* xlii. 239.

[65] The Privy Council ordered that both commissions be sent into the counties. See *APC,* xlii. 237, 288, 375.

[66] "Whiteway's Diary" BL, Egerton 784 f. 62v.

their lives.[67] The desire of the Privy Council to impose exemplary punishment and county officers' discomfort with martial law only produced one confrontation. In December 1627, the Privy Council wrote a letter to the commissioners in Hampshire that commanded them to try a surgeon by the name of William Lawson at martial law. Lawson, according to the Privy Council, had drawn his sword on his captain, and had rushed at him. His attack was prevented by other sailors who intervened in the affair.[68] The commissioners removed Lawson into the county gaol, but they wrote back to the Council that Lawson should be tried at the assizes, not at martial law. They worried that the wrong had been committed before their commission had been issued. They were also concerned, given that Lawson faced the death penalty at martial law, that they did not have the power to depose witnesses. Perhaps the commissioners were simply uncomfortable with martial law. The assault by Lawson was capital in that jurisdiction; it was not capital at common law.[69] They removed the case from martial law to the assizes. The Privy Council, in spite of being openly challenged, apparently assented to the commissioners' jurisdictional switch.[70]

Trial by life and limb at martial law was rare from 1624-8. When commissioners executed their commission, they did so to terrify soldiers and sailors into obedience. More often, they fell back on common law process and custom, of which they were deeply familiar. Martial law in general was too severe for men who had no experience with serving in the army under

[67] *APC*, xlii. 257. Another example comes from Devon in 1628, when the Privy Council wanted mutinous mariners tried by martial law. *APC* xliii. 360.

[68] "Southampton Mshall Business" HRO, 55/M50, f. 117.

[69] Commissioners of Hampshire to the Privy Council, 10 Jan. 1628 BL, Add. Ms. 21,922, f. 128. Conway's son who was also a deputy lieutenant, refused to sign the letter. The commissioners had sought out evidence earlier in December by warrant. Perhaps they were unsuccessful in securing it. Ibid., f. 127. Lawson was tried at the assizes in Hampshire. "Southhampton Mshall Business" HRO, 55/5, f. 118.

[70] Derek Hirst's point that the the increasingly novel commands of the Privy Council in this period required the Privy Council to mete out punishment, which it often did not have time for, is well taken. Derek Hirst, "The Privy Council and the Problems of Enforcement in the 1620s" *Journal of British Studies* 18, no. 1 (1978): 50-3. The Council focused on the enforcement of the loan, and often left other business and its enforcement unattended.

martial law. Trials by life and limb at martial law were hardly threatening the supremacy of common law process.

The Petitioning System and trial for Misdemeanor

The martial law commissions were not a source of complaint amongst the county gentry in the south of England. Instead, certain JPs expressed frustration over their inability to prosecute soldiers for misdemeanors. These claims, as we shall see, are difficult to verify. Let us examine the background to the ways in which the Crown managed civilian misdemeanor prosecutions of soldiers prior to the 1620s: a process that required the civilian to petition the commander before formal prosecution could commence. Then, through admittedly scanty evidence, we will see how martial law commissioners applied this petitioning system from 1624-8, and how the Privy Council employed a variety of legal strategies to keep soldiers disciplined. It is likely that at times JPs were prevented from prosecuting soldiers. But these exemptions were probably informal and a product of the failure of the martial law commissioners to properly oversee the discipline of the soldiers.

In Roman Civil law, jurists crafted a strict boundary by reason of person between soldiers and civilians. As we have seen, members of the Roman army were subject to the substantive laws which came to be known as *de re Militari*. Fellow soldiers convened tribunals that would try the soldiers who failed to uphold these laws. Civilian courts had no jurisdiction over soldiers. By the early modern period, some European monarchs adopted this strict jurisdictional division. The clearest example comes from the king of Spain, who granted his soldiers the *fuero militar,* which exempted them from civilian jurisdiction. As Balthazar D'Ayala, the famous Spanish

judge advocate general, put it, "Soldiers cannot be summoned before any but their own judge, or be punished by any other if in fault; and so, if arrested by a civil official, they ought to be remitted to their own judge."[71] Soldiers if brought before a civilian tribunal could make a *praescriptio fori*, or a claim to jurisdiction, and gain exemption from the proceedings.[72]

This division was never so simple in English law. English commanders often sought to accommodate civilian officials whenever they were able to do so, and allowed them to hear and determine cases against soldiers.[73] However, by the sixteenth century, the English Crown began to develop a legal system in garrison towns that sought to prevent magistrates from jailing soldiers over misdemeanors like debt. It decided upon a rule that civilian magistrates could hear and determine cases against soldiers in cases involving life and limb, but they could not prosecute soldiers for misdemeanor charges unless they had received permission from the suspect's commanding officer.[74] In Berwick for example, civilians petitioned the marshal of the town to hear cases involving the debts of soldiers to civilians.[75] Only in Ireland in the sixteenth century were soldiers exempt from common law. However, if the commander refused to act on a complaint in three months, the complainant could take the case to a civilian court.[76] The point of

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[71] Balthasar Ayala *De Jure et Officis bellicis et disciplina militari libri III* ed. John Westlake 2 vols. (Washington : Carnegie Institution of Washington, 1912), ii. 205.

[72] Ibid.

[73] See B.J.H. Rowe, "Discipline in the Norman Garrisons under Bedford" 1422-35" *The English Historical Review* 46:182 (Apr., 1931): 194-208.

[74] As Thomas Ridley noted in his 1607 work on Roman Civil Law in England, "soldiers faults are either proper to themselues or common with others. Those are common with others, which fall into other men, and are corrected with like ordinarie proceeding as other crimes of such like nature are, as manslaughter, theft, adulterie, and such like." Ridley, *A View of the Civile and Ecclesiastical Law* (London, 1607), 88.

[75] See TNA, WO 55/1939, fos. 7-14. This reference is to the letter book of the governor of Berwick. In it, we see that civilians had to petition in cases involving soldiers.

[76] "Instructions to Sir Anthony St. Leger, 1550," HEHL, EL Ms. 1700, f. 5v. CPR, 1549-51, 346.

the petitioning system was not to exempt soldiers from law. Instead, it gave the commander an opportunity to act as an arbitrator, where the dispute could be resolved without the soldier having to be jailed.

In 1625, the Council of War in its draft ordinances of war included a provision authorizing the martial law commissioners to utilize the petitioning system. It stated that "if anie soldier or officer doe abuse anie man or woman the partie grieued shall goe to the officers commanders therein" and if not to them then to another martial officer and inform them of the offence. Then, they needed to crave the commanding officer to call a council of war to hear and determine the case, and if they found the defendant guilty, punish him or her "with imprisonment or the strappadoe or with more or lesse as the fault requireth."[77] We can see through these instructions that the Council of War recognized that certain officers might not help those in need of justice, and granted petitioners the power to move up the chain of command should they feel it necessary. Since this was only a draft ordinance, it is not clear that these instructions ever went out to the martial law commissioners.

Indeed, the Crown and Privy Council simply wanted order to be maintained by any means necessary. This more or less desperate attempt to control soldiers included adjudication by martial law commissioners of misdemeanors. In the remnants of Sir John Hippisley's notebook from the autumn of 1626, there is a plan for how civilians could complain about wrongs committed by soldiers.[78] The complainant had to submit in writing the name of the soldier and his supposed offence to the commissioners; otherwise the martial law commissioners would not

[77] TNA, SP 16/13/41.

[78] The notebook is BL, Egerton, 2087.

investigate the offence any further.[79] The commissioners of Hampshire, likewise heard plaints from civilians, officers, and soldiers, and attempted to act upon their acquired knowledge. In 1626, for example, the commissioners instructed the regimental commanders that they would be meeting in October 1626 to address the complaints they had received from officers, soldiers, and those billeting soldiers about wrongs committed.[80]

The martial law commissioners in Hampshire, Devon, and presumably Kent, heard and determined misdemeanor cases.[81] Mostly, the records that survive for our understanding of these proceedings are warrants in collected papers of deputy lieutenants.[82] The commissioners in Hampshire, for example received information that Captain Ogle's regiment had committed diverse misdemeanors while stationed in Winchester. They commanded his appearance before them at a meeting to be held in Alreford. A copy of the warrant was sent to the mayor of Winchester to show him that justice was being performed.[83] These warrants reveal that civilians along with soldiers could be brought before the martial commissioners for failure to perform the services assigned to them. Hippisley, for example, commanded the body of Edward Ryden of Awcombe to appear before the commissioners on 15 December 1626.[84] Although we know nothing more about the case, it appears Ryden was a civilian. Perhaps he had disobeyed his instructions to billet troops. The commissioners in Hampshire commanded Thomas Phillips of

[79] Ibid., f. 30.

[80] "The deputy lieutenancy book of Sir Richard Norton." BL, Add. Ms. 21,922, f. 82v.

[81] The commissioners of Devon, for example, punished three soldiers for drunkenness in the spring of 1626. TNA, SP 16/24/26.

[82] One such warrant can be found in HRO, Jervoise Ms. 44M69/G5/48/125.

[83] Ibid., f. 88.

[84] Sir John Hippisley's notebook, BL, Egerton 2087, f. 37.

Romsey, John Ivey, and Thomas Rolfe to appear before the commissioners at Winchester because they refused to allow their horses to go with the soldiers as commanded by the constable. Upon information from the constable, the commissioners decided to hear the case.[85] In effect, the commissioners had powers to punish civilians who committed contempt of the Privy Council by not obeying its orders.[86]

The commissioners of martial law heard cases involving the misdemeanors of soldiers, and even in certain instances, civilians. But could civilians prosecute soldiers through other means than the court martial? It seems clear that in general, civilians could pursue other legal avenues. The sessions of the peace for the city of Exeter, for example, which was in the heart of Devon and billeted troops, contains several court cases involving wrongs supposedly committed by soldiers.[87] The city's sessions of the peace heard in November 1627, for example, a case against eight soldiers brought upon the information of one Robert Clarke, who claimed that they had killed some sheep in the grounds of a citizen named John Roes. From these records, it does not appear that the high command in any way tried to prevent the case from going forward.

On certain occasions, the Privy Council acted as a gatekeeper when complaints were made to it about wrongs committed by soldiers. For example, Conway wrote to the martial law commissioners in Hampshire about three soldiers who had supposedly stolen a horse from someone while marching through Wiltshire. The Council ordered that they repay that person for the horse, but in doing so, gave him the opportunity to be removed from the ambit of

[85]BL, Ad. Ms. 21, 922, f. 88v. HRO, Jervoise Ms. 44M69/G5/38/4.

[86] The Privy Council commanded the deputy lieutenants of Essex to imprison those who refused to billet soldiers in 1628. Bodl. Firth C.4, f. 446.

[87] DROE, ECP BK, 62, f. 328vff.

prosecution.[88] In another letter, the Privy Council authorized the martial law commissioners to remove soldiers who had been jailed for misdemeanors so that they might continue to serve the Crown as soldiers. However it warned the commissioners not to release those who had committed egregious or violent offences.[89]

In the end, it was not any of these policies that infuriated those living in the south of England. It was the failure to execute those policies. Riots amongst the soldiery erupted in Essex, both in Harwich in 1626 and in Witham in 1628. The Mayor of Canterbury wrote to the Privy Council in 1628 that he feared for his life due to the violence of the soldiers stationed there. Soldiers were not being restrained. Further, it seems clear that the officers of soldiers were protecting them from prosecution. It was this form of informal exemption that the inhabitants of the Isle of Wight complained to the Privy Council about in 1627. The Privy Council was acutely aware of this problem, and in the spring of 1628 laid the blame on its martial law commissioners. It scolded the Hampshire commissioners for meeting too infrequently and for not adjudicating complaints made by civilians on various depredations of soldiers.[90] The constables of Devon received a similar treatment in the spring of 1628. [91]The Privy Council declared that they had failed to maintain order amongst the soldiery. Members of parliament when it convened in March likewise had few kind things to say about the deputy lieutenants and their treatment of soldiers.

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[88] Conway to the Martial Law Commissioners, 9 Jan. 1628 HRO, Jervoise Ms. 44M69/G5/39/2.

[89] Privy Council to the Commissioners of Martial Law HRO, Jervoise Ms. 44M69/G548/16.

[90] Privy Council to the Commissioners in Hampshire, 13 Feb. 1628, BL, Add. Ms. 21,922 f. 132v. For the lieutenancy's failures in general, see Thomas Garden Barnes, "Deputies not Principals."

[91] *APC,* xliii. 360.

Re-Imagining the Verge: The New Law of Martial Law

Charles convened parliament to meet in 1628 because he desperately needed money. His government was not in a good state: it had no success, no money, and its chief minister, the Duke of Buckingham, had innumerable enemies. The members of parliament wanted to redress injustices committed by Charles' ministers, and due to the weakness of the Crown, possessed the political capital to effect changes. Several leading legal minds who sat in this parliament: Sir Edward Coke, the former chief justice of King's Bench and prominent legal theorist, John Selden, an active writer and legal theorist, and William Noy, another prominent lawyer who would go on to serve as Charles' attorney general, all debated martial law. These men crafted interpretations of martial law that would supplant the scant sixteenth century literature on the jurisdiction. Through these new interpretations, martial law would be temporally restrained in England.

The debates in the Commons over the Crown's war policies began with the office of deputy lieutenant. As we shall remember these county officials were in charge not just of martial law but also of billeting and impressment. They were, along with the mayors and several colonels, the commanders of Charles' soldiers. Many did not sit in the 1628 parliament. Their general absence allowed the justices of the peace who were sitting in the Commons to take aim at their powers. On 24 March, Sir Edward Giles, an MP from County Devon, complained "what can we do, when a commander commands us to join with his commanders to billet soldiers in our country? We must do it, or else it would be worse."[92] The House barred the deputy lieutenants from speaking at this debate.

[92] *Proceedings in Parliament 1628*, ii. 80 (P&D).

The lawyers that heard complaints began to think about time. Through this meditation, they would make new laws to regulate what they perceived to be discretionary acts of the Crown. Sir Edward Coke complained that few known boundaries for the office were known, because it was new.[93] Coke called for a committee to examine the deputy lieutenants, so that it could make new laws to govern their activities. Several days later, in a discussion on the billeting of soldiers by deputy lieutenants, John Selden declared that billeting was illegal. Deputy Lieutenants only had powers in certain states of time: "deputy lieutenants…are appointed by a writ under the Great Seal, to kill, slay, and depress all rebels, in times of rebellion, or any open violence of the King's peace."[94] The deputy's office, when Coke and Selden intervened in these debates, should be delimited to certain states of time. This same pattern continued on 8 April when MPs from areas where soldiers were billeted complained about the outrages of soldiers. Sir Walter Erle, an MP from Dorset, opened the subject by complaining once again about billeting.[95] Others complained about the numerous depredations soldiers had committed in their localities. Some argued that the officers in the army actively prevented them from prosecuting soldiers for these wrongs. Once again Edward Coke intervened in the debate. Once again he was concerned about time. "Here is a secret of the law" he opened, "Before the 27th Queen Elizabeth no man [i.e. deputy lieutenant] was to have a continual commission; it was only for a time."[96] According to Coke, in times of peace, the deputy lieutenant could do nothing but according to law. It was in this context that the commissions of martial law were first debated. From a discussion of the depredations of soldiers, to one of billeting, to one of the temporal constraints of powers of

[93] Ibid., 79-80.

[94] Ibid., 268.

[95] Ibid., 360, 364.

[96] Ibid., 367 (quoted from Stowe). Or alternatively "there is a secret of the law." Ibid., 362 (P&D).

lieutenants who supervised billeting, and finally, to a discussion of martial law as an example of the powers that deputy lieutenants should only possess during times of war.

In this context, Coke provided a negative definition of martial law: it was simply a trial of life and limb without indictment or presentment. Through this broad definition, Coke gained access to debates about due process that had taken place in the fourteenth century – with which we should by now possess familiarity. It was in this period that members of parliament had reinvented clause 29 of Magna Charta as a barrier to procedural alternatives to trial by peers like the conviction by the king's record according to the notoriety of an offence. Coke looked to the overturning of the conviction of Thomas of Lancaster by the first parliament under Edward III in 1327: "Thomas Lancaster in E.2 was taken…and they gave judgment without indictment, and he was beheaded."[97] According to Coke, in its reversal, parliament declared that "if the courts of justice be open" none ought to be executed unless they were indicted and tried by their peers. In this reading, Coke understood Lancaster's trial and execution as a form of martial law.[98] By doing so, the reversal of his conviction set a precedent that martial law could not be used while the Courts of Westminster were open.

Coke did not go back to the past to find the immutable truths of the ancient constitution.[99] Instead, he accessed very specific parts of past discourses because it provided tools that he could use to block some of the innovations the Crown had made in the past four years. Let us examine more closely what the reversal of the trial of Thomas of Lancaster actually said. As we shall recall, Edward II had convicted Lancaster of treason upon his record due to the notoriety of his

[97] Ibid., 363 (P&D).

[98] Ibid.

[99] The much more pressing problem with describing these debates as "Ancient Constitution" is that at no point did the jurists actually discuss immutable custom. Christianson, "Debates over Billeting and Martial Law."

offence in 1322 at Pontrefact Castle. Parliament, concerned about this practice, reversed the decision in 1327 which restored the real property of the descendants of Thomas. In the reversal, parliament asserted that conviction upon record could only be used in times of war, defined *either* as when the Chancery was open *or* when the king had raised his banner. Anyone within the verge of the banner could be subject to conviction upon record. Through selection, Coke eliminated the banner and the power of the king to alter time. Two jurists, Sir John Bankes and Robert Mason, supported his questioning of the legality of martial law, if not his assertions, and called for the elimination of the martial law commissions.[100]

Coke's intervention provoked further debate on the legality of martial law in England. Once again, the focus of the debate swayed from the real problems that soldiers presented to county officers and the jurisdictional politics the jurists wanted to pursue. On 11 April, MPs examined a sample commission of martial law and the accompanying ordinances of war – glossed by the MPs as "instructions."[101] The prevalence of the death penalty within the instructions was shocking. And Coke attempted to ban them with an identical strategy: that martial law could not be used while Chancery was open.

The others, those who had been JPs in the counties, moved the debate to the problems they had actually experienced. While many agreed that the martial law commissions might not be good policy, they focused on their own inability to punish soldiers. John Eliot reported that in the West Country (county Devon and Cornwall) he was prevented from punishing soldiers by their commanders who claimed that when a justice of the peace "offered to meddle, he was

[100] Ibid., 364. For a more extensive discussion of this case, see the prologue.

[101] Ibid., 412-3, 416, 420, 423-4.

menaced and threatened, as if he had passed beyond his limits."[102] Others were not that opposed to the martial law commissions. Sir William Beecher, a client of the Duke of Buckingham, stated that the commissions were simply *"ad terrorem,"* they were only meant for soldiers, and that the Crown had ordered common law to be used whenever possible. In response, John Selden for the first time entered the debate. For Selden, the question of legality of the commissions was pressing. Commissioners were hanging soldiers, and perhaps preventing JPs from performing their judicial duties. Most of all, he was concerned about the language within the commission: "it is not only to execute soldiers but any dissolute man that joins with them."[103] What constituted a "dissolute man" concerned Selden, and he moved that the Commons should investigate the nature of martial law further.

Selden by 1628 was a famous if controversial jurist. In 1627, Selden served as council for the "five knights" – five men who Charles had imprisoned for refusing to pay the so-called "forced loan" in November 1627. Here Selden claimed in that case that the Crown could only imprison those that had either been indicted or presented. Selden and his fellow councilors lost the case. And they lost it because it was recognized by most jurists at the time that the Crown could imprison subjects by a variety of other laws. Selden did not go down without a fight. He continued his narrowing project in the parliament of 1628, and would move to change the laws relating to imprisonment. He would use the same narrowing reasoning to combat martial law jurisdiction.[104]

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[102] Ibid., 413 (p&d).

[103] Ibid., 417 (Stowe).

[104] For Selden's career, see Paul Christianson, *Discourse on History, Law, and Governance in the Career of John Selden, 1610-1635* (Toronto: University of Toronto Press, 1996).

On 15 April, the Commons at Selden's request resumed the debate on martial law. Initially, for Selden, the debate did not go well. And it did not go well because Robert Mason, an established lawyer who had earlier agreed with Coke that the commissions of martial law were illegal, began by disagreeing with Coke's position that martial law could only be used when the courts were closed. Although Mason agreed that the current commissions were illegal, he granted that an army royal in the field could employ martial law. The soldiers as currently billeted did not constitute a force in the field. Perhaps Mason had read the full text of the reversal of the treason trial of Thomas Lancaster. Or perhaps he had read Fleta, which we recall outlined that in times of war the king raised his banner, and the Constable and Marshal of his host had jurisdiction over the verge. In any event, Mason provided a more expansive jurisdiction of martial law, even if it did not allow for the legality of the current commissions.[105] Selden was motivated to respond to these claims to martial law jurisdiction. In his response, Selden argued for the virtual elimination of martial law in England.

He did so by re-imagining the Court of the Verge and the medieval Court of Chivalry.[106] Let us recall that the Court of the Verge was the king's ambulatory court which had cognizance over the 12 mile circumference around the king's body. We shall also recall that the king's host in the middle ages fell under the jurisdiction of the verge, which had jurisdictions of peace signified by the wand, and of war, signified by the banner. A plea roll from the time of Edward I, the *placita exercitus*, revealed this heritage. Using the *placita exercitus*, Selden argued that common law as constituted in the Court of the Verge, governed the king's hosts. Martial law thus

[105] *Proceedings in Parliament 1628*, ii. 461, 466, 469.

[106] Ibid., 462-3, 467-8, 470, 473-6.

played no role in the disciplining of troops.[107] The Constable and the Marshal for Selden only had judicial responsibilities when they encountered rebels in the act of rebellion. This power was simply *flagrante crimine,* (execution of the criminal in the act of committing a crime), and "is the legal power of the lieutenants now."[108] Martial law was thus common law substance without common law process. In other words, its executors did not hold court.

Second, Selden examined the medieval Court of Chivalry, and used this court to ensure that martial law had no jurisdiction *in* England. We shall recall that the Court of Chivalry was established in the fourteenth century to handle the legal business of the wars taking place in France. Many suitors used the court, even when those suits could have been heard either at King's Bench or at Common Pleas. In the thirteenth year of the reign of Richard II, parliament passed a statute that restricted the court's jurisdiction to treason and all matters relating to war overseas, and to all matters of war not cognizable at common law within the realm.[109] Selden claimed that martial law and the Court of the Constable were one and the same, which has generated an enormous amount of confusion among scholars ever since. He did so to combat any claims that martial law might have jurisdiction within England. Outside the realm, the court could punish by life and limb. Coke agreed that martial law and the Court of Chivalry were one and the same. The jurisdictional politics of both were clear: by turning martial law into the Court of Chivalry, they could bind the jurisdiction in England through 13 Richard II. Selden's claim

[107] The Placita Exercitus roll can now be found in TNA, E 39/93/15. Selden's notes on the roll are still extant. LPL, Ms. 3474, fos. 7-v. In ibid., fos. 10-v, there are notes taken by John Bradshaw, who was a member of the sub-committee to examine martial law, on 14 April 1628 on a *coram rege* roll from the same time period. It seems as though Selden, apparently with the help of Bradshaw, was comparing the *placita exercitus* with a "common" plea roll. These records are now located in the manuscript collection of Sir Matthew Hale, but they certainly belong to Selden. Hale was Selden's executor. For the list of the members of the sub-committee to examine martial law, see *Proceedings in Parliament 1628*, vi. 105.

[108] *Proceedings in Parliament 1628*, ii. 463 (P&D).

[109] Ibid., 464.

on this front was accepted: martial law was legal overseas. On the one hand, martial law as constituted in hosts was not actually a law; on the other, martial law as constituted overseas was that practiced by the Court of Chivalry.

Martial law could also be applied to enemies within the realm. Here Selden and all the other jurists came to an agreement.[110] They understood this point from the trial of Perkin Warbeck, the pretender who claimed to be a Yorkist heir who in 1497 invaded England. Henry VII caught him after his rebel army had dissipated in October. Eventually, the king tried Warbeck before a court of the Constable and the Marshal where he was convicted of treason and executed. The reports of the case in the sixteenth and seventeenth centuries claimed that Warbeck was tried before the Court of the Constable and Marshal because he was not an English subject; he had been born in Tournai, which was held by the king of France.[111] Using this case, Selden and all the other jurists agreed that courts martial had jurisdiction over enemies of the realm in cases involving life and limb.

But when it came to Selden's arguments about what constituted a state of war, and thus martial law jurisdiction in England, many of his colleagues remained unconvinced. Sir Francis Ashley was one of the skeptics. A former JP, Ashley had been called to the Bar in Lincoln's Inn in 1616. That year, he gave one of the most detailed readings on chapter 29 of Magna Charta of the seventeenth century. In it, Ashley argued that rather than signifying that imprisonment could only take place after indictment or by presentment, all the many laws of the land, including martial law, had powers of imprisonment based upon their jurisdiction. Ashley's understanding

[110] Ibid., 463.

[111] The report of the Warbeck case that Edward Coke and Selden were probably familiar with can be found in *Reports from the Lost Notebooks of Sir James Dyer* ed. J.H. Baker 2 vols. (London: Selden Society, no. 109, 1994), i. 206. Other reports of the case can be found in *Reports of Cases by John Caryll part one 1485-1499* ed. J.H. Baker (London: Selden Society, no. 115, 1999), 383: and in *The Notebook of Sir John Port* ed. J.H. Baker 2 vols. (London: Selden Society, no. 102, 1986), ii. 125.

of English laws was much broader than the interpretation offered by Selden. By 1628, Ashley was a sergeant of the king, and on 16 April, he attended a conference between the Lords and the Commons. In the conference, Ashley reiterated his position that imprisonment need not be by clause 29 of Magna Charta. Instead, even martial law was a law of the land, in times of "invasion or hostility."[112]

Two days later, in a debate on imprisonment in the Lords, Ashley expanded his definition of martial law. Ashley gave a speech that once again denounced Selden's narrow interpretation of the process by which the Crown could imprison its subjects. Once again, he went through all the laws of the land. When he came to martial law, Ashley argued that martial law,

> though it could not be exercised in times of peace when recourse may be had to the King's courts; yet in time of invasion or other times of hostility when an army royal is in the field and offences are committed which require speedy reformation and cannot expect the solemnities of legal trials, then such imprisonment, execution, or other justice done by the law martial is warrantable.[113]

Ashley thus agreed with the general argument initially offered by Mason that an army royal had martial law jurisdiction in England. This claim would have still made the martial law commissions of the past three years illegal. But Ashley's analysis stung Selden and some of the others. They attacked him as someone making a political argument for his master, not for making a valid legal argument. The charge was baseless, but it was made because Selden, Coke, and the others were losing ground on the martial law argument.[114]

By 18 April, MPs trained in Roman Civil Law began to assert more aggressively the scope of martial law jurisdiction. Previously, Crown officers had simply warned the MPs to

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[112] Halliday, *Habeas Corpus,* 145-6.

[113] *Proceedings in Parliament*, iv. 282.

[114] Christianson, "Arguments on Billeting and Martial Law:" 553-4.

debate the abuses relating to martial law and not the Crown's right to use it. But on 18 April, several MPs trained in Roman Civil Law argued that the martial law commissions the Crown had issued for the past three years were perfectly legal. Thomas Eden, a Civil Lawyer and master in Chancery, argued that soldiers must not only be tried by laws unique to the army, but also by military men. Speaking next, Sir Henry Marten, another Civil Lawyer who had served James I as his advocate, made a more extended defense of martial law. Marten was incredulous about Selden's argument that martial law was simply the execution of common law substance without common law process: "Is this not a law? Have we not military men? Have we lived so long lawless?"[115] The need for martial law in the mind of Marten was similar to the justifications offered for it by commanders: drawing up an indictment for a soldier who committed a wrong and then trying him at the next assizes missed a teaching opportunity for the rest of the soldiers. For Marten, "present death is present terror."[116] Along with these justifications, Marten dismissed the temporal constraints that Coke, Selden, and others offered for martial law: "Execution of martial law is necessary where the sovereign and state think it necessary."[117]

In this context of divisiveness, William Noy made the most important and influential speech on martial law in the 1628 parliament. Noy, like Selden, was by 1628 a highly respected but controversial jurist. He had with Selden sided with the five knights in their Habeas Corpus case in 1627. He was a strong opponent of the Duke of Buckingham, and he had been critical of the king's extra-parliamentary taxation schemes. However, Noy did not agree with Selden on

[115] *Proceedings in Parliament*, ii. 548 (Stowe).

[116] Ibid., 549.

[117] Ibid.

what constituted a state of war, and through his speech reframed both Selden's and other jurists' opinions on martial law jurisdiction.[118]

Noy began by asserting that martial law was a valid jurisdiction in England, but only for soldiers and only in a state of war. But a state of war was not signified by the Courts of Westminster being closed. Looking back to the Battle of Evesham in the thirteenth century, Noy noted that "war is entered into the red book of the Exchequer…and yet the Chancery was open, and writs went out."[119] The "law of the camp" could thus operate even when the courts of Westminster were open. What then signified a state of war? For Noy, martial law was "not to be executed but when there is a banner displayed."[120] He had re-discovered the banner as a signal of a time. But it was the enemy's banner: "the law intends that the enemy's banner should be first displayed in the field." It was only when the army royal was near the enemy in expectation of battle that martial law could be deployed. The enemy, and its banner, now controlled time.

While Coke continued to speak about the Courts being closed, Noy's points about a state of war influenced the remainder of the proceedings. Selden in two speeches on 19 April and on 21 April, when parliament decided to convene a sub-committee to examine the history of martial law, ever so slightly changed his arguments. He still argued that the Court of the Verge held jurisdiction over the army: "[A]ll the proceedings was by those laws which was used in the Steward's and Marshal's courts."[121] But he granted that a state of war might be when

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[118] James S. Hart, Jr. "Noy, William," in *ODNB*.

[119] *Proceedings in Parliament 1628*, ii. 544 (P&D).

[120] Ibid. 558 (Newdigate). I have taken this quote to be accurate in part because another set of notes (HRO 44M69/52/34) also cites this statement. I will discuss these notes shortly. According to the diarist Henry Sherfield, Noy stated that "martial law may be executed: not when an army is preparing, or billeted, or in conduct, unless the enemy be near approaching, or under a banner marching or intrenched – then martial law will be executed, but not at any other time. *Proceedings in Parliament*, vi. 73.

[121] *Proceedings in Parliament*, iii. 83 (Grosvenor).

the sheriffs' writ could not run. Selden also now admitted that "if an army were gathered together against an enemy, martial law may be used." All of the men of the army, and any of those rebels or disobedient near the verge of the army, were bound to obey. Selden had been influenced by Noy. Although he could not bring himself to grant martial law powers of life and limb: commanders could only punish through imprisonment. Only rebels engaging in the act of rebellion could be executed at martial law.[122] Others also came around to this point of view. Sir Dudley Digges on 22 April argued that armies were governed by commissions of *oyer* and *terminer* until "there's an enemy near."[123] Noy had effected a re-imagining of the verge. In peace, the army and those within its verge were governed by common law. In war, this was now signified by the enemy's banner, commanders governed by martial law.

The Crown's position that its delegation of martial law had been legal was lost by 22 April. That day, Sir John Coke, the king's principal secretary of state, gave a speech to the commons where he pleaded with them that the king's power to create martial law jurisdiction was part of his prerogative; that martial law was necessary to use in preparation for wars to discipline soldiers.[124] According to Coke, "for it is necessary that in time of peace we have provision for war." Where the common law's cognizance ended, martial law was necessary to keep soldiers in awe and obedience, whether or not England was in a state of internal war. This power, further, "touched the king highly."[125] It was a part of his prerogative powers. And lest anyone should forget, Coke asked the Commons: "Did not the commissions go out at the request

[122] Ibid., 72.

[123] Ibid, 25 (Stowe).

[124] Ibid., 23-4, 27-8, 31-2, 34-5, 38.
[125] Ibid., 24 (Stowe).

of the gentlemen of the country[?]"[126] None of these claims were wrong. The last argument, that martial law was meant to accommodate the county governments, was absolutely true. But the Crown was too weak in the spring of 1628 to win with the truth. The lawyers in the Commons, upset over all the innovations made to sustain the war for the past three years, dismissed Coke immediately. The Commons ordered a sub-committee for martial law to examine the history of the commissions of martial law before it made a final determination on the legality of the martial law commissions made by James and Charles.

A critical observer would have found much to quarrel with the ensuing report on the history of martial law. After they had been officially assigned the investigation, Selden investigated all those commissions between the reign of Edward I and Henry VII, while Noy focused on the Tudor era. They gave their reports on 25 April and on 7 May.[127] Their interpretations did not change as a basis of their examinations. Some of the commissions they found certainly proved their points. The Court of the Verge did take a prominent role in the disciplining of soldiers. But other points that disputed their interpretation were omitted or rationalized. The several commissions that authorized generals to proceed to try by life and limb by simple information process made sense to Noy and Selden only because they were for armies outside of the realm. The several known examples from the sixteenth century of commanders executing soldiers in England – the most prominent being the Earl of Essex executing three soldiers in 1596 prior to his Cadiz expedition – were explained away by the claim that he had required a pardon (he had not). The Pilgrimage of Grace and the Northern Rebellion were

[126] Ibid.

[127] Ibid., 72, 79, 83, 86, 88, 302, 305-7, 312-3, 318.

ignored. The comprehensive history of martial law was not that useful for those who desired to restrain it.

Sir Henry Marten was certainly not convinced. He admitted – and here we can see the power of Noy's argument - that the "instructions" or the articles of war, could only go into effect "when the army is before an enemy."[128] But Marten still maintained that martial law as a procedural complement to common law could be employed at the discretion of the king. The history of martial law, according to Marten, proved that point. Moreover, he was deeply troubled by the attempts of the common lawyers to bind the king's ability to alter time: "The king has power to proclaim war or to make peace; and by consequence they are to judge when it is time of peace or time of war."[129] Marten was right that the king had controlled time. But when it came to trials by life and limb, it was no longer the legal understanding in England.

Consequences

The victory of Noy and the other jurists was total. On 7 May, the Commons voted to state that the commissions were illegal, and eventually they included into the Petition of Right – a petition to Charles that asked for redress of grievances– a clause that asked for the revoking of the current commissions of martial law. Charles and his council, after thinking about responding by stating they would make the commissions only for soldiers in pay, consented to the request.[130] Even though the JPs in the counties had not participated in the full debate on the abstract jurisdiction of martial law, their desire that no man should be exempt from common law was

[128] Ibid., 307 (P&D).

[129] Ibid.

[130] For the drafts of the responses to the Petition the Crown made, see *Proceedings in Parliament 1628*, vi. 47-50.

included in the Petition as well. The Crown only issued commissions of martial law to officers on the isle of Guernsey, in the Channel Islands, in the summer of 1628 for the discipline of 200 garrisoned soldiers.[131] The actual petition mattered.

But the juristic arguments made by the leading lawyers of the realm mattered far more for the future history of martial law. And while the Petition of Right claimed simply to re-affirm 25 Edward III – itself a re-imagining of Magna Charta's clause 29 that no man be tried by life and limb except by the law of the land and by his peers – in actuality, the arguments on the law of martial law were new. For the first time, jurists had spoken at length on martial law jurisdiction. These arguments were written down, stored, and well-received by the English legal community. In particular, the idea that only the enemy through its actions changed time was almost universally adopted in Caroline England. This idea was successful but not infallible in restraining martial law jurisdiction.

The idea that the enemy's acts created a state of war was central to how an anonymous notetaker – probably the diarist and lawyer Henry Sherfield – understood martial law jurisdiction.[132] In three pages, Sherfield outlined what he believed to be the law of martial law in England.[133] He was taken with the debate between Selden and Henry Marten. Dividing one page in half, Sherfield listed all of the arguments Selden made on 16 April on the top and all those Marten made on the bottom. He listed many of the statutes and references both cited. Sherfield concluded that Marten had argued that soldiers in pay in an army royal could be tried by martial

[131] TNA, C 66/2481, m. 5d, 7d; *APC* xliii. 204. The commissions were recalled, at the request of the inhabitants of Guernsey, in 1629. *APC* xliv. 546.

[132] HRO, Jervoise 44M69/52/34. Sherfield's diary can be found in the same archive. It has been printed in *Proceedings in Parliament 1628*, vi. 58-93. Both the notes on martial law and Sherfield's diary were written in a combination of English, law French, and Latin, and Sherfield in his diary, made extensive notes of the martial law debates.

[133] HRO, Jervoise 44M69/52/34.

law, and cited 4&5 Phillip and Mary. From Selden, Sherfield noted the *placita exercitus* from the reign of Edward I and the statute on the Court of Chivalry from 13 Richard II. He understood Selden's point that generals could imprison but not kill soldiers in an army royal: only at common law could one be tried by life and limb. This point was the key to Selden's argument for Sherfield, who noted wryly, "better I married a lawyers daughter."[134]

After he had taken down the specific notes, Sherfield established ground rules for when martial law could be used. Here, we can see the influence of Noy's arguments. First, Sherfield wrote that the James' and Charles' martial law commissions were against the law. Martial law could not, according to Sherfield, be used "in this nacon" in a time of peace. A time of peace, however, was not when the courts were open. Instead, a time of peace was when "noe enemy or Rebell in the field wth banner displayed." Sherfield then added an important component of this theory of a state of peace which was not recorded in the debates. He also claimed that war could be determined if the enemy was at hand "ready to enter into the land to invade." Otherwise, martial law could not be used on either soldiers or civilians within the realm.

What was less clear to Sherfield was the legality of execution if the army was near an enemy. This confusion was understandable as Noy and Selden disagreed on this point. In trying to figure it out, Sherfield played out a hypothetical: "a capten kills a souldier of his owne in the battayle or nearby the battayle…what law doth he kill him by…shall not the common lawe judge of it after[wards]"[135] The execution was "phaps justifiable" Sherfield mused, but "phaps not." The common law might have cognizance over the case, but it also might come before the constable and marshal who, according to Noy, had jurisdiction in the field.

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[134] Ibid.

[135] There is an ink blot that mars the last word, but it seems like it reads as "afterwards."

Others who took notes also stressed the importance of the enemy's role in authorizing martial jurisdiction. A notebook of legal precedents from Charles' reign, which unfortunately is anonymous, had kept track of the debates on martial law since Coke began it on 7 April through 1637 when Oliver St. John made speeches on Ship Money.[136] In it, the jurist thus began with Coke's arguments that unless the "courts be hindered" martial law was not legal in England. He understood that "abroad it hath power indefinite." It had power over enemies even in states of peace. But the notes eventually moved on from Coke and ended with Noy's claims. In times of war, martial law could not be used "vnless another army were against them." The key point for this note-taker was that in times of peace in England, subjects could only be tried by life and limb "by due process of law."[137]In general the 1630s was a decade absent of martial law in England. The summary martial law proclamations – so prevalent in England and in Ireland in the sixteenth century – had disappeared.

The restrictions on martial law only became tested when Charles sent royal armies in 1639 and in 1640 to Scotland to quell a rising in that kingdom over Charles' attempts to mandate an episcopal government for the Scottish church. In both campaigns, Charles issued fairly standard orders to his commanders, who in turn issued ordinances of war to discipline their soldiers.[138] But in spite of these commissions, there was considerable debate over when they could be legally enacted. This uncertainty became pressing in the spring and summer of 1640, during the Second Bishops' War. Edward Conway, the son of Charles' secretary of state in 1625, wrote to William Laud, the Archbishop of Canterbury, and complained that his soldiers were out

[136] BL, Harley Ms. 980, f. 164v.

[137] Ibid.

[138] *Lawes and Ordinances of Warre, for the better Government of his Majesty's Army Royall* (London, 1639); *Lawes and Ordinances of Warre established for the better conduct of the service in the northern parts* (London, 1640); *Lawes and Ordinances of Warre established for the better Government of the armie* (London, 1641).

of control. The war was immensely unpopular; many soldiers serving in Charles' armies had religious sympathies with the Scots and agreed with their protests over the king's attempted religious reforms. Mutinies, riots, and general disobedience were common amongst the soldiers.

In May 1640, Conway had put a soldier to death by firing squad for mutiny. The soldiers under his command at Newcastle mutinied on pay-day because Conway had withheld two pence from each soldier for the payment of their arms. Conway apprehended the spokesman. On the next day twenty soldiers tried to break him out of jail. Conway arrested the two ringleaders, had them roll dice for their lives, and executed the loser by firing squad. Many within the town and within the army were shocked at the execution, and told Conway he had no authority to convict by life and limb without trial by indictment.[139] Indeed, the Crown was so concerned about his actions that it gave Conway a pardon pre-emptively before he could be tried for murder. The disorders did not stop over the summer, and Conway wrote to William Laud in July about his problems with maintaining discipline. He informed Laud that the commander of the army, the Earl of Northumberland, had told him that he could not execute his commission of martial law in Newcastle, except "when an enemy is really neare to an Army of the Kings."[140] Conway was furious: trial by a jury instead of by a court of war "will take away the respect of the souldier to the officer and therewith presently be noe obedience or care in either soldier or officer."[141] Conway's solution was to hang the lawyers. But finally Northumberland in the summer delivered a warrant to Conway which allowed him to try soldiers by martial law. But he also delivered a

[139] *CSPD*, 1640, 189.

[140] Conway to Laud, 6 Jul. 1640, LPL, Ms. 943 fol. 695v.

[141] Ibid.

pardon. In order to get around the discourses on martial law, commanders needed to strategically employ the king's mercy.

The most famous use of the discourses on martial law came in the treason trial of the Earl of Strafford in the spring of 1641. This case is well known, controversial, and potentially time-consuming so let us simply focus on the arguments made in relation to martial law at the trial. While lord deputy of Ireland, Strafford had presided over the conviction of a peer, Lord Mountnorris, of a capital offence at martial law. He had also executed a soldier at martial law in 1638 for desertion and for theft. The prosecutors, who were trying to prove that Strafford systematically attempted to subvert the king's laws, claimed that he had violated the Petition of Right, which was a re-affirmation of ancient English statutes that had been incorporated into Irish law, because he had the soldier executed while the army was garrisoned during a time of peace. Wentworth, after he finally conceded that the Petition of Right was law in Ireland, claimed that he could be tried for murder but not treason, and that he would receive a pardon for his execution of the soldier in the same way that Conway had received one. The discourses on martial law had made such an impact that both sides in the trial agreed that it was illegal to take the life of a soldier during a time of peace.[142]

The idea that the enemy through its actions invoked martial law continued into the 1640s, at least among some legal circles. Sometime in that decade the Roman Civil Lawyer Walter Walker played out a hypothetical scenario involving a case where a soldier stationed in Ireland had killed another soldier while on duty.[143] A court martial heard and determined the case, and

[142] John Rushworth. *Historical Collections of Private Passages of State, Weighty Matters in Law, remarkable proceedings in Five Parliaments* 8 vols. (London, 1721), viii.

[143] BL, Add. Ms. 4159 f. 179.

then sentenced the guilty party to death. The question was whether a court martial had jurisdiction over the case, "noe enemy being noted in the field." Citing the Earl of Strafford's case, Walker advised in the hypothetical that unless an enemy was visible, the commanders should proceed against the defendant by a court of the land – or a common law court – because during a time of peace martial law had no jurisdiction.

By the outbreak of the English Civil War, the Petition of Right and the discourses surrounding martial law had completely transformed the jurisdiction. In the sixteenth century, jurists had contemplated time as a boundary for martial law but these attempts were at best partially successful. Through creative experimentation, the Crown had used martial law to punish or threaten to punish soldiers, mariners, pirates, rebels, vagrants, rioters, religious dissidents, and Virginians. In its last experiment, the Privy Council under James and Charles sought to grant martial law jurisdiction to its mayors and deputy lieutenants so that they might terrify soldiers into obedience through exemplary punishment.

In response, jurists sitting in the 1628 parliament used historical precedents – most completely unrelated to martial law – to re-imagine both martial law and its jurisdiction. It was now defined negatively. Martial law was that which tried someone by life and limb but did not follow the supposed rules laid down in clause 29 of Magna Charta; trial by life and limb needed to be by indictment or presentment, and conviction needed to be by one's peers. Only in a state of war could these rules be dismissed. It was now highly questionable whether or not the Crown could try rebels by martial law. Further, the monarch no longer controlled time; he could not upon his own discretion move his kingdom into a state of war. Only the enemy had the power to alter time in England.

Chapter Seven:
Hidden in Plain Sight:
Martial Law and the Making of the High Courts of Justice

The new law of martial law shackled monarchs but only embarrassed MPs. When England descended into Civil War in 1642, MPs authorized martial law conservatively. But as in the 1620s when the Crown accommodated its deputy lieutenants and mayors, local officials began to petition for martial law jurisdiction, and MPs accommodated the requests of its more powerful allies. The conservatism of jurists was overcome through the pressure of important groups like the government of the City of London and the New Model Army. Through petitions and threats, soldiers by 1647 obtained a jurisdiction which intervened in courts of law on their behalf. Those same threats made Members of Parliament grant martial law jurisdiction to their commanders in times of peace so that they might terrify soldiers into obedience. Through the same process, the City of London periodically obtained martial law jurisdiction to try "delinquents" – important enemies of the Parliamentary cause. The product of the desire to restrain martial law jurisdiction and also appease the City led to a new civilian variant of martial law: the garrison court martial.

In November 1648, when the army decided that Charles I had to die, Parliament began to authorize martial law jurisdiction more often. In this period of legal creativity, Members of Parliament looked to all of those past legal forms which had been banned by strict readings of clause 29 of Magna Charta, and combined and reformatted them to make new procedures and laws to meet their legal problems. The first was the trial of Charles in January 1649. Opponents of the trial saw the proceedings as a court martial. Their complaints against the new regime's legal innovations continued into the 1650s, when the Commonwealth and Protectorate authorized the garrison court martial – now glossed as a "high court of justice" – to sit in Westminster, and

try traitors. As we shall see, the Commonwealth changed the name out of embarrassment. But their shame did not prevent them from using a form of law that might be able to terrorize their opponents into obedience.

Prosecuting Soldiers: Discipline and Exemption

In the summer of 1642, most realized that the disputes between Charles and his Parliament would now be decided by military force. The demands made by MPs for the reformation of the Church of England, their execution of the Earl of Strafford, and their desire for control over the militia produced a chasm between them and the king that could not be overcome by peaceful means. Charles, having fled Westminster, began to raise forces through commissions of array. On 22 August, the king at Nottingham raised his standard to signify his belligerent status against Parliament.[1]

Over a month before, Parliament issued a commission to the Third Earl of Essex to command forces in order to protect the realm against the forces of the king who had been seduced by "papists and malicious counsels of divers ill-affected Persons" into raising forces against his Parliament. Through the commission, Parliament gave Essex powers to use either the laws of the realm or laws relating to the customs of war to discipline his troops.[2] The makers of the ordinance could not bring themselves to write the phrase "martial law." But that was surely their intent. This permission set a new precedent. Just over a year before, Parliament authorized

[1] For the causes of the Civil War, see Conrad Russell, *The Causes of the English Civil War: The Ford Lectures delivered in the University of Oxford, 1987-88* (Oxford: Clarendon Press, 1990). J.S. Morrill, "The Religious Context of the English Civil War" *Transactions of the Royal Historical Society*, 5th Ser. 34 (1984): 155-78. S.R. Gardiner, *History of the Great Civil War* 4 vols. (London: Phoenix Press, 1987), i. 1-2.

[2] *Acts and Ordinances of the Interregnum, 1642-1660* (hereafter *A&O*) ed. C.H. Firth, 3 vols. (London: H.M. Stationary, 1911), i. 14-16.

its lord general supervising the remainder of the army that had recently fought the Scots to only use a commission of *oyer* and *terminer*. In 1642, Parliament gave the commission to its lord general only five weeks after it ordered the republishing of the Petition of Right.[3]

Over the years, the writers of the Parliamentary ordinances became more confident in granting martial law jurisdiction. By 1645, in its ordinance granting Sir Thomas Fairfax powers of commander in chief of the "New Model Army," Parliament ordered him to "execute Martial Law, for the Punishment of all Tumults, Rapines, Murders, and other Crimes and Misdemeanors, of any Person whatsoever in the said Army."[4] The wording of the commission to Fairfax was almost exactly the same as that of Essex. And the intention was almost certainly the same. But by 1645, Parliament had overcome its embarrassment over the phrase "martial law." In ensuing ordinances, MPs granted powers of martial law to its top commanders to discipline soldiers under their command. This delegation of martial law was still reasonably conservative in nature. Parliament confined martial law in these ordinances to its top commanders so they could discipline soldiers in pay. Enemy armies were in the field, which gave Parliament temporal claims to grant martial law jurisdiction.

Due to mutinies, Parliament extended powers of martial law to its inferior commanders during times of peace. The taking of Oxford and of Charles in 1646 – thus ending the war – did not end Parliament's delegation of martial law jurisdiction. By 1645, Parliament had no capability of paying its soldiers, who were now owed considerable sums in arrears. The consequence of this financial failure was that many soldiers either decided to take their pay informally through pillage, or that they engaged in increasingly sophisticated mutinies to protest

[3] Barbara Donagan, *War in England, 1642-1649* (Oxford: Oxford University Press, 2006), 172. *The Petition of Right exhibited to his Majestie* (London, 1642).

[4] *A&O* i. 660-2.

their situation.[5] Further, Parliament could not disband the troops because it still needed the army to enforce its victory. In response to these problems of possessing a standing but unpaid and unhappy army, Parliament granted powers of martial law to its inferior commanders. William Brereton, the commander of Parliament's forces in Cheshire, for example, received powers of martial law in the aftermath of a mutiny by the troops there. It granted the same powers to Colonel Poyntz in the north in the winter of 1646 so that he could quell a mutiny.[6] Martial law jurisdiction continued in England even after the state of war had passed. One of the few strategies Parliament possessed in those years was to terrify its soldiers into obedience through the exemplary punishment by martial law. 1645-7 would not be the last time MPs authorized martial law jurisdiction in response to the mutinies of soldiers.

Martial law jurisdiction in a state of peace generated some protests. The most vocal criticism came from John Lilburne, the oft-imprisoned leader of the so-called "leveller movement" of the late 1640s.[7] Lilburne was deeply influenced by the works of Sir Edward Coke, whose *Institutes* had been published by Parliament during the 1640s, and which included his belief that the taking of life or limb by martial law when the courts of Westminster were closed was willful murder.[8] After a mutinous assembly had been quelled in March 1649, a court martial had sentenced the ringleaders to draw lots for their lives. Lilburne and other agitators argued that the legal recourses the Parliamentary commanders took to be illegal: "we do protest your exercise of Martial law against any whomsoever, in times of peace, where all courts of Justice

[5] J.S. Morrill, "Mutiny and Discontent in English Provincial Armies, 1645-7," *Past & Present* 56 (1972): 49-74.

[6] Ibid., 69-70. Poyntz, as we have seen, was arrested by his own soldiers.

[7] For Lilburne, see Pauline Gregg, *Free-Born John: A Biography of John Lilburne* (London: Harrap, 1961). For his legal thought, see Diane Parkin-Speer, "John Lilburne: A Revolutionary Interprets Statute and Common Law Due Process," *Law and History Review* 1 (1983): 276-96. Halliday, *Habeas Corpus*, 193-7.

[8] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: W. Clarke & Sons, 1809), 52-5[3].

are open, as the greatest encroachment upon our Laws and Liberties that can be acted against us."[9] As Lilburne, suggested, the courts of Westminster had never closed, and according to him, the use of martial law in England was therefore illegal.

Members of Parliament, while very sensitive to these arguments, also had to confront practical problems. Along with real fears that an army mutiny might undermine the fragile new Commonwealth, most citizens wanted soldiers restrained even if it meant that the Commonwealth used martial law during states of peace. Therefore, the Commonwealth and later the Protectorate published the sentences of its courts martial of soldiers in order to show they were being disciplined. In the winter of 1648, for example, after the London government had complained in the previous year about how soldiers garrisoned in the city were causing havoc on its citizens, news-books sympathetic to the new regime published accounts of soldiers being disciplined.[10] *A Perfect Diurnall,* for example, reported the hanging of a soldier at Smithfield for beating a London constable and shouting abuses at his wife. In 1655, news-books informed the reading populace of the disciplining of soldiers for various moral outrages. Parliament periodically engaged in this strategy because it needed to assure skeptics that soldiers faced punishment.[11]

There was among some skepticism that soldiers had to face justice. This belief in their exempt status arose in response to the establishment of the Committee of Indemnity in the summer of 1647. The problem for the soldiers fighting for Parliament was the dubious legality of their actions during the war. From 1642-6, soldiers had plundered homes, taken horses for the

[9] John Lilburne, *Copie of a Letter, written to the General* (London, 1649), [1].

[10] For the city's complaints, see LMA, Rep. 59, fos. 322v, 339v. Two soldiers were punished at a court martial for attacking city grocers. *Kingedomes Weekly Intelligencer,* 19-26 Dec. 1648, 1197-8.

[11] H.M. Reece, "The Military Presence in England, 1649-1660," (unpublished D.Phil Dissertation, University of Oxford, 1981), 120; *Perfect Proceedings of State Affairs* 24-31 May, 1655, 4694.

war effort, and imprisoned royalists. Commanders had protected them from prosecutions at law through the petitioning system. Starting with the earl of Essex and continuing under Fairfax, the Parliamentary high command banned civilian courts from prosecuting soldiers for misdemeanors without the consent of the accused soldier's commander. The petitioning system probably went unused throughout 1642-6 because while the Courts of Westminster remained open, the assize circuits had stopped running.

Due to the continued fear that once they left the army, soldiers might be prosecuted for their acts during the war, Parliament eventually consented to the creation of a Committee of Indemnity in the spring of 1647.[12] Comprised of often the most radical Members of the Commons, the Indemnity Committee had the power to protect any current or former servant of the Parliamentary cause against prosecution for executing orders during the war. Under the provisions of the Committee, a defendant being prosecuted for acts committed during the war could petition the committee for a suspension of proceedings. The committee, with five making a quorum, heard the petition, and usually commanded JPs in the country to depose witnesses. If the Committee believed that the petitioner's case had merit, it had the powers to intercede. Should the plaintiff continue his or her suit, the Committee had powers of imprisonment for contempt, and could fine the plaintiff three times the amount they had asked for in their original suit against the defendant.[13]

From 1647-1653, the Committee of Indemnity heard petitions from Parliamentary soldiers, Parliamentary civil servants, and even supporters of Parliament who were being sued by

[12] *A&O* i. 936.

[13] The best work on the Committee is John Shedd, "Friends of the Revolution: The English Parliamentary Committee for Indemnity, 1647-1655" (unpublished PhD dissertation, University of Tennessee-Knoxville, 1990). He has summarized his work in Shedd, "Thwarted Victors: Criminal and Civil Prosecution of Parliamentary Officials during the English Civil War and Commonwealth," *Journal of British Studies* 41:2 (Apr., 2002): 139-69: and in Shedd, "Legalism over Revolution: the English Parliamentary Committee for Indemnity and Property Confiscation Disputes, 1647-55" *The Historical Journal* 43:4 (2000), 1093-1107.

Royalists at law.[14] Many of the cases involved the taking of horses or of supposed plunder done by soldiers. But the committee also heard cases relating to royalists taking livings from supporters of Parliament, deposed royalists holding public office, and enforced mandatory deductions in rent for those who paid their monthly assessment taxes mandated by Parliament for the upkeep of the army. These quite substantial powers generated outcries by the judiciary. Its purpose and its legality have been hotly debated ever since.[15] Whether or not it was a form of "Parliamentary tyranny" the creation of the indemnity committee was certainly novel. Through its lawmaking powers, Parliament in the aftermath of the first civil war altered what had been the law of the land. Their innovations did not stop with courts that heard and determined cases against soldiers.

The Garrison Court Martial

It was decided early on in the Civil War that the opposing sides would treat prisoners of war not as rebels – either against Parliament or against the king – but as enemies who should be treated as prisoners of war. This classificatory scheme was meant to save lives. But it also meant that civilians who committed wrongs according either to the articles of war of the army or to the unwritten laws of war were subject to martial law because they were now "enemies." This idea was never fully executed. Neither Parliament nor the Crown, from the little we know about

[14] Shedd, "Friends of the Revolution."

[15] For the beginnings of this debate, see J.S. Morrill, *The Revolt of the Provinces: Conservatives and Radicals in the English Civil War, 1630-1650* (London: George Allen & Unwin Ltd., 1976), 76.Robert Ashton, "The Problem of Indemnity, 1647-1648" in *Politics and People in Revolutionary England: Essays in Honour of Ivan Roots* ed. Colin Jones, Malyn Newitt and Stephen Roberts (New York: Basil Blackwell, 1986), 117-40. Anne Hughes, "Parliamentary Tyranny? Indemnity Proceedings and the impact of the Civil War: A Case Study from Warwickshire" *Midland History* 11 (1986): 49-78. Ronan Bennett, "War and Disorder: Policing the Soldiery in Civil War Yorkshire" in *War and Government1598*-165 ed. Mark Charles Fissel (Manchester: Manchester University Press, 1991), 248-67.

Charles' uses of martial law during the Civil War, was comfortable continuously glossing English men and women as enemies. But in certain cases which involved spying or in major cases involving conspiracies to overthrow its garrisons, Parliament resorted to trying suspects at martial law. The rationale was simple. At common law, it would be difficult if not impossible to convict someone of treason for actively trying to aid the king. The terror inspired by death at martial law, so Parliament hoped, might convince potential future conspirators to remain quiet.

Parliament began experimenting with using martial law on civilians in the spring of 1643 when Nathanial Fiennes, the governor of Bristol, discovered a plot made by prominent citizens to overthrow the town and hand it over to the king.[16] On 20 May, a council of war condemned the two principal leaders to death and promised to investigate other potential conspirators.[17] Fiennes appealed to Parliament, which was not dissuaded from action. On 22 May, it allowed the council of war to execute the ringleaders, and three days later, it published an explanation for doing so.[18] The council of war convicted them of "traitorous intelligence" with the enemy and of a "traitorous conspiracy" to overthrow the garrison at Bristol.[19] Civilians were now subject to martial law in certain cases of treason.

A similar case arose less than a month later in London – the so-called "Waller Plot." But in this case, those in opposition to martial law attempted to prevent the work done by the parliament of 1628 from being destroyed by the Long Parliament. On the last day of May, John

[16] *A Brief Relation, abstracted out of severall letters, of a most hellish, cruel, and bloudy plot against the city of Bristoll* (London, 1643); *CJ.* iii. 97.

[17] *Mercurius Civicus* 18-25 May 1643, 20-1.

[18] *The Several Examinations and Confessions of the Treacherous Conspirators against the Cittie of Bristoll* (London, 1643)*; Mercurius Civicus* 18 May to 25 May 1643, 20-22.

[19] *The Several Examinations*, 4.

Pym had made public a plot by the MP Edmund Waller and several prominent London citizens to take the city for the king.[20] Pym wanted the conspirators tried by martial law. Sir Simonds D'Ewes, a veteran of the 1628 parliament, opposed Pym and argued that "martial law which was in former ages vtterly vnknowne to the subjects of England."[21] Others were unsure as to martial law's legality. In order to appease the doubters, the supporters of martial law brought in Isaac Dorislaus, a learned Dutch Civil lawyer and the judge advocate general of Essex's army, who reassured the Commons that trying conspirators at martial law was common amongst all armies during times of war. D'Ewes' disgust at the whole debate is evident in his journal: "this made diuers to dislike the proceedings more than formerly seeing that the liues of men were to be taken away vpon an aduocates opinions being also of Holland."[22] Others within Parliament were appeased. Six men ultimately came before a court martial on 30 June; the council of war executed two of them.[23]

The key justification for using martial law in 1643 was that in all times of war, amongst all nations, courts martial were used on conspirators and plotters. This justification allowed Members of Parliament to combat royalist protests against the executions. Royalists argued that

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[20] The best account of Waller's plot is still Gardiner, *History of the Great Civil War*, i. 146-49, 156-8. Also see Keith Lindley, *Popular Politics and Religion in Civil War London* (Aldershot: Scolar Press, 1997), 348-50.

[21] Journal of Simonds D'Ewes, BL, Harley Ms. 165, f. 102v.

[22] *Ibid*, f. 103; in general it is difficult to associate any group, faction, or "party" with the consistent desire to expand martial law, even D'Ewes became a supporter of martial law by November 1643, see below. For the debates on parties within the Commons during the early Civil War, see J.H. Hexter, *The Reign of King Pym* (Cambridge, MA: Harvard University Press, 1941); for a strong critique of Hexter's view see J.H. Morrill, "The unwearableness of Mr. Pym: influence and eloquence in the Long Parliament" in *Political Culture and Cultural Politics in Early Modern England: Essays presented to David Underdown* ed. Susan Amussen and Mark Kishlansky (Manchester: Manchester University Press, 1995), 19-55; Mark Kishlansky, "The Emergence of Adversary Politics in the Long Parliament" *The Journal of Modern History* 49:4 (Dec., 1977): 617-40.

[23] Laurence Whitaker's Diary, BL, Add. Ms. 31,116 fos. 59v-60v; *Cobbett's Complete Collection of State Trials,* ed. William Cobbett, Thomas Bayly, and T.B. Howell 10 vols. (London, 1816), iv. cols. 626-54; *A Brief Narrative of the late treacherous plot and horrid designe* (London, 1643).

like their soldiers, conspirators should be treated as prisoners of war. In the Bristol case, Parliament justified its executions by stating that although the king's soldiers and those who had actively declared for the king could not be executed for treason, "the Law of Armes amongst all souldiers, maketh a difference betweene open enemies and secret Foes, and Conspirators."[24]

Most were still hesitant about granting martial law such an extensive jurisdiction. Ultimately, trials in these garrisons were acceptable because Members of Parliament bounded martial law geographically. Some argued that London was effectively joined to the army because it was its garrison. Laurence Whitaker reported in his journal that the committee to examine the plot decided that they would approach the earl of Essex,

> to desire him that he would pceed agt Mr Waller a membr of or ho: and Mr Tomkins his brother, and ye rest of ye Citizens yt were found to be Actors in this Conspiracy by the law of Marshall Law by reason yt it was Plotted agt ye Army, whereof he was genll and agt London a garrison town[25]

By making this connection between city and army, Parliament thus made martial law within London acceptable.

Within this space, Parliament expanded the cognizance of martial law so it could punish other betrayals against the war effort. These expansions often came at the behest of the rich, powerful, but insecure and therefore aggressive faction that ruled the City of London. It had only gained the office of mayor late in the summer of 1642 and still faced strong opposition from those who either supported the king or who wanted to make peace on more generous terms with

[24] *Mercurius Civicus* 18 May to 25 May 1643, 22.

[25] Laurence Whitaker's diary, BL Add. Ms. 31,116, f. 56. The committee to investigate the conspiracy included John Pym, Denzil Holles, John Holland, William Pierrepoint, and John Maynard, but it is not clear who made this argument.

him than the hardliners desired.[26] In early August 1643, after the fall of Bristol to royalist forces, the House of Lords devised peace propositions on favorable grounds to the king.[27] Meeting on a Sunday, the mayor and common council of London wrote a petition to the Commons in protest. Among their demands, they wanted to make sure "traytors and delinquents" were speedily punished.[28] In response, a protest from the peace faction erupted within London.[29] Due to this disturbance, on 17 August, Parliament gave the committee of the militia within London the power to punish by life and limb at martial law "all such as shall weare any Markes Signes or Colours to distinguish themselves as a party against that of Parliament."[30] This new court martial also had cognizance over any insurrection, tumult, or unlawful meeting within the city.

Throughout the autumn, Parliament continued to expand the cognizance of martial law to supervise punishment over a variety of acts that it considered betrayal. In September, Parliament ordered that any who tried to take war provisions out of London was subject to martial law.[31] In November, the Commons wanted to try a king's messenger as a "spy" for bringing in a commission of array and royal proclamations to London. The rationale in this case was similar to that in the earlier cases: the messenger was attempting to create a faction within London that would take the city for the king. That same month, the Commons imprisoned three printers to

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[26] Valerie Pearl, *London and the Outbreak of the Puritan Revolution*: *city government and national politics, 1625-43* (Oxford: Oxford University press, 1961), 160-276; Keith Lindley, *Popular Politics and Religion in Civil War London*, 201-15, 337-45.

[27] Gardiner, *History of the Great Civil War*, i. 181-88; Lindley, *Popular Politics in London*, 351-53.

[28] LMA, Letter Book QQ, f. 83; LMA, Journ. 40 fos. 69v-70; *Journal of the House of Lords* (hereafter *LJ*) (1767-1830), vi, 172 *Kingdomes' Weekly Intelligencer* 8-15 August, 1643, 227-28.

[29] Whitaker's Diary, BL Add. Ms. 31,116, f. 138v.

[30] *A&O*, i. 249-51.

[31] *CJ*, iii. 254.

await a court martial for producing royalist propaganda.[32] By January 1644, it declared that any who challenged the authority of its Great Seal in court would be tried as a spy at a court martial.[33]

Parliament had expanded the boundaries of martial law's cognizance to include treasonable acts made against its war effort. But with the important exception of the London court martial, which had jurisdiction over rioting, Parliament had not delegated jurisdiction outside of the army. In the courts-martial of the Waller conspirators, for example, Parliament had to request a commission from the Earl of Essex, the lord general of its army, to proceed with the trials.[34] Likewise, in November 1643, Parliament once again had to ask him for permission to try three royalist spies.[35]

By the autumn of 1643, Parliament wanted a standing court martial in London to try both civilians and members of its armies because some officers fighting for the Parliamentary cause had defected to the king. By the end of the summer of 1643, the Commons was interested in having a standing court martial so that it could try military officers who had not simply defected but also had attempted to betray garrisons or cities to the king: the most important being Sir John Hotham and his son and sir Alexander Carew. By the fall of 1643, the Commons sent Henry Mildmay and another to request that Essex issue a standing commission for a court martial in London and to name a president so that delinquents guilty of crimes against the laws of arms

[32] Ibid., 296-97, 307.

[33] Ibid., 374.

[34]Ibid., 120, 144.

[35] The Commons ordered the Oxford spies to be tried on 22 November. *CJ* iii. 318. One of the spies, a man named Kneiveton, was hanged on 27 November. *Kingdomes Weekly Intelligencer* 21-28 Nov., 1643, 257.

could be punished.[36] After not receiving a reply, messengers went again on 12 October, to ask the general to grant the commission so that "the great Expectation and desire of the City and Kingdom that Justice should be done."[37] Essex refused to allow a court martial to try men under his charge. In a typically petulant fashion, he delivered a commission that November that left the position of the presidency vacant and declared that any who served under the general was exempt from the court's jurisdiction. Essex was extremely sensitive to any challenge to his authority, but he also may have been trying to protect the Hothams.[38]

In the debate over Essex's response on 18 November, Members of the Commons came to a remarkably similar conclusion to the one the Crown and Privy Council had come to in the 1620s: that garrisoned soldiers away from their general still needed to be tried by martial law. The suddenly cosmopolitan D'Ewes declared that "in all times and in all nations of the world martial law was chiefly exercised to suppress sudden mutinies" and that the commission should be returned amended so the city could establish a court martial. It needed the commission because the lord general might be hundreds of miles away. Selden agreed with D'Ewes.[39] Now responsible for the actions of the army, Members of Parliament began to change their mind about the usefulness of martial law jurisdiction.

The speeches by D'Ewes and Selden were not enough for Parliament to create a separate court martial in London. It was only when the powerful City of London petitioned Parliament in May 1644 to create a court that would try delinquents and traitors that the House once again

[36] Ibid., 262.

[37] Ibid., 275.

[38] Diary of Laurence Whitaker, BL Add. Ms. 31,116, f. 93; *CJ* iii. 313.

[39] Diary of Simonds D'Ewes, BL, Harley Ms. 165, f. 210v. many thanks are owed to Dr. Stephen Roberts for allowing me to see a transcription of this speech.

debated creating a court martial for London. Parliament assigned a committee dominated by those who had connections to the city of London to examine the petition.[40] The committee included prominent lawyers, including Oliver St. John, Bulstrode Whitelocke, and John Glyn, the recorder of London. The Commons did not pass the resulting bill. Laurence Whitaker reported that it "was twice read & committed: it being debated bec: it was to establish martiall law, wch in y Peticon of Right had been cryed down..."[41] The bill was re-submitted to committee but never returned to the floor of the Commons. The issue only came up again in July after the City of London delivered yet another petition to the Commons that demanded a court to try delinquents. This time the bill passed the Commons on 15 July.[42]

The Lords had their own reservations about the bill. They committed it on 26 July, and the next day, the Earl of Northumberland read the alterations to the House, who approved a proviso that both houses had to be first notified of an execution. The rationale was that the ordinance had given "power only to heare, determyn, Trye Condemne, and Execute, and no power of Mercy, there may be place for mercy to be extended to a fitt subiect wch they conceiue most prop to reserue to the two houses."[43] The alterations led to a fight between the two houses. The commons disagreed with the proviso on 29 July and demanded a conference on 2 August. The impasse was once again broken by the City of London, who on 3 August delivered yet another petition that demanded a court for the trial of delinquents. After more heated debate

[40] Valerie Pearl, "Oliver St. John and the Middle Group in the Long Parliament: August 1643-May 1644" *English Historical Review* 81:230 (Jul. 1966): 490-519.

[41] Laurence Whitaker's Diary, BL, Add. Ms. 31,116, f. 138v; *CJ*, iii. 498.

[42] LMA, Jour. 40 f. 102v**;** *CJ*, iii 510, 518, 554, 562.

[43] PA, HL/PO/JO/10/1/172, the amendments came from 29 July and were attached to a marked up bill dated 16 August, 1644; *LJ*, vi 646, 648.

throughout August, the Lords finally gave way. On 19 August Parliament authorized through an ordinance a court martial to sit in London for three months. It would eventually sit for four. While it had to sit in London, the court had jurisdiction over "all causes as belong to military cognizance" in England.[44]

Parliament adopted seven ordinances of war for the court martial in London. These were taken from the category which Matthew Sutcliffe framed as "for the Safety of the State, Garrison, and Army."[45] Let us recall that this category outlined the martial law of treason. Specific acts in it included deserting to the side of the enemy, the delivering of a town to an enemy, furnishing the enemy with information or supplies, inciting an enemy to declare war, and breaking an exile. The medieval ancestor to a court martial possessed jurisdiction over these treasonable offences during war. Some of these rules were included in the great treason statute made during the reign of Edward III, which provided the statutory basis for punishing treason. The Earl of Arundel had copied this category into his articles of war of 1639.[46] The third Earl of Essex had done likewise in 1642 but had changed the title of the category to "Of Duties in General."[47]

Even though the Earl of Essex changed it, we should contemplate Matthew Sutcliffe's title further because it helps us better understand one reason why Parliament would consider expanding martial law jurisdiction in 1644. In contrast to statutory treason, which revolved

[44] *A&O,* i. 487.

[45] Matthew Sutcliffe, *The Practice, Proceedings, and Lawes of Armes* (London, 1593), 310.

[46] *Lawes and Ordinances of Warre* (London, 1639), 7.

[47] *Lawes and Ordinances of Warre* (London, 1642); *Lawes and Ordinances of Warre established for the better conduct of the army, by his excellency the Earl of Essex* (London, 1643).

around betrayals of the king's body, the martial law of treason focused on betrayals of abstract polities. Parliament still used statutory treason during the 1640s to punish Irish rebels, like Connor Lord Maguire, the second baron of Enniskillen, or even the archbishop of Canterbury, William Laud. But it was little help in punishing men and women who conspired to *help* the king in his military campaigns against Parliament.[48] However, these articles determined treason based on betrayals of abstractions, not betrayals of the king. It was therefore very useful. These ordinances were as follows: no person, either soldier or civilian, shall go from a place under the power of Parliament to the king or queen or give any intelligence to an officer of the king; no person shall plot to betray or in fact betray a Parliamentary garrison; no person may relieve an enemy with money or victuals; no officer shall make mutinous assemblies; no guardian shall suffer a prisoner of war to escape; no person shall take up arms against Parliament after having taken the national covenant; and no officer shall desert his trust and adhere to the enemy. Guilt on six of the seven articles carried the death penalty.[49]

During the time it sat in London, the garrison court martial mostly tried those who had committed treason at martial law. On 29 August, the Commons ordered that evidence be heard against the Hothams, Carew, and Waller, who had escaped punishment the previous summer.[50] By early October, the court convicted Thomas Syppens and Francis Pitt for conspiring to betray

[48] D. Alan Orr, *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge: Cambridge University press, 2002), 101-70.

[49] Sutcliffe, *Practice Proceedings, and Lawes of Armes*, 310; *A&O*, i., 486-88, 842-5. Compare these articles with Essex's *The Lawes and Ordinances of Warre* (1643), A3-v.

[50] *CJ*, iii. 610. The slippery Edmund Waller, however, escaped capital punishment yet again.

garrisons to the king.[51] In November, the court convicted Carew of the same offence; after a month's reprieve he went to his death. In late December, the court convicted Captain John Hotham of treason. His father, Sir John Hotham came before the court in late November, and the court convicted him of treason in early December. Upon hearing the court's verdict, Hotham only replied that "there was another tribunal."[52]

Many, especially in the Lords, had no desire to renew the court's jurisdiction, and made sure that a court martial never permanently sat in London. The Lords had attempted to save Sir John Hothams' life, and while the upper house secured several remittances, both the son and the father went to their deaths on 2 and 3 January, respectively. The Lords, who had agreed to a one month extension of the court in December, refused any further renewal in 1645 in spite of many attempts by Members of the Commons to pass a new ordinance for the sitting of a garrison court martial.[53] It was not until January 1646, when the Commons seemed to want to secure their garrisons from spies, that it passed a bill for a new sitting court martial.[54] This variation included an amendment that refused any claims to exception, even from Peers of the Realm.[55] The Lords refused to pass the bill, and intense debates between the two houses continued through March.

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[51] *Mercurius* Civicus 3-10 Oct 1644, 674; Syppens was respited by Parliament on 7 November for reasons that are unclear: *CJ,* iii 689; *Mercurius Civicus* 3-10 Oct. 1644, 674-75. Parliament had referred the case against Pitt to the court martial: *CJ,* iii. 654.

[52] *The Journal of Thomas Juxon, 1644-1647* ed. by Keith Lindley and David Scott (Cambridge: Cambridge University Press, 1999), 69; *Mercurius Civicus* 14-21 Nov. 1644, 723-725; *Mercurius Civicus* 19-26 Dec. 1644, 761; *idem* 28 Nov. – 5 Dec. 1644, 736-739.

[53] *LJ,* vii. 121; Gardiner, *History of the Great Civil War* ii. 105.

[54] *Mercurius Civicus,* 1-8 January 1646, 1195; The city of London was in favor of such a tribunal but the Commons also wanted to create garrison courts martial in the west, in Gloucester and Hereford, Henly, and Reading and near Oxford in Newport Pagnell and Aylesbury, probably in the worry that fleeing royalists would infiltrate the towns.

[55] This attempt to make the Lords subject to the court martial probably means the commons had a specific peer they wanted to try. A good guess is Lord Savile, see Patricia Crawford, "The Savile Affair" *The English Historical Review* 90:354 (Jan. 1975): 76-93.

Finally, the Commons relented and removed the amendment from each successive ordinance, ending with London in April 1646. They perhaps did so because of their desire to try William Murray, an agent of Charles I caught coming into the country from France in February.[56] Garrison courts martial, for the last time in the war, sat in London, and in many other Parliamentary garrisons, throughout the summer of 1646.[57] But this court, unlike its predecessor, only had jurisdiction over those residing in London. Murray's seems to be one of the few cases the court heard, and he was acquitted.[58]

Along with fights over whether or not to allow a sitting court martial in London, Parliament's county committees and other garrisons also sought jurisdiction to punish traitors. Parliament passed an ordinance for the garrison of Kingston –upon – Hull to establish a garrison court martial in 1646.[59] In the one instance where the Lords granted martial law jurisdiction in 1645, the county committee in Kent received martial law powers to punish rebels for four months. But other draft bills for county committees, including Hampshire and the County Palatine of Lancaster, were never made into ordinances. Even Kent could not get its martial law powers renewed after 1645; attempts to punish royalist "rebels" by martial law in the spring of

[56] The agreement for the London court martial was made last, the Lords assented to martial law in Hereford and Gloucester on 15 Jan. 1646 *LJ*, viii. 100-01; *CJ*, iv. 407; on 14 February, it was agreed to grant martial law in Aylesbury and Newport Pagnell, *CJ*, iv. 440; *LJ*, viii. 167; on 4 March, it was agreed to provide martial law for Henly and Reading, *CJ* iv. 461; *LJ*, viii. 197, 200; the debates over the London court martial and trying William Murray can be found in *CJ*, iv. 394-96, 399-400, 405, 412, 414, 417, 420, 431, 433 435,437-9, 456, 461- 2, 490-1, 493-4, 497-98, 505; *LJ*, viii. 83, 86, 90, 94, 96, 99, 107, 116, 122, 162-3, 168-9, 190, 197, 216, 242, 246-48, 266-7; the lords objections can be found in Lords Main Papers dated 14 Feb., PA, HL/PO/JO/10/1/201. Gardiner, *History of the Great Civil War*, iii. 69-70.

[57] *A&O*, i. 842-5.

[58] *Mercurius Civicus*, 21 May - 28 May 1646, 2254. A copy of Murray's trial was attached to his 6 July petition for release, Lords Main Papers, PA, HL/PO/JO/10/1/209. While Murray was tried by the garrison court martial, a special ordinance had to be made to try him, because his crimes were outside of the city of London: *LJ*, viii. 266-67.

[59] *A&O*, i. 857-61.

1648 were refused by Parliament.[60] In the summer of 1648, during the height of the "second civil war" Parliament delegated martial law powers to its commanders to punish open rebellion.[61] But like the ordinances for sitting garrison courts martial, these powers were temporary. Using martial jurisdiction created painful and protracted debates and ultimately produced only temporary sittings of courts martial.

Members of Parliament found the procedural components of martial law useful during the Civil War. Nevertheless, they made three major changes in martial law procedure.[62] Let us examine them.

First, Parliament designated non-military personnel to be commissioners and appointed common lawyers as advocates. From June 1643 onwards, Parliament appointed its allies as commissioners of the court martial. Laurence Whitaker reported that members of the London militia, as well as military men, had been chosen to serve on the court martial of the Waller conspirators.[63] Men closely associated with the London government continued to serve on garrison courts martial in 1644 and in 1646. Alongside the London militia, Parliament nominated high ranking military officers. Many of these men also served in Parliament. In 1644, Parliament mandated that at least three of the commissioners on any court martial be members of both Parliament and the army. By 1646, this proviso was impossible due to the Self-Denying

[60] Alan Everitt, *The Community of Kent and the Great Rebellion, 1640-1660* (Leicester: Leicester University Press, 1966), 141, 200-70. Anthony Welden, in 1648, pleaded with the Commons that a more speedy process that did not rely on the discretion of county jurors was necessary to try Royalist "insurgents," Bodl. Tanner Ms. 57, f. 60-v.

[61] See for example, *CJ*, v. 641.

[62] There is a fourth change, only for the 1646 court martial, where the Lords successfully forced the Commons to mandate that any conviction must be done by "full proof" or two eyewitnesses or a confession without constraint. *A&O*, i. 45; *LJ*, viii. 266-7. The 1646 London court martial was unique in this respect.

[63] Diary of Whitaker, Add Ms. 31,116, f. 59v.

Ordinance, and Parliament settled on a mandate of notification before any execution could take place.[64] In both of these tribunals, Parliament chose all of the potential commissioners and listed them in the respective ordinance.

The second major innovation was that Parliament opened the confrontation stage of the trial to the public as early as the summer of 1643. *Mercurius Civicus* reported that 4 October 1644,

> was the first day of the publique sitting of the Court-martiall in Guildhall London, they having before sate at Weavers-hall, about the preparing of examinations, and other matters in readinesse for publique trial.[65]

The public confrontation stage of these courts martial went against the traditionally private councils of war of English armies. William Prynne explained to the unimpressed Dorislaus at a traditional private court martial the rationale for this innovation in an attempt to get him to open trial of Nathaniel Fiennes to the public: "that there was as great cause to give the Parliament, City, and kingdome satisfaction in this…it being of as like publike concernment."[66] Prynne also pointed out that all the courts of England were open to the public and that courts of war should be no different.

Third, the crafters of the garrison courts martial installed a quorum. In all of the ordinances for a garrison court martial, with the sole exception of a draft ordinance for

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[64] *A&O,* i. 486-88, 842-45. The self-denying ordinance, passed in April 1645, discharged Members of Parliament from all military and civil offices. *A&O,* i. 664-5. For the context behind the making of this ordinance, see Mark Kishlansky, *The Rise of the New Model Army* (Cambridge: Cambridge University Press, 1979), 26-51.

[65] *Mercurius Civicus,* 3-10 Oct. 1644, 674.

[66] William Prynne, *A True and Full Relation of the Prosecution, Arraignment, Tryall, and Condemnation of Nathaniel Fiennes* (London, 1644), 12.

Hampshire in 1645, Parliament named around fifty potential commissioners who could sit on the court, with twelve required to meet the quorum.[67] While it was not unusual to have twelve commissioners at a normal court martial, it was never necessary. Parliament had mandated a quorum of twelve men as early as 1643. Those who were drafting the orders for the court seemed to want to ensure that the magical number of twelve men sat on a court martial: the required number for a jury.

The first innovation – placing non-military personnel on the court – signaled Parliament's desire to accommodate the City of London. It also signified the alliance between leading members of the London government and leading lights in the Commons who desired to vigorously pursue the war against the king. The final two innovations probably reveal a desire by the court's makers to bring courts martial into line with other English courts. While it is impossible to name with any certainty who in Parliament advocated these changes, we should be aware of how many men with experience at law were involved in making of these courts martial, including Oliver St. John, Bulstrode Whitelock, and John Glyn.[68] These men, particularly, St. John, came out of the tradition of Selden who maintained strict readings of clause 29 of Magna Charta: that trial by life and limb had to be conducted through indictment or presentment and the trial had to be by one's peers. So even while these lawyers participated in the legalization of courts martial in the 1640s, they sought to reform those same procedures so that they might resemble more closely those used by common law courts. Parliament had created a new legal technology to enforce obedience through terror. All it needed was a new name.

The Trial of Charles I

[67] *CJ*, iii. 146; *A&O*, i. 486-88, 692-94, 715-16, 842-45; PA, HL/PO/JO/10/1/193, 202.

[68] *CJ*, iii. 496.

In the winter of 1648 all was chaos. The king's refusal to negotiate with Members of Parliament, and his continued plotting against Parliament led to several violent campaigns in 1648, two years after the English Civil War had technically been decided. Many within Parliament's New Model Army were furious with the king; they had seen their friends die on the battlefield due to what they perceived to be his deceitfulness. "That man of blood" as they now called him, must pay for his sins. In November 1648, the Army called for Charles' trial. They purged all those who opposed them to ensure that the king would be brought to justice. The new Purged Parliament in December set out plans to try Charles Stuart.[69] How were they to try the king? There was no precedent in English law for such a trial. In order to create a new court, Members of Parliament looked to past courts – both recent and ancient - in order to create a hybrid court. One of these was a court martial.[70]

The procedures that the Purged Parliament developed for the trial have received far less attention amongst historians than the great rhetorical battles between Charles and his overmatched adversary John Bradshaw, the lord president of the court.[71] On three occasions, on

[69] See Gardiner, *History of the Great Civil War*, iv. David Underdown, *Pride's Purge: Politics in the Puritan Revolution* (Oxford, 1971); Patricia Crawford, "Charles Stuart, That Man of Blood" *Journal of British Studies* 16, no. 2 (Spring 1977): 41-61.

[70] The most current account is Sean Kelsey, "Politics and Procedure in the Trial of Charles I" *Law and History Review* 22:1 (Spring, 2004): 1-25; this article is part of a corpus arguing that Charles' trial was actually an extended negotiation, Kelsey, "The Death of Charles I" *The Historical Journal* 45:4 (Dec. 2002), 727-54; "The Trial of Charles I" *The English Historical Review* 118:477 (June 2003): 583-616; "Staging the Trial of Charles I" in Jason Peacey (ed.) *The Regicides and the Execution of Charles I*, 71-94; and "The Ordinance for the Trial of Charles I" *Historical Research* 76:193 (Aug. 2003), 310-331; also see John Adamson, "The Frighted Junto: Perceptions of Ireland, and the Last Attempts at Settlement with Charles I" in Jason Peacey ed. *The Regicides and the Execution of Charles I*, 36-71. These interpretations have been convincingly challenged by Clive Holmes, "The Trial and Execution of Charles I" *Historical Journal* 53:2 (2010): 289-316.

[71] Gardiner, *History of the Great Civil War*, iv. 212-331; C.V. Wedgewood, *The Trial of Charles I* (London: Collins, 1964); Wedgewood, *A Coffin for King Charles* (new ed. New York: Time Inc: 1966), 83-109; H.R. Williamson, *The Day they Killed the King* (London: Frederick Muller, 1957). For an examination of treason law as it related to the trial, see Orr, *Treason and the State*, 182-3. For a historiographical review of those who have written on the trial, see Jason Peacey, "Introduction" in *The Regicides and the Execution of Charles I*, 1-10.

20, 22, and 23 January, Charles in open court refused to enter a plea, and claimed that the court had no right to try him because he was a divinely appointed monarch. Eventually, after it had failed to win Charles' compliance and thus legitimate itself to the English public, the court convicted Charles of treason for having waged war against his own people. His refusal to plea signified his guilt. The execution was carried out on 30 January.[72] The procedures the Members of the Rump authorized for the court have received far less attention.

One of the central ideas Parliament used in the trial was impeachment. Charles Stuart, according to the new legal ideas spun out by the Rump, was no longer a sacred divine-right monarch but an office holder who performed duties for the English state, whose sovereign was the "people." He had abused these delimited powers by levying war against them. In the past two decades, Members of Parliament had re-imagined medieval trials by the Court of the Steward, who supervised the punishment of those serving in the king's household for treason and other offences in order that they might hear and determine corruption and even treason cases against both James' and Charles' chief councilors. The most famous case of this nature was Parliament's prosecution of the Earl of Strafford in 1641.[73] Charles, likewise, was to be prosecuted for abusing his office, and, in the process, committing treason. As the official charge noted on the first day of the trial on 20 January 1649, "the said people of England impeach the said Charles

[72] The execution of the king by law has also drawn much attention from political theorists. See for example, M. Walzer, "Regicide and Revolution" *Social Research* xl (1973): 617-42.

[73] For impeachment trials, see Colin G.C. Tite, *Impeachment and Parliamentary Judicature* (London: Athlone Press, 1974), 211-18. For the procedures of the trial of Strafford, see Danila Cole Spielman, "Impeachments and Parliamentary Opposition in England, 1621-41 (unpublished PhD dissertation, University of Wisconsin-Madison, 1959), 144-53; for the medieval court see L. Vernon Harcourt, *His Grace the Steward and trial of peers: a novel inquiry into a special branch of constitutional government founded entirely upon original sources of information, and extensively upon hitherto unprinted materials* (London: Longmans Green, 1907), 205-470.

Stuart, as a Tyrant Traytor Murderer and a Publick and implacable Enemy to the Commonwealth of England."[74]

Second, Parliament framed the membership of the court in the manner of a "Great Council." In the middle ages, Great Councils of barons and knights of the realm met to hear and determine grave matters that pressed the king's attention.[75] While it was rare for a Great Council to hear and determine cases involving life and limb, it was not unheard of. The much smaller treason trial of Mary Queen of Scots likewise had the three chief justices sitting as judges with the Great Councilors from the Lords and Commons sitting as the jury. 24 men were mandated for a quorum for that tribunal.[76]

Parliament had likely come up with a plan to impeach Charles with a Great Council overseeing the trial. By 1 January 1649, the Commons had heard its committee twice and had debated on successive days the trial of the king, and passed the second version of the ordinance to try the king.[77] By this time, the Commons had decided upon a large number of commissioners, with members of the army, Parliament, and all the counties serving as jurors.[78] Twenty were to

[74] J. Nalson, *A True Copie of the Journal of the High Court of Justice* (London, 1683), 32.

[75] John Guy, "The Rhetoric of Counsel in Early Modern England" in *Tudor Political Culture* ed. Dale Hoak, 292-310; P.J. Holmes, "The Last Great Tudor Councils" *Historical Journal* 33 (1990), 1-22; Michael Mendle, "The Great Council of Parliament and the First Ordinances: The Constitutional Theory of the Civil War" *Journal of British Studies* 31:2 (Apr., 1992): 133-62.

[76] 27 Eliz. C. 1.

[77] On 23 December 1648 the Commons resolved to form a committee to try the king, *CJ* vi. 102-03; the first draft of the ordinance was debated on 28 December, a second draft on 29 and on the 30 the Commons ordered the committee to submit another version on 1 January: this version passed the Commons, *CJ* vi. 105-07.

[78] The ordinance for the trial was initially passed on 1 January 1649, *CJ* vi. 107.

be required for a quorum. The three great judges of the common law courts, King's Bench, Common Pleas, and Exchequer, would be included.[79]

However, what role were these judges to play in the trial? We have conflicting evidence. In the most detailed account given of this ordinance, from the news book of Henry Walker, *Perfect Occurrences*, the justices were to act as judges with the rest of the commissioners acting as a jury.[80] While this source is not perfect, Walker was closely connected to Parliament and to the army, having been an official publisher of army literature since 1647. He was so trusted by Parliament that he, along with Gilbert Mabbot, was to be Parliament's "official" reporter of the trial of Charles I.[81] It makes sense that this great jury trial was the initial procedural scheme to try the king. Although in retrospect the notion that the judiciary would serve on the trial seems fantastical, if Parliament could have convinced them to participate, why would they have buried them as three of 150 commissioners? Why not separate, if it were possible, the judiciary from the jury? The gravity of the court would have increased immeasurably with the three greatest judges

[79] There is only one detailed source for this, *Perfect Occurrences of every daies journall of parliament* 29 December 1648 – 5 January 1649, 784; but we can trust it because it got the quorum right (20) and the Moderate Intelligencer confirmed that the judges of the realm and the lords were initially supposed to participate in the trial, *Moderate Intelligencer* 4-11 January 1649, Pppppppp 1v; for an examination of the commissioners of the court, see William Sachse, "England's Black Tribunal: an Analysis of the Regicide Court" *Journal of British Studies*12:2 (May, 1973): 69-85; for an examination of potential commissioners before the final version of the Act see Sean Kelsey, "The Ordinance for the Trial of Charles I," 310-12. C.H. Firth, *The House of Lords during the Civil War* (London: 1910), 207-08.

[80] *Perfect Occurrences* 29 December 1648-5 January 1649, 784. This interpretation can also be found in *Perfect Weekly Account* 27 December 1648-3 January 1649 (London, 1649), unpaginated; and *Heads of a Diarie* 27 December 1648 -2 January 1649 (London, 1649), 39-40; Gardiner has accepted this original plan. *History of the Great Civil War*, iv. 288.

[81] Jason Peacey, "Reporting a Revolution: A Failed Propaganda Campaign" in *The Regicides and the Execution of Charles I*, 163-65; Peacey, "Walker, Henry," in *ODNB*. For a different view see, S.M. Koenigsberg, "The Vote to Create the High Court of Justice: 26 to 20? *Parliamentary History* xii. (1993): 281. It is also true that other print traditions did not separate a judiciary from commissioners: see *Royal Prisoner at Windsor* (London, 1649), 5-6; *The Manner of the Deposition of Charles Stewart King of England by the Parliament and Generall Councell of the Army* (London, 1649); *the Queenes Majesties Letter to the parliament of England* (London, 1649), 5-6; *Mercurius Pragmaticus* 26 December 1648 – 9 January 1649. None of these sources are as reliable as *Perfect Occurences*. For a discussion of these sources see Sean Kelsey, "The Ordinance for the Trial of Charles I."

participating *as* judges. In any case, the plan was still-born. On 4 January 1649, the Lords refused to pass the initial act to try Charles Stuart. The judges also refused to participate in the trial. All the Commons had left of their plan was a relatively large list of commissioners, now with Members of the Lords and of the judiciary deleted, with the idea that at least a quorum of twenty would try the king.[82]

Their plan foiled, the Commons looked to other options. It removed the Members of the Lords and the judges from their list of participants. In the stead of the judges, the Commons on 3 January named two lawyers associated with the city of London: John Bradshaw and William Steele.[83] We should note that both of these men had extensive experience serving on courts martial in the 1640s. Bradshaw had served as a commissioner in the court martial of William Murray, and Steele had been listed as a potential commissioner on courts martial since 1644.[84] While these two were not technically named as officers of the court until 10 January, it seems clear that given their appointment as replacements to the judges, the Commons envisioned leadership roles for the two men a week earlier. The following day, the Commons famously declared that they did not need the Lords, and that they spoke for the people of England on their own.

That same day, they passed the ordinance to try the king, and secretly engrossed it. One report from the *Kingdome's Weekly Intelligencer* declared that Parliament passed the "ordinance for the Triall of the King by a Court Martiall."[85] This gloss was not an attack on the proceedings:

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[82] *LJ* x, 641-2; *CJ* vi 110-11.

[83] *Perfect Occurrences*, 29 Dec. 1648 – 4 Jan. 1649, 787.

[84] *LJ* viii. 267; *A&O* i. 486-88, 842-45. For the participants on William Murray's trial see PA, HL/PO/JO/10/1/209.

[85] *Kingdomes Weekly Intelligencer* 2-9 Jan. 1649, {1214}. The news-book says it again on 1215.

the news-book did not refer to the court as a court martial either before or after 4 January. Further, 4 January was the first time the Commons began calling the court which was to try Charles as "the High Court of Justice." Perhaps, given the reporting of the *Kingdome's Weekly Intelligencer*, that was final, but not the first, name the Commons contrived for the tribunal that would try the king.

On 6 January, the Commons published the Act to try the king for treason, having dispensed with the House of Lords.[86] We can glean several clues as to the procedure the Commons envisioned. First, the large body of commissioners with a mandate for a quorum of at least twenty remained. Second, those commissioners would craft the charge; they had the power to "take order for the charging of him the said Charles Stuart with the Crimes and Treasons abovementioned."[87] There would be no bill of indictment proven true by a grand jury. Nor would the Commons craft the charge, as was traditional in treason trials before the Lord Steward in the House of Lords. Second, the commissioners had the powers for the "examination of witnesses upon Oath, which the court hath hereby Authority to administer, or otherwise, and take any evidence concerning the same."[88] While the commissioners needed to prove the guilt of Charles Stuart, they could do so with wide-ranging discretion. Here we have our first and very important similarity with a court martial; the High Court of Justice had summary procedure.

The court, after meeting several times, further clarified its nature. The Commons on 6 January gave the court discretion for naming its own officers. On 10 January, members voted that it would be a presidential council, with John Bradshaw leading the tribunal. This change in

[86] *A&O*, i. 1253-55.

[87] Ibid.

[88] Ibid.

the plan from December makes sense because not one individual commissioner had enough legal gravity to be the sole trier of law in the case. Instead, all would try both law and fact, with Bradshaw being the first among equals. As its officers, it named Isaac Dorislaus, Robert Aske, William Steel, and John Coke.[89] Dorislaus had even more training that Steele or Bradshaw in martial law. He had been the judge advocate general of Essex's army. The tribunal had a summary jurisdiction. It was now also a presidential council.

From the time the Act was passed to the time the king came before the court on 20 January, the court sat in private to make the charge and other arrangements for the trial. These private meetings were commonplace for a garrison court martial.[90] The private preliminary proceedings were essential because it was here that the lawyers and the commissioners crafted the questions for the witnesses to see whether or not they had proof for their charges. There was no strict separation at a court martial or at the trial of Charles I between the prosecution and the judges, as there was at common law or at an impeachment trial at the House of Lords.[91]

Second, in a manner consistent with a court martial, they deposed witnesses who could provide eyewitness proof to Charles' crimes. Even though Charles refused to recognize the court, it still desired to hear eyewitness testimony. It appointed a committee to depose the witnesses, a

[89] J.G. Muddiman, *Trial of King Charles I (*Glasgow: William Hodge and Company, 1928), 198; The best source for the trial is the journal of the proceedings of the High Court of Justice taken by the clerks now in TNA SP 16/517 which has been transcribed as "Bradshaw's notebook" in Muddiman's *The Trial of King Charles I*; also see J. Nalson, *A True Copie of the Journal of the High Court of Justice for the Tryal of Charles I*. I have used these two printed sources in my examination; for the contemporary printed reports of the trial see Jason Peacey, "Reporting a Revolution: A Failed Propaganda Campaign,"161-81.

[90] The first meeting of the court took place on Monday, 8 January 1649, J. Nalson, *A True Copie of the Journal of the Proceedings of the High Court of Justice*, 5; Muddiman, *The Trial of King Charles I*, 201-02, 205-06; John Langbein, *Prosecuting Crime in the Renaissance*: *England, Germany, France* (Cambridge, MA: Harvard University Press, 1974), 224-8.

[91] Sean Kelsey has stated that "any pretension to the independence of the prosecutor in drafting his own charge was entirely otiose" "Politics and Procedure", 13. However there was no such pretension, at least by 6 January.

practice identical to army procedure.[92] Once deposed in private, the witnesses came to court to confirm their depositions publicly on oath, in a manner similar to the French confrontation procedure we have already seen in operation in English courts martial.[93] The king refused to acknowledge the court's jurisdiction. But if he had, he could have challenged the witnesses' testimony.[94] The court would have allowed Charles to issue a rejoinder to the charge and to produce his own witnesses to be deposed to contradict the witnesses of the court. The witnesses were meant to prove the *legal* claims being made.

Through this procedure, the Court tried Charles for levying war against the people of England. The genesis of the charge came from the army's Grand Remonstrance, submitted to Parliament on 20 November 1648. The Remonstrance focused, among many crimes, on Charles being the "chief author" of the wars that spilt the blood of the people.[95] In December 1648, rumors circulated about draft charges against Charles, focusing on him waging war against Parliament. The High Court of Justice, when it crafted the charge, focused on this crime in particular. There was a controversy over the final version of the charge, which had been committed to the council to draft and was modified by a subsequent committee.[96] But it is unlikely that the dispute centered on whether or not the king would ultimately be killed. Instead,

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[92] Muddiman, *The Trial of King Charles I*, 213. For committees in the army to examine witnesses see LPL, Ms 709, f. 80

[93] Nalson, *A True Copie of the Journal of the High Court of Justice*, 61, 79; Muddiman, *The Trial of King Charles I*, 212. The depositions of the witnesses are on Nalson, *A True Copie of the Journal of the High Court of Justice*, 63-79; Muddiman, *The Trial of King Charles I*, 213-22.

[94] *A&O*, i. 1253-55.

[95] *A Remonstrance of his excellency Thomas Lord Fairfax…and of the generall councell of officers held at St. Albans the 16 of November, 1648* (London, 1648), 62.

[96] Clive Holmes and Sean Kelsey are in disagreement over what the nature of this dispute was, with Kelsey arguing that it was over John Cook's desire to charge Charles with crimes dating back to 1625 "Politics and Procedure", 9-15: Holmes disagrees, "The Trial and Execution of Charles I" 299-300.

the central issue was probably matching witness testimony with the charge, an essential component to a trial. The end version was highly specific. The charge against Charles focused on the times and places during the 1640s where the High Court actually had eyewitnesses who could put Charles on battlefields when he was actively participating in the fight against Parliament. In the end, the High Court of Justice focused on proving that Charles had both waged war against Parliament, and that he conspired to do so again in the future. His crimes were military in nature. Because of his crimes, he was a "Tyrant, Traitor, Murderer, and a Publick and Implacable Enemy to the Commonwealth."[97] To the army and to its allies, Charles was a past and future danger to the safety of the state and needed to be executed.[98]

While much was consistent with a court martial and Charles' trial, we should not be blinded to the hybrid nature of the court. Let us return to the Act made on 6 January once more and examine the employment by Parliament of the Civilian concept of notoriety. Understanding this concept will help us see much more clearly Parliament's foresight, and how, in admittedly new circumstances, it relied on the fusion of old legal concepts.

In the opening of the Act, Parliament declared,

> Whereas it is notorious that Charles Stewart the now king of England not content with those many encroachments which his predecessors had made upon the People in their rights and freedoms, hath had a wicked design totally to subvert the antient and fundamentall lawes and liberties of this nation.[99]

[97] Ibid., 32.

[98] These ideas were consistent with the accusations that Charles had committed treason in the Grand Remonstrance of November 1648, *A Remonstrance of his Excellency Thomas Lord Fairfax, Lord General of Parliaments Forces,* 22-23.

[99] *A&O* i. 1253.

Medieval English monarchs had utilized notoriety against so-called "public enemies," criminals who were so well known and dangerous that their guilt was obvious. As we shall recall, notoriety was both the means of bringing a suspect into court and a declaration of that suspect's guilt.[100] The king could thus order the execution of the criminal without proving him guilty. By the end of the fourteenth century, Parliament had adopted this form of proof in order that it might convict suspects of treason by simple vote: what has come to be known as an act of attainder.

From the end of December, the *Kingedome's Weekly Intelligencer* was reporting that the Commons was preparing both an act for attainder and an ordinance for the trial of the king.[101] Why do both? In short, the Commons had predicted that Charles would refuse to plea. Indeed, rumors that the king would employ this strategy had been circulating since December 1648.[102] Aware of this possibility, Parliament authorized the High Court of Justice that "in default of such answer, to proceed to final sentence, according to justice, and the merit of the Cause."[103] Or to put it in more clear words, if Charles refused to plea, the court could kill him. But it could kill him not just based on his refusal, but also based on the notoriety of his guilt. The concept of notoriety was a backup plan should the court be unable to prove him guilty at law.

Thus, when John Cook, the attorney general, invoked the concept on the third day of the trial after Charles had twice refused to recognize the court, he was not simply making up an ad

[100] For notoriety see the prologue. Clive Holmes has been the only historian to notice the significance of the word notorious. "The Trial and Execution of Charles I", 301.

[101] *The Kingedomes Weekly Intelligencer* 26 Dec 1648 – 2 Jan. 1649, 1206.

[102] Multiple news books reported the possibility of Charles refusing to plea including *Mercurius Pragmaticus* 26 December 1648 – 9 January 1649, 30; *The Manner of the Deposition of Charles Stewart, King of England*, 2. The Commons debated this very possibility on 30 December. *Kingedomes Weekly Intelligencer* 26 Dec. 1648- 2 Jan. 1649, 1207.

[103] *A&O*, i. 1253-55.

hoc response to Charles' intransigence. He declared that "the House of Commons have declared that his treason is notorious and that the matter of fact is true (as in truth it is) my lord, as clear as crystal or as the sun at noonday."[104] President Bradshaw agreed, but in private the court decided it would still depose the witnesses, in spite of the notoriety of the accused, to give "clearer satisfaction of their owne judgments and consciences."[105] It is certainly true that the king made the court look bad, but he did so because of the intractable flaws in Parliament's strategic planning. The Commons and the army desperately wanted to prove him guilty at law in public, even though the men who planned the trial realized that the king would probably not go along with their plan. But plans the Commons and the High Court of Justice had. And these plans were crafted out of well-established legal concepts.

The High Court of Justice was thus a fusion of a variety of legal concepts in an attempt to convict the king at law publicly. Vestiges of the original plan of a great jury court survived. The use of notoriety was meant to guard against the king's refusals to recognize the court. The titles of the legal officers came from common law. The pomp and ceremony of the court hearkened back to the trial of the Earl of Strafford before the Lord High Steward in the House of Lords. So too did the idea of impeachment. But most importantly the procedures of the trial reflected the influence of martial law. Its presidential tribunal, its summary powers, its private depositions showed the influence of martial law. This was intentional.

And it was noticed. By March, dissident and mutinous members of the New Model Army – Robert Ward, Symon Grant, Thomas Watson, George Ielles, and William Sawyer – attacked the Army's Council for using martial law on its own soldiers. Included in this attack were strong

[104] Nalson, *A True Copie of the Journal of the High Court of Justice for the Tryal of Charles I*, 56.

[105] Muddiman, *The Trial of King Charles I* (London, 1928), 211.

criticisms of what the members of the army believed to be the Council of War's undue influence on English government that past winter: "finding the Military Power in an absolute usurpation of the Civil Jurisdiction in the place of the Magistrate, executing that authority."[106] They cried out against the new government and the purging of Parliament. Further,

> we find the just and legall way of triall by men of the neighborhood in criminall cases, utterly subverted in this new constitution of an high court, a president *for ought we know*, to frame all the Courts of England by and to which our selves may be subjected as well as our enemies.[107]

Not only were these soldiers inferring that the High Court of Justice was actually a court martial, of which they were familiar, they were also making a jurisdictional claim based on readings of the discourses surrounding the Petition of Right: only enemies should be tried in England during states of peace by a court martial. Now the entire realm would be tried as though they were enemies.

Clement Walker, a jurist and writer who had sided with Parliament in the 1640s but had disagreed with the Regicide, thought similarly when he observed the proceedings against the king. In his scathing *History of Independency*, he wrote:

> *The Persons constituting* this extrajudicial Court are the present, pretended Parliament consisting of 40 or 50 thriving Commons only, who conspired with Cromwell & the Army to expel 7 parts of 8 of their fellow members, without any cause shewen, abolished the House of Peers, erected this High Court of Justice (*in nature a Court Martiall*) to Murder the King…[108]

[106] John Lilburne, *The Hunting of the Foxes from New-Market and Triploe-Heaths to White-Hall,* (London, 1649), 18.

[107] Ibid., 19.

[108] Clement Walker, *The High Court of Justice or Cromwells Slaughter House,* (London, 1651), 19.

Walker was biased against the Rump and Cromwell. But he had experience in both common and martial law. Before the Civil War, he had studied at the Middle Temple and had practiced in both the courts of Exchequer and Common Pleas.[109] During the Civil War, he had served as an advocate at courts martial in Bristol in 1643, and had prosecuted royalist conspirators.[110] That same year, he, along with William Prynne, accused Nathaniel Fiennes, the Parliamentary commander of the city, of neglect of duty and treason in abandoning Bristol too quickly to royalist forces.[111] In his examination of the court, Walker ignored its name and instead examined the acts that authorized the High Court of Justice to understand its nature. He thought it was a court martial.

These readings reflect the real borrowings the High Court of Justice took from martial law. They also reflect the increasing association those in protest of the new Commonwealth made between martial law and military authority. This alternate form was now simply a valence of martial power: an "extralegal" power according to Walker. Never great, the reputation of martial law was getting worse. It would continue to decline as the new Commonwealth kept experimenting with martial law in the 1650s.

Keep it Secret: The High Courts of Justice, 1650-1660

In 1646, Parliament won the Civil War. Then it lost the peace. In 1648, it won the "Second Civil War." Then it lost the peace again. In December 1648, after Parliament had been unable to come to an agreement with Charles I, the army intervened. Parliament was purged.

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[109] David Underdown, "Walker, Clement (*d.* 1651)," in *ODNB.*

[110] *The Several Examinations and Confessions of the Treacherous Conspirators against the Cittie of Bristoll* , 4.

[111] Prynne, *A True and Full Relation of the Prosecution, arraignment, tryall and condemnation of Nathaniel Fiennes*.

Charles Stuart was tried for treason and executed. A Commonwealth was proclaimed. The English Civil Wars caused a revolution in government. But by 1650 it had not caused peace. Still fighting royalists and rebels in Ireland, Parliament by the spring of 1650 was preparing for a new war against its former ally, the Scots. Unhappy with the execution of Charles I, the Scottish commissioners began negotiating with his son at Breda. Further, royalists still residing in England were plotting the overthrow of the Commonwealth in order to restore the Stuart monarchy. Enemies were everywhere. New treason laws had been created that mandated obedience to the Commonwealth. In March 1650, MPs considered legalizing martial law to enforce these statutes so that obedience might be induced through terror.[112]

They did so because in the fall of 1649 the Commonwealth had been brought to its knees by a jury. Since the regicide, John Lilburne, the leading "Leveller," had consistently attacked the new government. Over the course of 1649, he published numerous attacks on Oliver Cromwell, the Rump Parliament, and on the army. He accused Cromwell of treason, declared that the army had illegally purged Parliament, and that the current government was a puppet to an arbitrary military power.[113] The Commonwealth simply could not get Lilburne to shut up. By October, it ordered Lilburne to be tried in London for treason according to recent acts that prohibited public polemical attacks against the government. In October, Lilburne was indicted by a grand jury. At his trial, Lilburne argued to the petty jury that it was a trier of law as well as fact, and that he was being tried by bad law. The jury seemed to agree with Lilburne, and acquitted him. The Council

[112] S.R. Gardiner, *History of the Commonwealth and the Protectorate* 3 vols. (London: Bombay, 1894-1903), i. 247-8; David Underdown, *Royalist Conspiracy in England, 1649-60* (New Haven: Yale University Press,1960), 23-30.

[113] See for example, John Lilburne, *An Impeachment of High Treason against Oliver Cromwell* (London, 1649).

of State was furious.[114] By March of the next year, it sought to legalize martial law so that it could avoid future jury nullification.

On 14 March 1650, a bill was introduced entitled, "An Act for Establishing A Court Martial within the Cities of London and Westminster, and late lines of Communication."[115] We can tell from this title that the crafters of the bill looked to the garrison courts martial that had operated in London during the Civil War. The ordinance for the 1644 court martial, for example, was titled "Ordinance for the Establishment of Martial Law within the Cities of London and Westminster and the lines of communication."[116] Meanwhile the ordinance for the 1646 court martial was titled, "Ordinance for the speedy establishment of a court martial within the Cities of London and Westminster and the Lines of Communication."[117] The change to the title of this new Act was minimal: too minimal in fact. The Lines of Communication, the ringed fortresses built to protect London during the war, had largely been dismantled in 1647.[118] The only reason why language relating to the Lines of Communication was included was because the makers of the bill were working from a template when they created the bill for 1650: the ordinances that legalized the courts martial in London in the Civil War.

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[114] For the trial, see Thomas A. Green, *Verdict According to Conscience: Perspectives on the Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), 153-99.

[115] *CJ*, vi. 381. Both Blair Worden and Gardiner have failed to notice that the initial name of this bill was a court martial. Blair Worden, *The Rump Parliament, 1648-1653* (Cambridge: Cambridge University Press, 1974), 222; Gardiner, *History of the Commonwealth and Protectorate*, i. 247-8. F.A. Inderwick noted briefly that the High Courts of Justice were based off of a court martial, although it is more likely he took this information from Clement Walker than from the Commons Journal. F.A. Inderwick, *The Interregnum (A.D. 1648-1660): Studies of the Commonwealth Legislative, Social, and Legal* (London: Sampson, Low, Marston, Searle & Rivington, 1891), 249.

[116] *A&O*, i. 486.

[117] *A&O*, i. 842.

[118] For the Lines of Communication in the Civil War, see Victor Smith and Peter Kelsey, "The Lines of Communication: The Civil War Defenses of London" in *London and the Civil War* ed. Stephen Porter (New York: St. Martin's Press, 1996), 117-49.

After the first and second readings of the bill, Parliament resolved to rename the court to "The High Court of Justice." Hidden behind this new name, Parliament eventually authorized a court martial to sit in London. The new name, of course, was taken from the tribunals Parliament had used in 1649 to try Charles Stuart and five leading royalist commanders who had fought against Parliament in 1648. The new tribunals had much in common with those of 1649. They were garrison courts martial in nature, if not in name.[119]

The Commonwealth changed the name for two reasons. First, those who made the 1650 bill knew they were violating the temporal restraints made by the 1628 parliament. In the preface to the Act, Parliament declared that it was authorizing the High Court of Justice to sit for "the better preventing of the miseries of a new and bloody war."[120] In other words, the terror the sitting court would inspire would transform rebelliousness into obedience. This claim, however, also recognized that England was not currently in a state of internal war. There was no enemy in the field with banner displayed. Through statute, the Commonwealth overrode the Petition of Right. Out of embarrassment, it changed the name of the court. Second, the last thing the Commonwealth wanted to do in the spring of 1650 was to privilege procedures associated with the army. In doing so, it would have confirmed all of those claims made by Lilburne and other opponents of the regime, that it was nothing but a puppet to a military power.

In deliberations over the next twelve days, Members of Parliament inserted two amendments into the bill that altered the court's procedure. The first, passed on 21 March, ensured that the High Court of Justice in no way diminished the powers of the Commonwealth's

[119] For the subsequent High Court of Justice that tried the Earls of Cambridge and Holland, Sir Arthur Lord Capel, Lord George Goring, and Sir John Owen, see Gardiner, *History of the Commonwealth and Protectorate*, i. 10-12.

[120] *A&O* ii. 364.

generals and its admirals. We can see, even before reading the final version of the act, its close relationship with martial law: so close that the Commons had to make sure the court would not interfere with the legal power of their generals. Second, on the same day, Parliament passed an amendment that required all of the commissioners of the High Court of Justice to take an oath that "You shall Swear, that you shall well and truly, according to the best of your skill and knowledge, execute the several Powers given unto you by this present Act."[121] Here again we can detect a concern over the discretionary powers of a court martial. It is true that martial commissioners sometimes took oaths before sitting at a court martial. But it was not always true. Most importantly, no amendments were passed that fundamentally changed the procedure of the court. Its name was changed, but its nature endured. The bill passed on 26 March.[122]

The new High Court was to be a summary jurisdiction. Like the garrison courts martial, the court was given powers for "examination upon Oath (which the Court hath hereby authority to administer) or otherwise, and taking any other Evidence concerning the same."[123] The High Court of Justice needed to hear evidence when it prosecuted suspects. But the specific presentation of that evidence was left to the court's discretion. Like most courts martial, there were no rules relating to proof. The discretion also extended to the making of the charges. The court had the power to "take order for the charging of Offenders with all or any of the Crimes…and for receiving their personal answer thereunto."[124] There would be no indictment by grand jury. Just as the Judge Advocate General usually generated the charge for courts martial, so too did the officers of the High Court of Justice.

[121] *CJ*, vi. 385.

[122] *A&O*, ii. 364-7.

[123] Ibid., 367.

[124] Ibid.

There were other consistencies between the High Court of Justice of 1650 and the garrison courts martial of the Civil War. First, like the garrison courts martial, Parliament nominated a large number of men, and mandated twelve for a quorum. It kept the innovation of naming civilian commissions introduced by the garrison courts martial. Parliament's allies sat on the tribunal. Second, in both times the garrison court martial sat, in 1644 and 1646, Parliament put a time stamp on its existence. In 1644, the court martial was initially authorized to sit for three months, and eventually sat for four. The 1646 variation also was authorized to sit for three months. Likewise the 1650 High Court of Justice was authorized to sit for six months, from March 1650 until the following September. The rationale for these limitations was also similar. Many within both the Parliaments of the 1640s and the Parliament of 1650 were uncomfortable granting permanent jurisdiction. Third, like a court martial, the High Court of Justice would determine cases by plurality. The High Court of Justice could convict and punish, "as the Said Commissioners or the major part of them then present shall judge to appertain to Justice."[125]

In the Act, Parliament dictated that the High Court could specifically try eight offences. The first seven articles were nearly identical to the first seven articles assigned to the garrison courts martial of the Civil War. The High Court of Justice could punish those who communicated with the "Royal Family;" those who plotted to betray any towns, garrisons, or anything "belonging to this Commonwealth;" those who harbored delinquents; those participating in mutinous assemblies; those who allowed prisoners of war to escape; those taking up arms against Parliament; and those who deserted. The articles were thus also derived from the category of crimes labeled by Matthew Sutcliffe concerning "the safety of the state, garrison, and

[125] *A&O*, ii. 365.

army."[126] The ordinance authorizing garrison courts martial during the Civil War weighed heavily on the makers of the 1650 High Court of Justice.

The key divergence between the act authorizing the 1650 High Court of Justice and the acts that authorized the garrison courts martial of the Civil War was the eighth article, which allowed the High Court to have cognizance over five Acts passed by Parliament in 1649 that were related to treason.[127] The first stated that anyone who declared Charles Stuart king was guilty of treason. Two others involved the making of scandalous pamphlets and removing "papists" and delinquents from London.[128] But the second and third acts, passed in May and July 1649, attempted to reframe English treason law away from attacks on the king's personal body.[129] These acts made offences like attacks on the Council of State, or the clipping or counterfeiting of money, illegal. But they also included military crimes: mutiny in the army, conspiring with the Commonwealth's enemies, engaging in rebellion, and attempting to seize Commonwealth garrisons were included in both these acts. In other words, the first seven articles in the Act authorizing the High Court of Justice had already been enacted as treason the year before. Why, if Parliament had already passed these articles into law, did it list the articles separately in the 1650 Act for Establishing a High Court of Justice?

These redundancies reveal the nature of the making of the Act itself. Those who crafted it started with the 1644 ordinance to establish a garrison court martial in London. They then made minor modifications throughout the text by adding a short new preface, and changing the names

[126] Ibid., 366.

[127] Ibid., 366-7.

[128] Ibid., i. 1263-64, ii. 245-54, 349-54.

[129] Ibid., ii. 120-21, 193-4.

of the commissioners, the name of the court, and the exact timeline for the court's sitting. They made minor modifications to the first seven articles. Then at the end, they inserted a clause that legalized the previous Acts relating to treason Parliament had made in 1649. The redundancies confirm that the templates of the Act establishing a High Court of Justice were the ordinances that authorized courts martial in London during the Civil War.

The most famous case the court heard in the summer of 1650 was the treason trial of a former royalist colonel, Eusebius Andrewes. Andrewes had served Charles I through the surrender of Worcester in 1646. After steering clear of the Second Civil War, Andrewes became ensnared in a ruse designed by the Commonwealth's Council of State to uncover potential royalist conspiracies. Andrewes had agreed to to take Ely for Charles II. After tracking Andrewes for some time, the Council of State confronted him in the spring of 1650. A three person committee led by John Bradshaw, acting in his capacity as president of the Council of State, interrogated Andrewes, who subsequently delivered a written answer to the charge that he had attempted to subvert the government. Bradshaw then issued a commitment warrant to "receive the body of Eusebius Andrewes, esq. in order to his further examination and him you are safely to keep in close imprisonment in the Tower of London…he being committed to you for High Treason."[130] Andrewes had committed the second offence assigned to the High Court of Justice: that no man should plot to betray cities or other garrisons in the power of the Commonwealth. This determination had been made by the Council of State, not the High Court of Justice. The High Court of Justice only heard the case after it had been referred to it by the Council of State. The formal charge was not made until after Andrewes had been imprisoned.

[130] *State Trials*, v. col 12; *CSPD*, 1650. 533.

Andrewes finally came before the court in August 1650, after several petitions he had written had been ignored.[131] His outlook was not good. Not only did the court have all of Andrewes' correspondences about the plot to seize Ely, it also had his own written answer. Andrewes thus decided to defend himself not by denying the charges, but by denying the validity of the court. He did so by calling upon his legal and military training. Andrewes was trained in the law. He had been admitted to Lincoln's Inn in 1620, and was called to the bar in 1627. Andrewes also had experience in war. He had served with the armies of Charles I, ending his career with the rank of colonel in 1646.[132] Andrewes used both of these knowledge bases to attack the court and its procedure.

Andrewes issued his written response, read by the court in August, which claimed:

> That this Court is (though under a different stile) in nature, and in the Proceedings thereof, directly the same with the Commission Martial; the Freemen thereby being to be tried for life, and adjudged by the major number of the Commissioners sitting (as in Courts of Commissioners Martial was practiced, and was agreeable to their constitution) and consequently against the Petition of Right.[133]

He continued this line of attack when he came before the court. He admonished the commissioners to "remember the petition of Right."[134] The Petition, according to Andrewes, had affirmed that trial by life and death could only be by the laws of the land. He, argued that the martial commissioners were evil, not because of their personal qualities, but through "their

[131] *State Trials*, v. cols. 8-13; *CSPD*, 1650, 184.

[132] J. T. Peacey, "Andrewes, Eusebius" in *ODNB*.

[133] *State Trials*, v. col. 14.

[134] Ibid. v. col. 21.

proceedings by their own will and opinion, being themselves the Judges and Jury; offices incompatible and inconsistent with the people's liberties." He argued that if the commissioners "read the Act by which you now sit, I am confident you will grant this power to be of the same nature, though not under the same name."[135] Andrewes was right that these procedures were similar to courts martial. This was intentional.

The High Court dismissed Andrewes' arguments and convicted him of treason, using his own initial answer as a confession. But our procedural interest in the trial does not end with his conviction because a minor controversy erupted over how Andrewes was to be killed. At least initially, the court ordered the full, traditional punishment for a traitor: he was to be hanged, drawn, and quartered. The treason acts of 1649 had mandated this punishment. In his only successful petition, Andrewes asked Parliament for a less painful death. Parliament agreed and on the 27 August, passed an Act that declared that the High Court of Justice was "hereby authorized to cause such Sentence or Sentences of Death to be given and executed, by appointing such Offender or Offenders to be Beheaded or hanged onely."[136] Probably due to the discomfort many in Parliament felt towards the High Courts of Justice, only capital punishments allowed for at martial law were granted to the court.

The Commonwealth found the High Court of Justice useful. In the same summer that the High Court heard and determined Andrewes' case, the Commonwealth threatened to use the High Court of Justice to execute six imprisoned royalists as retribution for the murder by exiled royalists in Madrid of Anthony Ascham, the Commonwealth envoy to Spain. The Commonwealth ultimately decided not to execute the six men, holding them hostage as leverage

[135] Ibid.

[136] *A&O* ii., 419.

for the safety of its overseas diplomats instead.[137] In December 1650, Parliament authorized a High Court of Justice to sit in Norfolk to hear, determine, and punish those who had recently participated in a royalist rebellion, the so-called "winter rising," where those sympathetic to Charles Stuart attempted to take Norwich for the exiled monarch. At least eighteen men were executed by the High Court of Justice that December.[138] The High Court continued to operate through the summer of 1651. In that summer, the court tried the Presbyterian minister Christopher Love, an apothecary named Henry Potter, and another named John Gibbons, who with a group of Londoners had been secretly conspiring with the Scots. Love, in spite of admitting to corresponding secretly with the Scots since at least 1648, put up a spirited defense. He was aided by none other than Matthew Hale.[139] His defense did not save him; Love went to his death. The High Court of Justice used exemplary punishment to promote obedience to the Commonwealth.

V.

The Commonwealth did not last long. On 20 April 1653, Oliver Cromwell dissolved the Rump Parliament. A new one was called shortly after. Cromwell thought little better of this one, the "Barebones Parliament." The majority, after increased friction between moderates and

[137] *CJ*, vi. 434, 436-8; *An Act for the Trial of Sir John Stawel etc.* (London, 1650). Only one of the six, John Stawell, was tried by the High Court of Justice in December 1650, but his case was referred back to Parliament without a verdict given. John Wroughton, 'Stawell, Sir John" in *ODNB*; Gardiner, *History of the Commonwealth and Protectorate* i. 309-10.

[138] *CJ*, vi. 404-06; *CSPD*, 1650, 465 *A&O*, ii. 492-3. Accounts of the trials can be found in the correspondence of Thomas Scot, the Commonwealth's spymaster, which were printed in the eighteenth century. *Original Letters and Papers of State Addressed to Oliver Cromwell* ed John Nickolls (London, 1743), 33-39. Zachary Grey, An Impartial *Examination of the Fourth Volume of Mr. Daniel Neal's History of the Puritans* (London, 1739), appendix, 105-08; *A Perfect Diurnall* 23-30 Dec. 1650, 725; 30 Dec. 1650 – 6 Jan. 1651, 737-8; 6-13 Jan. 1651, 752-3; 27. My total of executions comes from *A Perfect Diurnall* 27 Jan. - 3 Feb. 1651, 793. Underdown, *Royalist Conspiracy in England,* 43-5.

[139] *State Trials* v. cols. 43-294; Potter and Gibbon were respited until the 15 August. *CJ*, vi. 614.

radicals, resigned the powers that Cromwell had given them on 12 December. On 16 December, Oliver Cromwell became "the Lord Protector of the Commonwealth, Scotland, and Ireland."[140] Once again, a single man stood at the center of English government.

With this transformation in 1653 from a Commonwealth to a Protectorate, the new government made changes to the Commonwealth's treason laws.[141] In a protectoral ordinance passed in January 1654, Oliver Cromwell streamlined the treason acts of the Commonwealth period, and incorporated the martial law of treason fully into the ordinance.[142] The ordinance also revived English statutory treason. It was now treason to "compass or imagine the death of the Lord Protector for the time being" – a clear aping of English statutory treason law, which stated it was treason to "compass or imagine the Death of our Lord the King."[143]

English statutory treason would now be tried by martial law procedure. That spring a conspiracy had been hatched to murder Cromwell and overwhelm the Protector's garrisons in London.[144] John Gerard, Peter Vowell, and Somerset Fox were accused of being part of a conspiracy to murder Cromwell as he traveled from London to Hampton Court on 13 May. Others were then to take control of garrisons in and around London and proclaim Charles Stuart king of England. The plot failed, and the plotters were captured. On 13 June, a protectoral ordinance authorized the sitting of a High Court of Justice through 20 August. This High Court

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[140] *The Constitutional Documents of the Puritan Revolution*, ed. S.R. Gardiner, 405. For a narrative of the dissolution, see Gardiner, *History of the Commonwealth and Protectorate*, ii; Austin Woolrych, *Commonwealth to Protectorate* (Oxford: Clarendon Press, 1982).

[141] Gardiner, *History of the Commonwealth and Protectorate* ii. 261-340.

[142] *A&O*, ii. 832-34.

[143] Ibid., 832; 25 Edw. III stat. 5 c.2.

[144] Underdown, *Royalist Conspiracy in England*, 100-02. The plot was described on the opening day of the trial. *State Trials* v. cols. 522-24.

of Justice had cognizance over all treasons and misprisions of treasons listed in the treason ordinance of January 1654.[145]

For this case, we have a view into the internal proceedings of the court because a written account by its president, John Lisle, has survived.[146] After the establishment of the court, the named commissioners met at the Middle Temple. Sir Thomas Widdrington, a commissioner of the Great Seal, came to administer the oath to each commissioner. Several had reservations about taking it. Justice Atkins of Common Pleas, for example, begged for more time to make his decision before he took the oath. Two days later, he informed Lisle, that "he had already taken several oaths as a serjeant and as a judge to do nothing contrary to the laws of England."[147] In spite of this rejection, Lisle managed to obtain enough men to take the oath to meet the quorum of thirteen mandated by the ordinance.

The trial opened in Westminster Hall, which according to Lisle was "very full of people."[148] Like the courts martial of the 1640s, the High Courts of Justice were open to the public. Fox came first and declared he would confess to his deposition. The other two eventually pleaded not guilty. The court heard eyewitnesses who testified *viva voce* to the suspect's guilt. It then adjourned to the Painted Chamber to deliberate. After reviewing the evidence, Lisle posed two questions to each of the justices: whether the suspect was guilty of plotting to raise forces against the protector, and whether the suspect was guilty of compassing the death of the

[145] *A&O*, ii. 917-18.

[146] *CSPD*, 1654, 233-40. This record has been briefly discussed by Stephen Black, "*Coram Protectore:* The Judges of Westminster Hall under the Protector Oliver Cromwell" *The Journal of American Legal History* 20:1 (Jan., 1976): 44-6.

[147] *CSPD*, 1654, 234.

[148] Ibid.

protector. In both cases, the commissioners voted in the affirmative for Fox and Gerard. For Vowell, they only voted on the first question, also finding him guilty. This voting system was consistent with that of a court martial. The three conspirators went to their deaths shortly thereafter.

The discomfort towards the High Court of Justice felt by Hale and Atkins perhaps can also be discerned in Parliament. Already by 1653, there is circumstantial evidence that some Members of Parliament opposed the sitting of the High Court of Justice. In that Parliament, the council of state had recommended a bill on 10 August to legalize a High Court of Justice to punish potential conspirators working for Charles Stuart.[149] But the bill was not introduced until almost the middle of October, and then disappeared in committee. Finally on 21 November, the bill passed, but apparently many were upset with the speed at which the bill was passed through the Commons.[150]

However, we should not overstate opposition to the High Court of Justice. Some scholars have argued that Cromwell's use of common law to try captured rebels in the immediate aftermath of Penruddock's rising – a royalist rebellion in Wiltshire in the spring of 1655 – as evidence that the Protector favored the common law. There is no evidence to support this assertion. Instead, as Stephen Black has noted, he had no other option but to use common law.[151] Under the terms of the Instrument of Government, the written constitution that established the

[149] *CJ*, vii. 297, 353-4; *CSPD*, 1653-4, 82-4; Woolrych, *Commonwealth to Protectorate*, 300-01.

[150] *A&O*, ii. 780-2.

[151] Black, "*Coram Protectore*", 46-7. For the argument that Cromwell had no desire to use the High Court of Justice during the rebellion see Austin Woolrych, "The Cromwellian Protectorate: A Military Dictatorship?" in *Cromwell and the Interregnum: The Essential Readings* ed. David L. Smith (Oxford, 2003), 67-8. Woolrych, *Penruddock's Rising, 1655 (*London: Historical Associations Publications, 1955), 21-2.

Protectorate in December 1653, Cromwell could issue ordinances only until the meeting of the first Protectorate Parliament. Further, those ordinances would only remain lawful if Parliament passed them as statutes. This power allowed Cromwell to issue the new treason ordinance in January 1654 and to authorize a sitting of the High Court of Justice in the summer of 1654. But once the first Protectorate Parliament met in the fall of 1654, Cromwell could no longer make these ordinances. Further, the treason ordinance he had passed was no longer legal. This contentious Parliament did not pass a new Act for the sitting of a High Court of Justice.[152] Therefore, Cromwell had to try the rebels at the assizes.

When the next Parliament met in the fall of 1656, Cromwell pressed for a new statute that would make it treason to compass the death of the Lord Protector, and one that authorized a sitting of a High Court of Justice. The bill was entitled, for the "Security of his Highness the Lord Protector."[153] Cromwell and his spymaster Thurloe were well aware that Royalists and other disaffected persons continued to plot against the government. Indeed, there had been a plot, unbeknownst to the Protector, to take his life on the first day of Parliament, 17 September 1656.[154] After a second reading on 26 September, Parliament passed the bill on 9 October. Some MPs had reservations about legalizing a new High Court of Justice but failed in an attempt to mandate that three judges had to participate to make a lawful quorum. The act authorized the

[152] *The Constitutional Documents of the Puritan Revolution, 1625-1660* ed. S.R. Gardiner (Oxford: Clarendon Press, 1906), 414. For a discussion of the written constitutions of the Protectorate, see Patrick Little and David L. Smith, *Parliaments and Politics During the Cromwellian Protectorate* (Cambridge: Cambridge University Press, 2007), 12-49. Gardiner, *History of the Commonwealth and Protectorate* iii. 178-252.

[153] The bill was first read on 23 September. *CJ* vii. 427. C.H. Firth, *The Last Years of the Protectorate, 1656-1658* 2 vols. (London: Longmans, 1909), i. 41-2.

[154] Underdown, *Royalist Conspiracy*, 178-93; Firth, *Last Years of the Protectorate*, i. 31-40.

Protector to call a High Court of Justice in England, Scotland, or Ireland by a commission of the Great Seal through the last sitting of the subsequent Parliament.[155]

The Act both expanded and limited the powers of the High Court of Justice. The High Court of Justice could now punish High Treason and misprision of treason by the full, traditional method of hanging, drawing and quartering. It was also explicitly authorized for the first time to take the property of traitors.[156] But in other areas, Parliament restricted the High Courts' powers. In terms of substantive law, the High Court only had powers over military treason, over those who imagined the death of the Protector, and over those who proclaimed Charles Stuart king. Its ability to punish those clipping coinage was no longer theoretically available. In terms of procedure, the Court only had powers to examine witnesses "upon oath…or upon confession." The Commons had eliminated summary procedure through amendment.[157]

Cromwell did not use the High Court of Justice until the summer of 1658. That spring, Thurloe had swept up a number of suspected royalist plotters. The three most prominent suspects were Sir Henry Slingsby, who had been in Hull and had been entrapped by military officers pretending to want to give up the garrison to Charles Stuart. The second was Dr. John Hewitt, an Anglican minister and leader of a Royalist network in London that had been planning an uprising. The third was John Mordaunt, the leader of the "new action party" in Surrey, which had also been involved in planning an uprising. The High Court of Justice convicted and killed Slingsby and Hewitt. However, Mordaunt was acquitted, in part due to the fact that the chief witness against him escaped from jail. The commissioners split their votes, 19 to 19 for

[155] *CJ*, vii. 429, 431, 434-6; *A&O*, ii. 1038-42.

[156] *A&O*, ii. 1041.

[157] *A&O*, ii. 1041; *CJ*, vii. 436.

conviction and acquittal. The president, John Lisle, voted to save Mordaunt's life.[158] Nine other plotters were tried that summer. Three were executed.

In all these cases, the court heard evidence. It deposed witnesses, and it examined the papers and correspondence of the defendants. It attempted to determine fact. It, in short, cared about proving the guilt of those that came before it. The point of the High Court of Justice was not to remove treason cases from the realm of law so that the named commissioners could achieve some pre-determined end. This desire for proof saved John Mordaunt's life. The Court also often granted its defendants counsel: an unusual privilege for those facing treason charges in the seventeenth century. The sometime allowance of defense counsel led to a long debate during the trial of Christopher Love, when the High Court allowed Matthew Hale to offer an extended defense of Love's case. For Hale, the officers of the court had written up the charge incorrectly. They had failed to connect the specific acts committed by Love with the abstract ordinances against treason embedded in the statutes passed by the Commonwealth. His example – and this must have been on purpose – was the article in 25 Edw. III that declared it treason to compass the death of the king. Hale's strategy ultimately failed, but the justices were interested enough in his arguments to debate them fully.

The High Court was meant to avoid jury nullification, and through this bypassing of juries, to instill terror. These reasons, at least, are what the various officers of the Commonwealth and Protectorate gave for legalizing the High Court of Justice. Robert Jermy, a local Norfolk officer, for example, wrote to William Lenthall, the speaker of the House of Commons, in December 1650 during the winter rising and stated that "it will be no end to try

[158] Underdown, *Royalist Conspiracy*, 209-28; Firth, *Last Years of the Protectorate* ii. 69-82; Victor Stater, 'Mordaunt, John," in *ODNB*; *State Trials* v. cols. 871-907; *The Publick Intelligencer* 28 June – 5 July 1658, 635-53; *Mercurius Politicus* 1-8 July 1658, 657-63, 665-70.

them by jury, but either to make some exemplary by a martial trial, or by the High Court of Justice."[159] The spymaster Thurloe in 1656 was delighted that Parliament had authorized a new High Court of Justice and stated to the diplomat John Pell that it was "thought more safe to try them in this way than by ordinary juries."[160] These views were shared by Cromwell. According to Bulstrode Whitelocke, when he begged the Protector not to try Slingsby and the rest by High Courts of Justice in 1658, Cromwell was "too much in love with the new way and thought it would be the more effectual and would the more terrify the offenders."[161] These rationales were fairly common for justifying martial law.

From the fall of 1658 through 1660, the non-monarchical governments of England did not use the High Court of Justice to punish treason. Cromwell died in September 1658. His son Richard was deposed as Protector in May 1659. The return of the rule of the Rump Parliament did not lead to the return of stability. In August 1659, Parliament successfully put down "Booth's Rising" in Cheshire and Lancashire. The punitive measures Parliament took were slight, and did not involve a High Court of Justice. It is not clear why. Perhaps, as David Underdown has suggested, the increased divisions between the army and Parliament by the fall of 1659 prevented any decisive action.[162] Charles II, restored in 1660, had no need for the High Court of Justice. At the opening of the treason trials of the regicides in October 1660, Sir Orlando Bridgeman, the presiding judge, declared that if Charles II "will try a man for his father's death,

[159] Robert Jermy and others to William Lenthall 4 Dec. 1650 in *HMC Portland* i. 545.

[160] Thurloe to Pell 9 Oct. 1656 in *The Protectorate of Oliver Cromwell* ed. Robert Vaughan 2 vols. (London, 1839), ii.37; Firth, *Last Years of the Protectorate*, i. 41-2.

[161] Quoted in Firth, *Last Years of the Protectorate*, ii. 72.

[162] Underdown, *Royalist Conspiracy*, 286, 254-85; Ronald Hutton, *The Restoration: A Political and Religious History of England and Wales* (Oxford: Clarendon Press, 1985), 1-119.

you see he will try them by the laws. The law is the rule and square of his actions."[163] Bridgeman was referring to the regimes of the 1650s. Perhaps he was also referring to the High Court of Justice. Martial law was now gone from Westminster.

At the outset of the Civil War, the discourses spun by Noy, Selden, and Coke – while divergent from one another – had succeeded in constraining martial law jurisdiction to the point where Charles had to issue his commanders pardons in 1640. Over the course of the war, Parliament painfully authorized martial law jurisdiction: first on soldiers in pay while an enemy was in the field, then on spies and conspirators, and rioters. Eventually, giving in to the pressure provided by the City of London, Parliament authorized sitting courts martial in London in 1644 and again in 1646. Mutinies amongst its soldiers made it continue to use martial law even though the realm was at peace by the summer of 1646. Further demands by the soldiers led to the creation of the Committee of Indemnity, which suspended misdemeanor and felony cases against soldiers at the assizes and quarter sessions throughout the realm. By 1649, a new government needed new laws and procedures. Martial law was one of the legal strategies the Commonwealth fused together to try Charles I. Throughout the 1650s, it changed the name of the court martial to the High Court of Justice so that it could try those accused of treason without relying on unreliable juries. Members of Parliament were embarrassed by overriding the law of martial law. But they did so nonetheless: not to enable arbitrary power but instead to ensure that discretion remained in the hands of those willing to execute the Commonwealth's, and later Protectorate's, laws. It was only when Charles II returned that the law of martial law returned also. The reaction by jurists to what they perceived to be the lawless and arbitrary acts of both the Commonwealth

[163] Quoted in Howard Nenner, "Bridgeman, Sir Orlando," in *ODNB.*

and Protectorate led to them enforcing the temporal and geographical restraints to martial law generated by the 1628 parliament.

Chapter Eight:
A Bounded Jurisdiction:
Using Martial Law in English Overseas Dominions

Those who had crafted the discourses relating to martial law in 1628 had not intended that their arguments be applied in the Crown's overseas dominions. Some of the lawyers who crafted the Petition of Right in 1628 had opposed the Crown delegating martial law jurisdiction to its overseas governors, but did not dwell on it.[1] Nevertheless, by the 1620s, the Crown began to bind martial law jurisdiction temporally. This movement began in Ireland, when subjects crafted their own solutions to martial law jurisdiction. In Ireland, the king's subjects argued that martial law could only be activated during states of invasion or rebellion. The Crown only removed temporal restraints on martial law for soldiers in pay.

English monarchs had little interest in delegating more extensive martial law powers to their deputies. Indeed, as we shall recall, Elizabeth I, James I, and Charles I had been deeply concerned about the proliferation of martial law jurisdiction in Ireland, and had actively sought to restrict access to those powers. The experimentations by the Virginia Company in martial law from 1611-1618 were not repeated once it became a royal colony in 1624. Instead, governors of royal dominions, proprietary colonies, and of territories belonging to English companies could only use martial law upon Crown soldiers and those engaging in mutiny and insurrection during a "state" of mutiny or insurrection. From the Crown's perspective, martial law was to be used

[1] *Proceedings in Parliament 1628* ed. Mary Freer Keeler, Maija Jansson Cole, and William B. Bidwell 6 vols. *(*New Haven: Yale University Press, 1983), iii 612, 618, 433. Members of Parliament had stumbled upon the martial law powers of the Muscovy Company while examining its charter. They protested the Crown's right to issue such powers to the Company, but only in passing. The issue seems to have been dropped without any major fight between Crown and Parliament over the Crown's right to delegate martial law to its overseas governors.

selectively by governors who had been delegated other, less controversial, legal tools for the maintenance of order and quiet.

Delegated authorities listened to these prescriptive commands. They did so for two reasons. First, the Crown from the 1620s onward flexed its muscle in its overseas dominions in ways that it did not in earlier parts of the seventeenth century. The Crown could now, upon little notice, send 1,000 soldiers all the way to Virginia to quell an uprising. It had administrative bodies, culminating in the 1675 creation of a more permanent Board of Trade and Plantations, that were prepared to review and judge legal and financial matters relating to the colonies. These responsibilities included hearing petitions from aggrieved colonists, who could attack governors for acting outside of their commissioned powers. Second, discourses relating to the illegality of martial law circulated around English dominions, which aggrieved colonists could use in petitions against their governors. Governors who wanted to keep both their master and their subjects happy had to be very careful in how they used martial law.

Martial law was thus not a commonly used tool for those who read their commissioned powers traditionally. Instead, governors utilized the jurisdiction simply to maintain order through terror in Crown garrisons. When they did move beyond their commissioned powers, it was usually to apply martial law on "soldiers," locally levied men, who fought for the colonies in local wars. Governors only used martial law on civilians during insurrections: the most prominent examples being Bacon's rebellion in Virginia and a rising in St. Helena. Martial law played a small and complementary role in the imperial legal regime.

Delegating Martial Law through Commission

Governors in the 1660s were apprehensive of the English Privy Council. Starting as early as the 1620s, when the Crown investigated and dissolved the Virginia Company, the Privy Council and various boards of trade reviewed and made serious attempts to supervise colonial governance. This supervision picked up speed in the 1650s, after the passing of the first Navigation Acts, a policy which the restored Crown continued in the 1660s.[2] Every governor had to take an oath to follow the Acts, and customs officials were sent out by the Crown to ensure that customs revenue arrived in Crown coffers.[3] While profits were its main motive, the Crown and its council also became interested in supervising the legal regimes of the plantations. By the 1660s, the Crown began including a clause in colonial charters that allowed subjects to appeal cases before the Privy Council. By the 1660s, royal colonies had to submit their written laws for review either by the Privy Council or by the Council for Trade and Plantations. Even a proprietary colony like Rhode Island reviewed its laws to ensure that they met Privy Council standards.[4]

This increased supervision often produced cat and mouse games between the Privy Council and Crown officials in the colonies, and would eventually lead to several unsuccessful attempts by the Crown in the 1680s to centralize colonial administration.[5] Delegated authorities hid illicit trade and smuggling. They often abstracted their laws or avoided publishing them, in

[2] Alison Games, *The Web of Empire*: *English Cosmopolitans in an Age of Expansion, 1560-1660* (Oxford: Oxford University Press, 2008), 256-88.

[3] Charles Mclean Andrews, *British Committees, Commissions, and Councils of Trade and Plantations, 1622-1675* (Baltimore: Johns Hopkins Press, 1908); *idem*, *The Colonial Period in American History* 4 vols (New Haven: Yale University Press, 1934-8), iv. For the oath see Ibid., 161.

[4] Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004), (introduction), 46-63.

[5] The most famous of these attempts was the so-called "dominion of New England." See Viola Florence Barnes, *The Dominion of New England: a Study in British Colonial Policy* (New York: F. Ungar Pub. Co., 1960). Other attempts included applying Poynings' Law to Jamaica. See the next chapter.

attempts to prevent the Privy Council from striking them down. Many officials lobbied their friends on the council, who could protect them from the wrath of the king should he find out they had subverted his wishes. Using martial law in ways other than those commanded by the Crown was a particularly dangerous game to play. Martial law was not included in the so-called "transatlantic constitution," which allowed for divergence from English customary and statute law.[6] Colonial statute and customary law could diverge from their English analogues, provided they were not "repugnant" to English laws. But the Crown did not allow this flexibility for other jurisdictions, like admiralty law and martial law. Instead, the Crown stipulated in commissions and charters exactly how martial law was to be used. Any actual divergence therefore, could be challenged by petitioners in England. Governors did not strictly follow these orders. But their divergences were small, usually accepted by their respective colonial populations, or explicitly allowed for by the Crown.

While each of its dominions was unique, the Crown gave its delegated authorities almost identical powers in regards to martial law. Its prescribed jurisdiction speaks both to how vital and to how dangerous the Crown believed martial law was as a legal strategy. These powers it granted had changed since the early seventeenth century. We shall recall that the Crown had given the Virginia Company powers of martial law that were based on powers given to lord lieutenants in England. Lords lieutenants could execute martial law on rebels and on invaders. A temporal requirement, while perhaps assumed, was not explicitly stated in the sixteenth century. By the 1620s, every commission of martial law contained explicit temporal boundaries. In Ireland, subjects achieved this temporal requirement after it asked the Crown to bind summary martial law temporally. In the so-called "Graces," a list of grievances the "Old English" subjects

[6] Bilder, *The Transatlantic Constitution*, introduction.

of Ireland submitted to Charles in the spring of 1628, Irish subjects demanded that provost marshals in Irish provinces only be allowed martial law powers during states of rebellion or invasion.[7]

The clause relating to martial law given to Lord Windsor in 1662, the governor of Jamaica, reflected this lineage. Windsor could use martial law, "for the better suppression of mutinous and actuall insurrections and Invasions, when the ordinary course of Justice cannot be well and safely attended."[8] These powers were highly restricted. The clause "when the ordinary course of Justice cannot be well and safely attended" was meant to doubly bind governors' discretion. They could only use martial law to suppress certain activities and only during times when the very activities they sought to suppress made the running of common law courts difficult if not impossible. Thus governors could not punish those suspected of rebellion outside the time the rebellion was actually taking place.

Along with these powers to use martial law in times of insurrection and invasion, certain delegated officials also had powers of martial law over Crown forces. The Crown granted governors in these areas powers of martial law upon its soldiers, and only its soldiers, unless the governor faced an insurrection or invasion. The 1661 commission to Sir Edward D'Oyly, the governor of Jamaica, for example, instructed him to use martial law "upon soldiers only."[9] Sir Thomas Temple, the governor of Nova Scotia, received identical powers in his commission.[10]

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[7] Aidan Clarke *The Old English in Ireland*, 1625-42 (Ithaca, NY: Cornell University Press, 1966), 249. Clarke, *The Graces, 1625-41* (Dublin: Dundalgan Press, 1968).

[8] TNA, CO 138/1 f. 10.

[9] TNA, CO 1/15 no. 10.

[10] TNA, CO 1/16 no. 42.

Likewise, the governor of Bombay could use martial law "upon soldiers only."[11] The governors of Tangier had similar powers.[12]

In granting its governors these powers, the Crown diverged from the discourses generated by the 1628 parliament. Soldiers residing in England could not be punished by life or limb at a court martial during times of peace. Instead, commanders could only use "extraordinary punishments" like whipping or running the gauntlet to maintain discipline in their forces. But abroad, commanders could and did punish their troops with death for mutiny, desertion, insubordination, and a variety of other crimes punishable by death in the ordinances of war. The Crown never justified this distinction. The only time common lawyers challenged a governor's ability to use martial law on soldiers, as we shall recall, came in the intentionally non-precedent setting treason trial of the lord lieutenant of Ireland, Sir Thomas Wentworth, Earl of Strafford, in 1641. His use of martial law in Ireland during "the time of full Peace" was deemed to be one of the many ways he had attempted to subvert the laws of the realm of England.[13] Strafford's example was only cited once during the Restoration, by James Butler, Duke of Ormond, the lord lieutenant of Ireland during the 1660s. Ormond in June 1663, after having received his commission, wrote to the secretary of state, Sir Henry Bennet (the future Earl of Arlington) and inquired whether his martial law powers included the death penalty.[14] Ormond recalled that

[11] Commission to Sir Abraham Shipmans, BL, IOR H/48 f. 4.

[12] TNA, CO 279/1 non-folioed. The articles of war for the soldiers are also in this volume.

[13] The article relating to martial law was number five. "The Articles against Strafford," *Historical Collections of Private Passages of State* 8: 1640-41 (1721), 61-101. The attainder made clear that Strafford's trial could not be used as a precedent for further treason trials. 16 Car. I c. 38.

[14] Ormond to Bennet, 13 Jun. 1663, Bodl. Carte Ms. 143, f. 142v.

Strafford's use of martial law "made parte of the treason vpon wch he was condemned."[15] However, Ormond's fears were assuaged enough to try by life and limb at martial law several mutinous soldiers in 1666 at Carrickfergus.[16]

There is some controversy as to whether the governors of Virginia possessed powers of martial law. The abovementioned clauses were not included in commissions to Virginia governors until 1676.[17] We shall recall that the Virginia Company had experimented extensively with martial law up to 1618. But after 1618, the Company in London withdrew those powers from their governors and ordered them to rule as near as possible by the laws of England. In 1620, a Company-issued report entitled "A Declaration of the State of the Colony," declared that "[t]he rigour of martiall law, wherewith before they were governed, is reduced within the limits and prescribed by his Majestie."[18] This statement suggests that governors still had powers to use martial law during times of invasion and rebellion, a hypothesis which is confirmed by the actions of Francis Wyatt in 1622 during so-called "Powhatan Uprising." Wyatt created captains in each town and hundred who had powers over "all matters of war." All those under the commander had to obey his dictates on pain of death.[19] However, the governor did not have powers of martial law during times of peace. In 1623, Wyatt wrote to the Company in London, and declared that the colonists had "grown careless."[20] He asked the Company for a

[15] Ibid.

[16] Bodl., Carte Ms. 34 fos. 710, 712, 714, 724, 726; Bodl., Carte MS 48, f. 45.

[17] The martial law clauses have been tracked by Wilcomb Washburn in "The Humble Petition of Sarah Drummond" *William and Mary Quarterly* 13.3 (1956): 366.

[18] *The Records of the Virginia Company of London* ed. Susan Myra Kingsbury, 4 vols. (Washington, D.C.: United States Government Printing Office, 1906-35), iii. 310.

[19] Ibid., 609-11, 623, 664-5.

[20] Ibid., iv. 105.

"commission martial" if for no other purpose than to terrify the inhabitants into obedience, even if the Company wanted to prevent Wyatt from actually taking life or limb by martial law. We do not know the answer the Company gave – it was probably no – but Wyatt's request signifies that Virginia governors felt that martial law had been circumscribed.

In 1626, after the Crown had dissolved the Company and had taken direct control over the colony, it issued a commission to George Yeardley, the new governor of Virginia. The Crown authorized Yeardley, "to execute & perform all and every Other matters & things concerning that plantation as fully & amply as any Governor & Councel resident thereat any time within the space of five years now last past had or might perform."[21] This shorthand clause, calling upon customary powers of the governors of Virginia, would become a staple of commissions to Virginia governors in the seventeenth century. Sir Francis Wyatt in 1639 was given all the powers Virginia governors had possessed within the past ten years.[22] William Berkeley's commission reflected this tradition in 1660, when the restored Crown issued the governor a new commission.[23] Virginia governors could probably claim martial law jurisdiction that allowed them to try by life and limb at courts martial during states of rebellion or invasion.

Garrison Towns and Martial Law

The powers the Crown gave to its overseas deputies, while not as restrictive as the powers it delegated to its military authorities in England, were nevertheless highly circumscribed. The Crown's increased ability to supervise its officials ensured that they would

[21] "Commission to Sir George Yeardley," *Virginia Magazine* XIII (1905-06): 300.

[22] "Virginia in 1638-9," *Virginia Magazine* 11:1 (1903): 51.

[23] TNA, C 66/2941, m. 22d.

employ martial law according to the restrictions laid out in their respective commissions. Martial law was thus rarely used in England's overseas dominions. When it was used, governors-general employed the jurisdiction to discipline soldiers in the Crown's selective garrisons. Those who did live in environments where martial law had jurisdiction used it to their own advantage.

Indeed, rather than being an autocratic "garrison government," as has been described by Stephen Saunders Webb, these militarized towns are more aptly described as governments with a garrison.[24] The people who inhabited these garrisons lived in a jurisdictionally pluralistic society, where martial law operated only as a complement to other forms of law, like merchant's law, some variation of English common law, and other, local mayoral courts. While it is true that "governors-general" had ultimate jurisdiction over both military and civil spheres, legally these powers were distinct.[25]

Crown garrisons were few and far between in the Restoration Empire. A garrison was briefly stationed in Dunkirk. A larger garrison at Tangier of roughly 3,000 men was created in 1662, and lasted until 1684. In Scotland, the Crown maintained a small army of roughly 1200 men, which was raised in 1678 during the Bothwell Bridge uprising to around 2700. Within England, the Crown possessed at the time of Charles II's death in 1685, a force of roughly 8800 men. In Ireland, the Crown maintained a force of 7,500 men, while in Portugal, due to the

[24] Stephen Saunders Webb, "The Strange Career of Francis Nicholson" *William and Mary Quarterly* 23:4 (Oct. 1966): 514-48; Webb, "William Blathwayt, Imperial Fixer: From the Popish Plot to the Glorious Revolution" *William and Mary Quarterly* 25:1 (Jan., 1968): 4-21; Webb, "Army and Empire: English Garrison Government in Britain and America, 1569-1763" *The William and Mary Quarterly* 34:1 (Jan., 1977): 1-31; Webb, *The Governors-General: The English Army and the Definition of the Empire, 1569-1681* (Chapel Hill: The University of North Carolina Press, 1979); Webb, *1676: The End of American Independence* (New York: Knopf, 1984); for critiques of Webb, See Richard R. Johnson, "The Imperial Webb: The Thesis of Garrison Government Considered" *William and Mary Quarterly* 43:3 (Jul., 1986): 408-30; Webb, "The Data and Theory of Restoration Empire" *William and Mary Quarterly* 43:3 (Jul., 1986): 431-59; Ian Steele, "Governors or Generals? A Note on Martial Law and the Revolution of 1689 in English America" *William and Mary Quarterly* 46:2 (Apr., 1989): 304-14.

[25] Webb, *The Governors-General*, vi. For a succinct definition of his "governor-general" see ibid., 1-6.

marriage agreement between Charles and Catherine of Braganza, the English kept 2,500 soldiers to help the Portuguese fight the Spanish. In the Caribbean during the 1670s, the Crown intermittently kept small forces, never more than 1000 men, in Barbados and Jamaica. The Crown briefly experimented with garrisons in Bombay, New York, New England, Nova Scotia, and Virginia in the aftermath of Bacon's rebellion.[26] By comparison to continental armies, those of the English were small. Most of the court martial records of these garrisons have not survived.

The notable exception to this rule was Tangier.[27] Tangier came to Charles II as part of the marriage treaty for his future wife Catherine of Braganza he signed with the Portuguese Crown. In return for English soldiers who would aid the king of Portugal's war against Spain, Charles received Bombay and Tangier, a Mediterranean port that was surrounded by powerful Muslim polities. To maintain the port, Charles commanded Henry Mordaunt, Lord Peterburgh, to take command, and bring with him roughly 3,000 soldiers. This militarized port was expensive. Further, many Portuguese and Tangerine merchants departed the port throughout the 1660s because they did not want to be ruled by an English governor, and because they felt threatened by the soldiers. The financial problems were compounded by the fact that the Moors had successfully isolated the city. The governor of Tangier had no access to grazing land, and suffered from shortages of water and other necessaries. In order to raise more money, the Crown, through commissioners it had sent out to examine deficiencies, set out new governing guidelines

[26] The numbers were taken from John Childs, *The Army of Charles II* (London: Routledge & Kegan Paul), 115-19, 196-7. Childs, *The Army, James II, and the Glorious Revolution* (Manchester: Manchester University Press, 1980), 1-3. The army was increased to over 34,000 by 1688. For Tangier see E.M.G. Routh, *Tangier, England's Lost Atlantic Outpost, 1661-1684* (London: Murray, 1912), and Tristan Stein, "Tangier in the Restoration Empire" *Historical Journal* 54:4 (Dec., 2011): 985-1011.

[27] BL, Sloane Ms. 1957, 1959, 1960 and 3514. The survival of courts martial records – general summaries of trials which sometimes contained attached witness depositions, as well as gaol delivery orders – was a chance occurrence. They somehow ended up in the library of the medical antiquarian Sir Hans Sloane, whose collection was eventually incorporated into the British Libraries manuscript collection.

in 1668 to encourage merchants to return to the city. Included in these new provisions were an incorporation of the city, and the creation of a mercantile court to handle business disputes. This new jurisdictional plurality replaced an all-encompassing governor's court, which merchants apparently distrusted.[28]

Courts martial were one of many jurisdictions in Tangier after 1668. As one would expect, the records include a large number of cases involving the punishment of desertion, mutiny, and insubordination. Given the problems commanders had in paying and sometimes even in feeding their troops in Tangier, it is unsurprising that they encountered soldiers who were trying to leave the city. However, martial law was useful not simply for commanders and governors-general but also for ordinary civilian inhabitants of garrison towns who shopped jurisdictions to their own advantage.[29]

In particular, Elizabeth Swinford, widow, mother, and shopkeeper, found martial law useful to combat hostile soldiers. Her use of martial jurisdiction began in October 1670, when she brought a petition to John Luke, the advocate general of the garrison, about the actions of the soldier John Matthews, who had come into Swinford's shop and loitered around the entrance.[30] As most shopkeepers would be, Swinford was annoyed by Matthew's behavior, and told him to stop pestering her customers. Outraged, Matthews called Swinford a bitch and a whore and swore that he would ransack both her shop and her home. He began throwing Swinford's goods on the ground. Then he went for her body: he began pulling at her hair and tried to choke her

[28] Routh, *Tangier*, 113-32.

[29] Childs, *The Army of Charles II*, 128-33; Routh, *Tangier*, 308-42. Neither of these sources investigates the relationship between courts martial and Tangier's other courts, nor how civilians used courts martial to their advantage.

[30] BL, Sloane Ms. 3514, f. 24.

before the distressed woman's customers came to her rescue. In her petition, Swinford stated that she "hath beene often times fformerly abused by soldiers wch on the request of their officers or friends willingly putt up with" in the hopes that such abuses would stop.[31] They had not stopped, and the widow Swinford decided to take action.

At the close of her petition, Swinford declared that due to the daily humiliations she had received from the soldiers, she was no longer "able to remaine in the garrison" unless the governor could provide her with justice.[32] This veiled threat was perhaps true, but it was also savvy. Tangier's leadership, particularly after 1667, was aware that many were fleeing the port due to its unruliness, and actively sought to de-militarize the colony by providing the city with its own charter and by creating a merchant court to preside over contract disputes.[33] Both John Luke and the governor, Lord Willoughby, were sensitive to the depredations of soldiers upon the civilian populace and were thus receptive to Swinford's plight. Luke had John Matthews arrested and imprisoned to await trial. Swinford was ready with two eye-witnesses. Later in the month, a court martial convicted Matthews, and sentenced him to be whipped publicly in the Parade.[34] Matthews' violence against Swinford had been in words and with his hands. The widow responded with the violence of the law.[35]

Widow Swinford's problems with soldiers did not end with Matthews. Early in November, Swinford once again came to see John Luke, this time over abusive actions by two

[31] Ibid.

[32] Ibid.

[33] Routh, *Tangier*, 113-32.

[34] BL, Sloane MS 3514, f. 54v.

[35] For law as a form of violence, see Robert Cover, "Violence and the Word" *Yale Law Journal* 95 (1985-86): 1601-29.

different soldiers. In the first case, Swinford charged that the soldier Laurence Ross, who had been renting several rooms from the widow, had failed to make rent. Swinford took Ross to the mayor's court, which granted a warrant to the constables of the court to collect. Upon hearing of this Ross went into a violent rage, swore at Swinford, and then attacked her.[36] If this assault was not enough, on three separate days in early November, a soldier by the name of Robert Moody, who perhaps was a friend of the humiliated Matthews, had come into her shop and had shouted expletives at the widow.[37] On the last day, Moody accused her of being a whore and threatened to rape her young daughter. Swinford told Moody that she would see him hanged in front of her door, and Moody responded that if she even tried to have him whipped like his friend Matthews, he would kill her. Swinford was not deterred by this threat and made her way to the Castle of Tangier to the office of John Luke.

With the help of eight depositions either she or Luke had taken from witnesses, Swinford convinced Luke to imprison both Moody and Ross. On 10 March 1671, a court martial heard both cases. The court sentenced Ross to "ride the horse" during the Parade for three consecutive days, with his hands tied and his mouth gagged. Afterwards, he was to be whipped ten times the first two days, and eleven on the final day.[38] Luke reported that in the case of Robert Moody, only three members of the court were "sensible of the greatness of the misdemenour."[39] Nevertheless, the court eventually decided that he should ride the horse on three consecutive days and on the last day he should apologize to the widow Swinford. When the court read the

[36] BL, Sloane Ms. 3514, f. 54.

[37] Ibid., f. 52.

[38] *Tangier at High Tide: The Journal of John Luke, 1670-1673* ed. Helen Andrews Kaufman (Geneva and Paris, Librairie E. Droz and Librairie Minard, 1958), 73-4.

[39] Ibid.

sentence, Moody protested and declared that he would never apologize to her. The court then ordered a second trial for Moody's insolent behavior where it was ordered that Moody was to be whipped and if he refused to apologize to Swinford on the appointed day he was to be whipped thirty-nine times per day until he apologized. Chances are Moody complied with the court's wishes and after his physical humiliation, made an apology. No diarist recorded these events, but it is almost certain that upon receiving his public submission, a broad and satisfied smile graced widow Swinford's face.

Not everyone who lived near soldiers won their legal battles against them, and tensions over the legal boundaries of jurisdictions certainly existed. However, these battles were usually not fought in the sexy world of crime but in the mundane world of debt. We shall recall that by the late sixteenth century, garrison governors in English dominions had adopted protections for their troops over non-capital offences – the so-called petitioning system.[40] Soldiers could not be prosecuted for minor or misdemeanor offences unless a civilian obtained the permission of the soldier's commanding officer through a petition. This practice was not uniformly followed. Indeed, the Tangier articles of war did not make any claim to exception for the soldiers stationed there, and we have already seen that Elizabeth Swinford took a soldier to the mayor's court over debts owed to her. But in other areas of the empire we can see this process at work. In March 1667, for example, Sir Thomas Modyford declared that the Jamaican militia on active duty could not be sued at law for debts, at least until threats from French privateers had subsided.[41]

The best evidence of this practice of the petitioning system comes from Ireland during the 1660s and 1670s, when civilians attempted to take soldiers to court for a variety of legal issues.

[40] For an example of this provision, see *Lawes and Ordinances of Warre* (London, 1643), v.i.

[41] TNA, CO 140/1, f. 167.

The process in Ireland can be clearly delineated. If a civilian wanted to take a soldier to court for a non-felony suit, he or she had to write a petition to the lord lieutenant of Ireland, which in the 1660s was the Duke of Ormond. For example, in January 1667, William Basil and his wife petitioned Ormond because they desired to "implead William Lord viscount Charlemount" for several "just causes."[42] But they could not do so because Charlemount was "a member of the Army." In a more common petition, John Clignett in February 1668 listed two members of the military indebted to him and asked "to grant ordr requireing theunto satisfied yd petition or els to Admitt yor peticoner to sue them at law."[43] The petitioning system in Ireland was supposed to grant protection from the prosecution of lawsuits and misdemeanors, at least until the head of the army was made aware of the potentiality of a lawsuit. If a civilian prosecuted without first obtaining leave, the lord lieutenant could call the violators before him, and possibly imprison them for contempt.[44]

Ormond, or the acting army commander, responded to these petitions in one of four ways. First and most commonly, the lord lieutenant ordered one or more of his underlings in the army to investigate the claim. For example, in August 1666, Ormond received a petition from Jane Aylen, a widow from Londonderry. Aylen claimed that Thomas Taylor, a private soldier, had owed her over 80 pounds while stationed in the city and had not paid her before he was relocated to the fortress at Carrickfergus.[45] Ormond ordered Colonel Humphrey Lydenham to examine the widow's claim and to "certifiy vs, what shall appeare vnto him, and thereupon Wee

[42] Bodl. Carte Ms. 154, f. 62.

[43] Ibid., f.152v; the petition was here presented to the Earl of Ossory, the Duke of Ormond's son and member of the Irish Privy Council, who was serving as lord deputy of Ireland while his father was in England.

[44] Bodl. Carte Ms. 163, f. 16v.

[45] Bodl. Carte Ms. 154, f. 58.

shall giue such further order as wee shall finde to bee fitt."[46] In other cases, Ormond, or his stand in, decided the matter immediately. In the case of John Clignett, for example, the acting lord deputy ordered that the two debtors should satisfy Clignett within two weeks, otherwise Clignett could "take his remedy against them generally by law notwithstanding their Military Capacity."[47] Less often, the acting governor of the army simply allowed the petitioner to find relief at law. In the petition against Viscount Charlemount, for example, Ormond allowed the petitioners to sue at law in spite of Charlemount's military capacity.[48]

In much rarer cases, the commander could force the issue to be heard at a court martial. In 1668 for example, Henry Hornsworth and his wife Mary accused Sir Arthur Chichester and John Chichester, both officers in the army, of "several violences and misdemenours."[49] The Earl of Ossory, the acting lord deputy, ordered the case to be heard before a court martial. The judge advocate general investigated diverse informations and deposed witnesses relating to the case. But we then find out that the complainants had already filed suit against the defendants in "several courts:" both ecclesiastical and common law.[50] The judge advocate, advising the court, concluded that the charges against the defendants were true but difficult to align with any particular article of war. Further, the petitioners wanted to have their suit tried at common law. Therefore, the court stopped prosecution of the defendants, after the complainants waived their privilege of being remedied at martial law, and allowed them to pursue their cases against the

[46] Ibid.

[47] Ibid., f. 152v.

[48] Ibid., f. 62.

[49] Bodl. Carte Ms. 163, fos. 67, 70-v. The quotation is on 70v.

[50] Ibid., f. 70v.

Chichesters' at common law.[51] The court martial ended up being just one more jurisdiction for these petitioners to shop.

Soldiers could certainly be annoying. Debts and drunkenness were common complaints against them. And sometimes the commanders of soldiers prevented prompt legal remedies from being secured. But living in a garrison town did not mean one lived under arbitrary military rule. Governors-general used martial law only to discipline soldiers. Martial law in these areas comprised one of many jurisdictions.

Governments with garrisons were few and far between in the English empire. However, English plantations were often militarized, just not by the Crown's armies. Most colonies instead utilized militias, or locally conscripted "armies." The Crown allowed its governors to raise forces, both land and sea, to defend their plantations. In its commission to Sir Thomas Modyford, the governor of Jamaica, the Crown allowed him to muster all military forces on the island.[52] The Crown allowed governors to punish at martial law, all those in "military employment," which suggested that colonial militias could fall under the jurisdiction.[53] Delegated authorities in different Crown dominions adopted martial law to punish their soldiers. They did so differently. Some, like the East India Company, always kept their troops under martial law, while other colonies only did so during times of war. Nevertheless, all delegated authorities maintained a strict distinction between soldiers and civilians.

[51] Ibid.

[52] TNA, CO 138/1, f. 25.

[53] Ibid.

During times of war, colonial governments adopted martial law to discipline their militia, at these moments dubbed soldiers. For example, Massachussetts' General Court adopted articles of war for its forces at the outset of King Philip's War in October 1675.[54] Like most articles of war, the Massachusetts code included the death penalty, to be determined by the General Court, acting as a court martial.[55] Likewise, the House of Burgesses in Virginia adopted 26 articles of war for the governance of its "army" in March 1676 during its campaigns against Native Americans.[56] The House stipulated that commanders could execute the articles with the exception of any offence involving life and limb. Those accused of capital offences were instead to be tried before a council of war that the House had appointed to coordinate the war effort. Massachusetts and Virginia still maintained the distinction between soldier and civilian advocated for by the Crown.

The East India Company also decided to use martial law on its soldiers, often referred to as militia. Upon taking over Bombay from the Crown in 1668, the Company issued articles of war to govern its militia stationed in the settlement.[57] Nevertheless, many believed that the Company did not have powers of martial law. The Company imprisoned one militia officer, Henry Gary, for telling his soldiers that they could not be punished at martial law.[58] The confusion stemmed from the fact that the Company did not have martial law powers in its charter

[54] Kyle Zelner, *A Rabble in Arms: Massachusetts Towns and Militiamen during King Philips' War* (New York and London: New York University Press, 2009), 40-43.

[55] Massachusetts General Court, *Severall Lawes and Ordinances of War past and made* (London, 1675).

[56] *Hening*'s *Statutes at Large: Being a Collection of all the laws of Virginia, from the first session of Legislature in the year 1619* , 13 vols. (Torrence, CA: Freddie L. Spradin, 2009), ii. 331-36; an example of a court martial can be found from 1673, during the Third Anglo-Dutch War. See "Miscellaneous Colonial Documents" *Virginia Historical Magazine* xx (1912): 28-9.

[57] BL, IOR H/49 fos. 71-91.

[58] BL, IOR g/3/1 f. 54.

to punish its soldiers by martial law until 1683. This confusion remained through the early 1680s, at least in parts of the East India Company's dominions.[59] By 1674, some company factors made full use of martial law. In August of that year, the governor and council of war in Bombay uncovered a plot made by a group of soldiers to overthrow the Company's government.[60] The following month, the governor and his council decided upon using martial law, and not the company's laws, because the soldiers had engaged in mutiny. Martial law would also provide "discoragment of such villanous persons and for the future security and quiet of the island it would be farr better to trye them by a court martiall."[61] After a long, drawn out procedure, where the council of war deposed many witnesses, and where the governor and council further debated whether or not they should actually execute the capital sentence required of a guilty verdict for mutiny, the governor decided to execute several soldiers. He argued once again that it was necessary for the future order and security of the island. Several were condemned to death, and forced to roll dice to see whose life would be spared.[62]

The Company's leadership in London approved of these severe measures, and encouraged the use of martial law on company militia throughout its domains. After 1685, the Company was sending "martial law books" to all of its governors in South Asia and in St. Helena.[63] These books were probably a pamphlet on military discipline created by James II for

[59] *A Collection of Charters and Statutes relating to the East India Company* (London: George Eyre and Andrew Strahan 1817), 121.

[60] BL, IOR g/3/1 f. 73.

[61] Ibid., f. 94.

[62] Ibid., fos. 94-106.

[63] BL, IOR E/3/90, fos. 205, 256, 284; BL, IOR E/3/91, fos. 2-4, 7, 23, 31, 33, 38, 58, 193-95.

his army in England, as well as printed articles of war.[64] The Company encouraged its factors to use martial law to maintain order and discipline and to terrify soldiers into obedience. It is unclear whether East India Company officials went through with the London council's plans, particularly beyond those caught for mutiny or insurrection. There are no surviving courts martial records that would allow us to discover how extensively capital punishment was employed in India. Given the uncertainty East India Company governors felt towards using the jurisdiction in such a severe manner, chances are they employed martial law conservatively towards their soldiers. What seems very clear is that prior to 1685, the Company's governors never utilized the jurisdiction on its civilian inhabitants. The governor of Surat, for example, declared that "it would reflect much on the company's honour to punish civilians by the articles of war."[65] In India, as in Virginia and Massachusetts, local officials strictly maintained the distinction between soldiers and civilians.

Punishing Civilians at Martial Law

Unlike early Virginia or Ireland in the sixteenth century, there is no evidence that governors experimented with using martial law as an exclusive punitive jurisdiction on civilians. Indeed governors used martial law to discipline civilians rarely, and when they did, they could justify their actions based on powers they had received in their commissions. The best examples of this circumscribed martial law comes from Restoration Ireland, Virginia in the aftermath of

[64] My guess for the book is the English army's *Abridgement of the English Military Discipline* (London, 1685). The guess is based upon the company's 1685 command to its factor on Pryaman (Sumatra) to train its troops "with the order and exercise of all sorts of arms compiled into one book and printed by his maties order…" BL, IOR E/3/91, fo. 4v. The articles of war could have been created by the East India Company, based on the ones used in Bombay in 1668 or could have been taken from the king's articles of war for his troops in Ireland. *Rules and Articles for the better government of His Majesties Army in this Kingdom* (Dublin, 1685).

[65] Quoted in Sir Charles Fawcett, *The English Factories in India: The Western Presidency, 1670-1677* (vol. 1) (Oxford: Clarendon Press, 1936), 35.

Bacon's Rebellion, and from St. Helena, an island controlled by the East India Company, in 1685 in the aftermath of a rising related to disputes over taxation and economic regulation.[66]

In Ireland, powers of summary martial law became even more circumscribed than they had been after John Davies and others sought to suppress them in the early seventeenth century. Nevertheless, they were not eliminated. The Cromwellian re-conquest of the island in the early 1650s had been brutal. And during that time, Parliamentary officers had declared certain geographic regions associated with armed resistance to be off limits on pain of death at martial law. Many Irish civilians were convicted of being in the wrong place, and condemned to die. With the restored monarchy, these types of experiments came to an end. However, lord lieutenants gave their military and local sheriffs powers of summary execution in certain cases that involved "tory" bandits: in all likelihood roving gangs of men and women who had been dispossessed by the Cromwellian land re-distribution settlements.[67] These para-military gangs were a consistent problem throughout the late seventeenth century. In order to stop them, lords lieutenants commissioned warrants to their soldiers to arrest the gangs and to bring them to justice. For example, in 1667, the Irish Privy Council sent out a warrant to their soldiers to track down "Neill oge o Neale" and several others for burglaries, murders, and a variety of other wrongs. The soldiers had powers to bring the bandits in to justice. If they resisted, they could be "cut off by the sword."[68]Usually, these soldiers only had powers to execute tory bandits if they

[66] In Jamaica, particularly in 1685, the governor and planters would have tried slaves at martial law for their roles in various rebellions. However, I have found no evidence of courts martial for captured rebel slaves in Restoration Jamaica, in no small measure because the slaves who revolted usually got away, forming maroon communities in the hills. For an account of the 1685 rebellion, see TNA, CO 138/5, 87ff. Orlando Patterson, "Slavery and Slave Revolts: A Socio-Historical Analysis of the First Maroon War Jamaica, 1655-1740" *Social and Economic Studies* 19:3 (Sept. 1970): 289-325.

[67] S.J. Connolly, *Religion, Law, and Power: The Making of Protestant Ireland, 1660-1760* (Oxford: Clarendon Press, 1992), 203-09.

[68] Bodl. Carte Ms. 163, fos. 23v-24.

resisted arrest.[69] These powers, as we shall recall, were similar to those given to London provost marshals in the 1590s when the Crown commanded them to quell riots going on in the city. The words martial law, which had been used in all the commissions and proclamations of the sixteenth century, were omitted. Summary martial law thus survived in Ireland when the Irish Privy Council decided it was necessary to use the military to track down bandits who could not be arrested by the ordinary officers of the law. And it only survived as a secondary option to arrest.

Capital conviction by a sitting court martial was even rarer than summary execution. The largest string of executions took place in the aftermath of Bacon's Rebellion in Virginia. The great rebellion began in the aftermath of Doeg and Susquehannock raids in the Potomac River valley, the northern frontier of the Virginia settlement. These attacks created a panic over the colony's security, and questions over the rights of Indians living within Virginia. Combined with a growing unease among poor householders over the taxation policies of William Berkeley, the wily septuagenarian governor, the frontier conflicts sparked an open rebellion in July 1676, when Berkeley declared Nathaniel Bacon, the leader of an anti-Indian frontier faction, a traitor and an outlaw after he had commandeered supplies from Gloucester County.[70] In the following months, Berkeley and his supporters were almost destroyed, and Bacon razed Jamestown to the ground.

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[69] Ibid., f. 3v.

[70] The traditional interpretation of Bacon's Rebellion, that it was over English liberties: see Thomas Jefferson Wertenbaker, *Torchbearer of the Revolution: The Story of Bacon's Rebellion and Its Leader* (Princeton: Princeton University Press, 1940); and Webb *1676: the End of American Independence*, 79-164. For a strong revision of this narrative, and an impassioned defense of Berkeley, see Wilcomb E. Washburn, *The Governor and the Rebel: A History of Bacon's Rebellion in Virginia* (Chapel Hill: University of North Carolina Press, 1957).Warren Billings in his biography of Berkeley generally follows the sympathies of Washburn, *Sir William Berkeley and the Forging of Colonial Virginia* (Baton Rouge: Louisiana State University Press, 2004). For a thoughtful examination of class during the rebellion see Peter Thompson, "The Thief, the Householder, and the Commons: Languages of Class in Seventeenth Century Virginia" *William and Mary Quarterly* LXI 1 (2004): 253-280.

The governor finally regained a military advantage in the fall, and with Bacon dying of the flux, the governor managed to quell the uprising by the end of December 1676.

Over the course of the rebellion, Berkeley used powers of martial law to try, convict, and execute fourteen of Bacon's followers.[71] The first five trials took place in Accomack in the autumn of 1676, when Berkeley had captured some of Bacon's officers charged with taking the then fleeing governor. The final eleven trials took place in January 1677. On 11 January, Berkeley convened a council of war on a ship in the York River, and tried four men for treason and rebellion. All four confessed, were found guilty, and were subsequently hanged. On 20 January, Berkeley charged William Drummond, one of Bacon's key supporters, with treason and convicted him before a council of war at Middle Plantation, where he was subsequently hanged. Finally, on 24 January, Berkeley brought another five men before a council of war at his home at Green Spring. They were all convicted of treason. Two escaped and the other three were hanged. Taken together, Berkeley used martial law on non-military personnel more than any other governor in the Restoration.[72]

Berkeley's use of martial law during the rebellion, while drawing the ire of some modern historians, was within bounds advised by the Crown.[73] First, his martial law strategy reflected the treason trials held by both Parliament and the Crown during the English Civil War, where either side sought only to punish notorious leaders of the opposition at martial law, rather than every participant. Indeed, his punishments were a far cry from the bloody aftermaths of the rebellions

[71] A list of those executed can be found in Peter Force, *Tracts and Other Papers relating principally to the origin, settlement, and progress of the colonies in North American: from the discovery of the country to the year 1776* 4 vols. (Gloucester, MA: Peter Smith, 1963), i. no. X.

[72] Records of the courts martial are extant from 11 January 1677 onwards in Hening, *Statutes* ii. 545-48.

[73] For criticisms of Berkeley, see Wertenbaker, *Torchbearer of the Revolution*, 200-01; and Webb, *1676*, 66.

undertaken in the Tudor century, where hosts of ordinary participants experienced the swift brutality of martial jurisdiction. Second, his legal strategy was well within the bounds of his commission. All of those executed at martial law had confessed to participating in an open insurrection, which along with mutiny and invasion was one of the three activities the Crown explicitly allowed its governors to punish by death at martial law. The king's three commissioners, who arrived in Virginia in early February 1677 to investigate the causes of the rebellion as well as its course, approved of Berkeley's acts.[74]

The commissioners arrived with an army of 1,000 men to subdue a rebellion that had already been subdued. But they had also been sent in November and December 1676 to investigate why Virginia had become so turbulent.[75] The king, after all, wanted his customs revenue to flow uninterrupted from the colony. The leader of the commission was the newly minted lieutenant governor, Herbert Jeffreys, the lead commissioner and commander of the English forces on their way to Virginia. While technically subordinate to the governor, the commissioners from February 1677 were in charge of the reconstruction of the colony.

Their subsequent interpretations of the governor's martial law jurisdiction reveal the limited ability of governors to use martial law. The commissioners in February declared Virginia to be in a state of peace, and while more men were to be tried for treason, they could no longer be tried at martial law. The commissioners told Berkeley that,

> Although wee rather commend what before hee might bee forced to doe in Furore Belli by a martiall power considering how the face of affaires then looked, that the lawes might

[74] Washburn, *The Governor and the Rebel*, 110.

[75] Two commissioners, Francis Moryson and Sir John Barry sailed in November. Herbert Jeffreys, the third commissioner, sailed in December. Wilcomb Washburn, *The Governor and the Rebel*, 92-113.

> returne to their owne proper Channell and that all future proceedings of his might bee by a Jury.[76]

Subsequently in March, the commissioners tried and executed another nine men for treason before a jury.[77]

Here we see the doubly binding constraints on martial law at work. Berkeley only tried those suspected of rebellion at martial law *during* the period of the rebellion. When that time was over, common law courts resumed their business, and tried others suspected of treason. Of course, without the intervention of the commissioners, it is unknown whether Berkeley would have followed these precepts. Nevertheless, the commissioners' removal of cases to common law courts reveals how little the Crown wanted its governors to use martial law.

The only other major case of delegated authorities employing martial law on civilians came in 1685, in the East-India Company controlled island of St. Helena. The Company, since acquiring the island in 1658 as a way station for its ships, had encouraged plantation in an attempt to emulate English Atlantic holdings. This policy led to the foundation of the capital, Jamestown, and the growth of the population to nearly one thousand soldiers and planters, the largest population in any of the East India Company's holdings.[78] However, once in St. Helena, the planters became unruly, particularly over the Company's taxation policies. Between 1679 and 1684, groups of dissatisfied soldiers and planters had staged four riots in protest, culminating

[76] Quoted in Washburn, *The Governor and the Rebel*, 110. An extract of this letter can also be found in *CSPC* 1677-80, no. 55. I have quoted Washburn because he examined the original. The extract has omitted reference to a jury trial.

[77] These trials, which had both grand and petty juries can be found in Hening, *Statutes*, ii. 548-58. Washburn, *The Governor and the Rebel*, 119.

[78] Stephen A. Royle, *Company's Island: St. Helena, Company Colonies and the Colonial Endeavor* (London: I.B. Tauris, 2007), 44-126; Philip Stern, "Politics and Ideology in the Early East India Company-State: The Case of St. Helena, 1673-1696" *Journal of Imperial and Commonwealth History* 35.1 (Mar. 2007): 1-23.

in the fall and winter of 1684, when they conspired to overtake Jamestown and remove the governor.

The Company had already been encouraging more severe measures against mutineers, and had obtained from the Crown in 1683 martial law powers to maintain order within their various dominions. The Crown reissued the Company's charter that year, which included a clause that allowed its members to

> Execute and use, within the said Plantations, Forts and Places, the Law, called the Martial Law, for the Defense of the said Forts, Places and Plantations, against any foreign Invasion, or domestic Insurrection or Rebellion…[79]

The Company was granted powers similar to those other governors possessed. Yet the governor of St. Helena, John Blackmore, initially hesitated using these powers on the mutineers in St. Helena, even those that were soldiers. Instead, in December 1684, Blackmore tried four Company soldiers, the supposed ringleaders of the conspiracy, for mutiny at a jury trial.[80]

The jury was composed of military officers, but there is no procedural evidence that the tribunal was a court martial.[81] At best, Blackmore's attempt to put military men on the jury, half of the men from a recently arrived ship, suggests that he wanted to pack the jury. Why not try the four soldiers by a court martial? The answer is probably that the governor was confused over his legal powers. In 1682, the Company had sent a missive telling the governor that in any case

[79] *Charters Granted to the East India Company, from 1601; also Treaties and Grants, made with, or obtained from, the Princes and Powers in India,* (London, 1773), 121.

[80] BL, IOR G/32/2, f. 588.

[81] For a description of the trial see IOR g/32/2 f. 588, which not only mentions the word "jury" but also "foreman" two words never used at a court martial. I thus hesitantly disagree (he has looked at records in St. Helena that I have not examined) with the assessment of the trial made by Royle, *The Company's Island,* 114-19. Further, the mother of one of those condemned, Martha Bowyer petitioned Parliament on 16 May 1689, and did not refer to the proceedings against her son as a court martial, a claim which would have been very helpful to her case. *CJ* x. 135.

involving life or limb, he had to use a jury.[82] Blackmore seemed hesitant to execute them even after the jury had convicted the men, and waited almost a month to sign the warrant for execution. He was working in a world of legal uncertainty.[83]

When the Company leaders in London learned of the attempted mutiny on St. Helena, it sought a legal remedy that would terrorize the island inhabitants into obedience. However, the Company was uncomfortable with using martial law on civilians, so it petitioned the king for a special commission. It obtained it under the great seal from the new king, James II, to try mutineers by martial law on St. Helena.[84] James granted the Company the commission because he had "byn credibly informed yt there has byn formerly a Treasonable Rebellion and insurrection made in our Island of St. Helena."[85] James did not grant the Company powers to execute anyone it deemed guilty of treason. Instead, he specified that only those proven guilty by "due proof" could be executed. He also excepted all the planters other than the supposed ringleaders from martial law jurisdiction. The Crown had been informed of the ringleaders through the information of Captain Holden, who had set sail for England shortly after the riots had taken place on the island. The Company did not have free rein to use martial law.[86]

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[82] BL, IOR G/32/1, f. 27.

[83] Royle, *The Company's Island*, 118-9.

[84] The commission is strange not least because there is no record of it in the Crown Office Chancery records at the National Archives (C66), and there was no trace of it there in 1689 either, when the Commons investigated the commission on 25 May, see *CJ*, x. 151. The Commons obtained a copy of the commission from the "Privy Council Books" although I have not found the commission in TNA, PC 2/71. See *CJ*, x. 152.

[85] The commission has been printed in *Extracts from the St. Helena Records* ed. Hudson Ralph Janisch (St. Helena, 1908), 30.

[86] Ibid.

Why did they feel the need to get this special commission when they already had martial law powers? First, the Company probably wanted to protect itself politically by obtaining a commission from James II. Second, the Company was probably tired of its hesitant governor, and wanted to take action outside of his authority. More importantly, as we have seen, the Company's charter related to the idea of time: it could use martial law *during* an insurrection, mutiny, or invasion. But as the commission noted, the mutiny had taken place in the *past*. The Company in London, given that it had been pushing for more severe punishments for dissidents, needed this commission to try the mutineers at martial law. The fact that the Company had to seek out a special commission reveals just how limited its martial powers were in its charter.

In November 1685 Captain Holden and several others returned with the commission, and tried and convicted fourteen St. Helena planters. The commissioners hanged five men immediately. These men had all been named by James in the commission as those the Company could potentially execute at martial law.[87] One planter named George Shelton, who according to the aggrieved petitioners was stifled to death in prison, had not been named. Potentially, Shelton had been murdered. The other eight still remained jailed on the island in 1689, in no small measure because the Company could not execute them according to the commission. The use of martial law by the Company, while traumatic for the planters, was delimited to specific individuals. The Company did not place the whole island under martial law. Its use of the jurisdiction, in comparison to the experiments of the sixteenth century, was conservative.

In Virginia in 1676/77, the conditions on the ground met those prescribed by the commissioned powers the Crown sent out to some of its delegates. In 1685, the East India

[87] Royle, *The Company's Island*, 118-19. The relatives of the deceased also gave an account of the tribunals. *The Most Deplorable Case of the Poor Distressed Planters in the Island of St. Helena under the cruel oppressions of the East India Company* (London, 1690).

Company actively sought out a special commission to ensure the legality of its proceedings. Governor Berkeley and the East India Company chose to use martial law to quell unrest for the very same reasons that embattled monarchs and governors had used the jurisdiction dating back to the late fifteenth century. Both intended to inspire terror and thus restore order through the swiftness and severity of the jurisdiction. The Company initially encouraged its other governors to punish mutineers by martial law in imitation of their success in restoring order on St. Helena. The East India Company openly admitted to using martial law to avoid jury nullification.[88] They had, as we have seen, been packing juries in 1684 in order to obtain convictions. It is probable that Berkeley had similar fears. These reasons should not be surprising to us by now. What is surprising is the new concern over ensuring the legality of the enterprise, a marked contrast to the use of martial law at the turn of the seventeenth century.

Using The Petition of Right

The use of martial law in English overseas dominions was circumscribed. These plantations during the Restoration were quarantined from the innovations in martial law of the sixteenth century. And yet, the same problem that had been plaguing English jurists since the middle ages – what in fact constituted a state of war –resurfaced in debates over the use of martial law abroad. Unsurprisingly, petitioners of executed family members used the classic discourse of restraining martial jurisdictions – that martial law could not be used unless the courts were closed – to challenge both Governor Berkeley's and the East India Company's use of

[88] BL, IOR E/3/91 fo. 102; William Atwood, *An Apology for the East-India Company with an account of some large prerogatives of the Crown of England* (London, 1690), 26.

martial law. These debates took place in England and not abroad, where the attitude of lawyers and Parliamentarians towards martial law was negative.[89]

In the fall of 1677, Berkeley having died in the summer, family members from two of those executed by the late governor sent petitions to the Board of Trade and Plantations challenging the legality of Berkeley's use of martial law. The first petition came from Sarah Drummond, the widow of William Drummond, who had been executed at Middle Plantation that January, and had been posthumously attainted by the House of Burgesses.[90] She claimed that Berkeley had illegally executed her husband and confiscated his property to the detriment of Sarah and her children. The language of the petition shows that Sarah, or her legal aid, knew well the parameters of martial law. It also shows that either Sarah or her lawyer was familiar with English debates over what constituted a state of war:

> That your Petitioners said husband was, after late rebellion there, taken, stript, and brought before sir W. Berkley then Governor there, who immediately (tho' in time of peace) was, without laying anything to his charge, sentenced to die by Martial law (although he never bore arms or any military Office)…[91]

The attorney framed the charge against Berkeley with an understanding that in the empire those who possessed military office were subject to martial law. But he also framed the charge against Berkeley according to an English common law discourse that declared it illegal to use martial law in times of peace. Why did Drummond frame the argument in this way? Possibly – the specific arguments are not extant – she wanted to argue that because her late husband had been

[89] See chapter nine.

[90] Hening, *Statutes*, ii. 370, 375, 377. Washburn, "The Humble Petition of Sarah Drummond," 354-75. The petition is in TNA, CO 5/1355, fos. 186-88.

[91] The petition has been reprinted in Washburn "The Humble Petition of Sarah Drummond," 355-56.

executed in the middle of January, after the most tumultuous period of the insurrection, he should have been tried by a jury. Given that Berkeley was dead; her goal was not to get him in trouble. Rather the petition was meant to inflame the passions of members of the board in an attempt to get them to reverse Berkeley's decision to escheat Drummond's property through an act of attainder after he had been executed at martial law.[92]

Given the response of the Board, the tactic worked. The Lords of Trade and Plantation called the proceedings "deplorable" and correctly stated that "ye estate of those that dye by martial law does not escheat but descend to their heirs."[93] However, Berkeley had not escheated property at martial law but had done so through an act of attainder, a maneuver that had been common in medieval English law. Nevertheless, the Lords condemned the act of attainder, which they wanted repealed, stating that it was meant to "iustify and indemnify" the dead governor.[94] The killing of Drummond was "contrary to and against the Known Laws of his Matie."[95] The idea of using martial law in a time of peace planted by Sarah Drummond had created a controversy over Berkeley's usage of martial law. When Drummond's case arrived in Virginia in 1678, it caused an outcry in the General Court, probably because those who sat on the tribunal knew the tendentiousness of her claims. Nevertheless, she recovered all of her dead husband's estate.[96]

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[92] It is unclear if Drummond was deprived of all her husband's property which was extensive or simply a leased plantation in James City that belonged to the Commonwealth and could be revoked, see Ibid., 370-2.

[93] TNA, CO 391/2, f. 129.

[94] TNA, CO 391/2, fos. 129-30.

[95] "Virginia in 1677" *Virginia Magazine of History and Biography*, xxii (1914), 236; *Acts of the Privy Council, Colonial Series* 6 vols. (London, 1908), i. no. 1167.

[96] Wilcomb Washburn, "The Petition of Sarah Drummond," 371-2.

The outcry by the Lords of Trade and Plantation towards Drummond's petition was not replicated, nor did it provide any precedent for ending martial law. The Lords of Trade and Plantations' suspicions were aroused only a month after Drummond's petition when the descendants of a much better known traitor, William Carver, delivered a similar petition to the Board.[97] This time, eyewitnesses from Virginia were on hand to confirm that Carver had attacked Berkeley on Accomack and was deeply involved with the rebellion.[98] Further, the Crown continued to delegate martial law jurisdiction to its governors of Virginia. Henry Jeffries, in 1676, received powers to execute martial law "during times of war…where the ordinary Course of Justice cannot be well and safely attended and applied to."[99] In 1682, the new governor, Thomas Lord Culpepper, received similar powers. Nevertheless the petitioning powers of Virginia civilians would have made these men think twice about using martial law jurisdiction, especially in ways that could be seen as being beyond their commissioned powers.[100]

The petition of Drummond caused Virginia officials a headache. The petitions of the family members of those executed at martial law in St. Helena gave the East India Company a migraine. Initially, the Company had been quite pleased with what had happened on St. Helena, and encouraged its deputies in its other territories to perform martial law on mutineers in similar

[97] TNA, CO 391/2, f. 146; Washburn "The Petition of Sarah Drummond", 359; the petition has also been abstracted in "Virginia in 1677 (continued) *Virginia Magazine*, xxiii (1915), 24-5.

[98] "Virginia in 1677 (continued)" xxiii *Virginia Historical Magazine*, 25.

[99] "Virginia Colonial Records. Culpepper's Administration (Continued)." *The Virginia Magazine of History and Biography* xiv (1907): 357.

[100] "Virginia in 1682 (continued)" *The Virginia Magazine of History and Biography* xxvi (1918): 262.

fashion.[101] But in the spring after the Glorious Revolution, the Company began to rue its use of martial law on St. Helena.

The deposition of James II, a stockholder and supporter of the East India Company, in 1688 by William of Orange, created an opportunity for those who despised the Company to attack it. During 1689 and continuing throughout the 1690s, many who supported either free trade or an alternative company to operate in the East Indies attacked the privileges of the East India Company. They found a receptive ear among many in Parliament who were also concerned about the Company's political autonomy in Asia.[102] The Company survived, although another "new East India Company" was created in 1698.[103] But during this period, those who had grievances against the Company had a good opportunity to see them redressed by Parliament.

The relatives of those executed at martial law in 1685 made good use of this window. Indeed, it is likely that they had decided to come to England prior to any knowledge of the Glorious Revolution, and had stumbled upon the best possible political climate for their cause. On 16 May 1689 Martha Bolton and Dorothy Bowyer, relatives of men executed on St. Helena in 1685, delivered a petition to Parliament. They argued that the East India Company had murdered their relatives, one at a "pretended court martial," the other at the jury trial in December 1684, and had then illegally seized their property.[104] Bolton prayed "that those concerned in the taking away her said Husband's Life, may be brought to condign Punishment;

[101] See for example BL, IOR E/3/91, fos. 102-03.

[102] Philip Stern, *The Company State: Corporate Sovereignty and the Early Modern Foundation of the British Empire in India* (Oxford: Oxford University Press, 2011), 142-64.

[103] The Old and the New East Companies merged in 1708.

[104] *CJ*, x. 135.

and to receive Redress for herself and Children."[105] The Commons took the two petitions very seriously, and notified the East India Company that it would be investigating the matter further.

In the resulting investigation, Parliament condemned the acts of the governor and lieutenant governor, John Blackmore and William Holden, and sought a further investigation into those who instructed them to use martial law. Beginning on 25 May, the Commons investigated the powers of martial law granted through the Company's charter as well as its commission from James to use martial law. The Company, fearing self-incrimination, refused to allow the Commons to see the instructions it gave to its deputies in 1685, which had been attached to the commission. The Commons did examine both a narrative of the supposed uprising as well as a journal of the court martial proceedings. It also called in witnesses and interrogated both Blackmore and Holden. The proceedings lasted several days, with the Commons investigating the matter on 25 and 29 May, as well as 7 and 8 June. Finally, Parliament decided to exempt all East India Company men from pardon who had either sought out the martial law commission or who had taken part in writing instructions for how it should be executed.[106]

The controversy had not ended. On 6 November of that year, the daughters of the late John Colson, one of the men executed at martial law, delivered a petition to the House of Commons. They, or the lawyer that prepared the petition for them, called upon specific legal language taken from Sir Edward Coke's writings to make their case. The daughters opened the petition by stating that they,

> Humbly presented to the Charitable Consideration of the Honourable, the knights and citizens and burgesses in Parliament assembled By Elizabeth, Martha, Grace, and Sarah,

[105] Ibid.

[106] Ibid., 151, 155, 167-68.

> the mournful daughters of John Colson, who was one of those that were Murthered by a Pretended COURT-MARSHAL at that place.[107]

The last line of the opening harkened to Coke's *Institutes*, where the oracle of the common law had argued that any execution by a court martial while the Courts of Westminster were open was murder.[108] The Commons agreed. They declared that "John Colson and the rest of the Persons who were executed…were put to Death contrary to law, and murdered."[109] The Commons made a request to the Crown that Blackmore and Holden be sent over in custody to answer the charge of murder. They also formed a committee of inquiry to examine who obtained the commission in the first place and who wrote the instructions for its execution.[110]

Parliament's decision made the Company and its lawyers incredulous. William Atwood, a reasonably famous lawyer known for his imperial apologetics, had initially been employed by the Company to argue its case in front of the committee. Later, he produced an apology for its actions.[111] Atwood claimed that the Petition of Right did not apply to St. Helena because the Petition of Right was only concerned with England, and therefore did not ban martial law in cases of treason committed overseas. But more importantly, he crafted his argument around the Crown's ability to grant powers of martial law in its commissions to delegated authorities. After

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[107] *The Most Deplorable Case of the Poor Distressed Planters in the Island of St. Helena under the cruel oppressions of the East India Company*, 1.

[108] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: W. Clarke & Sons, 1809), 52-5[3].

[109] *CJ*, x. 280.

[110] Ibid.

[111] For Atwood see Charles Ludington, "From Ancient Constitution to British Empire: William Atwood and the Imperial Crown of England" in *Political Thought in Seventeenth Century Ireland* ed. by Jane Ohlmeyer (Cambridge: Cambridge University Press, 2000), 244-71; Atwood, *An Apology*.

all, the Company had sought and received a commission from James II to execute martial law.[112] An attack on the East India's Company's use of martial law was thus an attack on the Crown's prerogative. Atwood's protests, however, fell on deaf ears from those sitting in Parliament. The East India Company's use of martial law to them was a perfect example of an abuse of power that Parliament could strategically use to further its supervision over the Company's dominions. The committee to examine the East India Company's actions issued its report in November 1690. They declared that those who had sought the commission from James II had had indeed committed "murther."[113]

The Crown and its council probably thought differently. While Atwood's arguments were unconvincing to those sitting in Parliament, perhaps they were more convincing to William III and his ministers. We do not know exactly what the Crown thought of Holden or Blackmore's actions, but the Crown did not indict either man.[114] Other Company officials were not tried for murder. The Crown did not re-issue any special commissions authorizing martial law for specific crimes. But it also did not change the martial law powers it had always assigned. In its new charters to the East India Company in 1693, the East India Company received all the powers it had possessed previously. Further, the Company declared to its residents on St. Helena in 1711 that it still could use martial law if it they deemed it necessary. [115]

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[112] Atwood. *An Apology,* 25.

[113] BL Add. Ms. 22185, f. 29.

[114] Royle, *The Company's Island,* 119. Blackmore died from a fall in London. It is unclear what Holden did with his life after 1690.

[115] *Charters of the East India Company,* 143; Philip Gosse, *St Helena, 1501-1938* (London: Cassell and Co., 1938). See the appendix for the 1711 determination.

Nevertheless, the Company had learned a painful lesson from its experience with Parliament. In 1691, another mutiny broke out in St. Helena. Company officials refrained from using martial law, and instead opted for jury courts.[116] In choosing this more conservative option, the governor on St. Helena adopted a typical stance of most governors in the empire during the Restoration: martial law was too dangerous and too controversial to use. Their planters did not like the jurisdiction. Moreover, they could come back to England and appeal the governor's decision in an environment that was extremely hostile to martial law.

Conclusion

Pressure on governors to refrain from using martial law came from both the people they governed and from the Crown and its council in England. Governors apprehended the consequences of using martial law from the beginning of the Restoration. By 1689, experience had proven that giving martial law jurisdiction to punish civilians was dangerous. The double bind in turn created a paradigm for how governors employed martial law in imperial dominions.

Let us draw four conclusions. First, when governors employed martial law it was usually to discipline soldiers and seamen. These powers were uncontroversial. Governments from the Massachusetts General Court to the East India Company adopted these measures. They used the swift and exemplary qualities of martial law to maintain discipline among often unruly and underpaid soldiers. The most common duties that were broken, and thus punished at martial law, were desertion, mutiny, and insubordination. Civilians could also use these tribunals.

Second, delegated authorities used martial law rarely on civilians. Martial law was wildly unpopular. Further, while the Petition of Right was not law in the colonies, it nevertheless

[116] Royle, *The Company's Island*, 122-25.

provided a discursive tradition that colonists could use to combat any innovative usage of martial law. The Crown's willingness to hear petitions from aggrieved colonists both at the Board of Trade and Plantations and later at Parliament provided a forum for redress, which colonists used to their advantage.

Third, almost everyone conceived of martial law only as a punitive legal tool. The makers of the Petition of Right conceived of it as such. It was dangerous because it could take away life and limb, or because it provided exemptions from common law prosecution. In general, governors in the colonies thought about martial law in this way. It was useful because they could ordain terrifying and swift punishment through it, and because they could avoid juries.

Fourth, the restraint on martial law was the operability of the ordinary course of justice. Parliament in 1689 interpreted this rule to mean that martial law could not be used unless the courts were closed. In general, it seems as though all Crown authorities conceived of this constraint as the physical inability of court officers to conduct their duties. No delegated authority that we have so far believed that they possessed discretion over when the courts should be closed. The circumscription of martial law required that governors make these assumptions. As long as martial law was only a punitive tool for civilians that could be used during the physical inoperability of ordinary courts, it would remain a complementary form of law utilized generally only on soldiers. Most in the seventeenth century conceived of martial law in this way. As we shall see, the governors of Jamaica did not.

Chapter 9:
Closing the Courts Down:
Martial Law and Property in Jamaica

In 1667, Sir Thomas Modyford needed to save Jamaica from destruction. The Spanish settlements nearby were threatening the plantation he had been governing since 1664. Further, French privateers based in Tortuga had often attacked Jamaican ships. To make matters worse, the Dutch also occupied islands nearby, and had just threatened the island during a war with England in 1665. Modyford had been warring with his neighbors as the leader of a fearsome privateering faction, which had gained treasure from a host of nearby targets.[1] But Jamaica's strategic location also posed problems: the Spanish and French could retaliate with relative ease against their tormentors. He would have known well the lesson of Providence Island, the English Caribbean plantation that had been destroyed by the Spanish in 1641, in part due to its weak defenses.[2] Like that failed enterprise, Jamaica had weak fortifications. And like Providence Island, Modyford had little hope of aid from other English plantations or from the English navy. He also had little capital: Jamaica, like every other English colony, received little financial aid from the Crown, and Modyford could not count on tax revenue due to his hostile relationship with the Jamaican Assembly. How was Modyford to improve his defenses? He needed to build a jurisdiction that would give him the powers he needed to build fortifications.

In order for the jurisdiction to give him the powers he needed, it had to allow him to commandeer labor and property – in the form of slaves – from Jamaican planters so he could build his forts. In order to do so, he closed the civilian courts down. In this re-imagining of both

[1] Nuala Zahedieh, "Modyford, Sir Thomas, first baronet" in *ODNB.*

[2] Karen Kupperman, *Providence Island, 1630-1641: the Other Puritan Colony* (Cambridge: Cambridge University Press, 1993).

the temporal restraints that bound martial law and of the possibilities of martial law jurisdiction, Jamaican governors were the first to adapt martial law to their own needs. In doing so, martial law was transformed from a jurisdiction that tried by life and limb as a procedural complement to common law into an all-encompassing jurisdiction that governed all matters of law. By the end of the eighteenth century, Jamaican martial law would be replicated throughout the Caribbean by governors seeking militia labor to quell slave risings.[3]

Jamaica in Context

Jamaica was a booby prize. The English invasion force that entered the Caribbean in 1655 was under orders from Lord Protector Cromwell to capture Hispaniola as a first step in a planned conquest of all Spanish New World possessions, dubbed the "western design."[4] After failing miserably in their attempts to capture Hispaniola, the expedition, led by General Robert Venables, fell upon the island of Jamaica – a large but sparsely inhabited Spanish possession in the south Caribbean. The expedition seized the capital quickly, and sent word to Cromwell of

[3] Those who have written on Jamaica in the seventeenth century have noted in passing how often Jamaican governors used martial law but not have examined why martial law was used or to what purpose. See for example, Agnes Whitson, *The Constitutional Development of Jamaica, 1660 to1729* (Manchester: Manchester University Press, 1929), 36. Stephen Saunders Webb, *The Governors-General: the English Army and the Definition of the Empire, 1561-1681* (Chapel Hill: University of North Carolina Press, 1979), 151-313. In his mammoth and controversial work, Webb often notes when Jamaican governors declared martial law and used it as evidence for his thesis that the English empire was martial in nature. However, Webb never investigated what declaring martial law signified, or to what purpose it was used. Because he was attempting to show that the Jamaican polity was normative for the empire as a whole, Webb also completely missed the innovative ways in which Jamaican governors used martial law. David Buisseret and Michael Powson have done a good job describing the building of forts in and around Port Royal, Jamaica, but have not investigated the legal powers governors utilized to build them. *Port Royal, Jamaica* (Oxford: Clarendon Press, 1985), 37-42.

[4] The classic account of the invasion of Jamaica is S.A.G. Taylor, *The Western Design: An Account of Cromwell's Expedition to the Caribbean* (Kingston: Jamaica Historical Society, 1965). Also see Timothy Venning, *Cromwellian Foreign Policy* (New York: St. Martin's Press, 1995), 71-90 ; Webb, *Governors General*, 158-67.

their "victory." The Lord Protector was inconsolable. The mighty "Western Design" was a catastrophe.

In order to salvage something from the wreckage, the high command on Jamaica attempted to build a plantation in and around Cagway, the southern port that would be renamed Port Royal in 1660. Plans were afoot to persuade mercantile interest in the new colony, and to attract settlers from England and Scotland as well as other English Caribbean settlements. The remaining soldiers who had survived the campaign and the "starving time" on the island were encouraged to become planters. Most in the end became privateers, and continued to attack Spanish settlements in the Caribbean. The nature of the government of Jamaica remained martial. The Council of War headed by the governor ruled the island. Courts martial disciplined the soldiers. The Governor's court also adjudicated mercantile cases, which involved Jamaica's growing contraband trade. Many by 1660 feared that the governor was going to rule solely by martial law. In commenting upon Jamaica in 1657, Cromwell's colonial committee noted that the plantation, "looks only like a great garrison, and rather an Army than a Colony."[5] The Restored monarch, Charles II, and his council in 1661 agreed with this assessment, and sought to transform Jamaica into a civil polity.

In 1661, the Crown sent the current governor, Sir Edward D'Oyley, a commission that ordered him to create civilian courts. By the time of his successor, Lord Windsor, Jamaican planters demanded to live under all the laws of England.[6] Under this new government, Jamaican governors only had those martial law powers the Crown had given to its other governors.

[5] Quoted in Webb, *Governors-General*, 200.

[6] Lord Windsor had proclaimed that the laws of England were in force on the island, a proclamation the Crown and Lords of Trade later regretted. Whitson, *The Constitutional Development of Jamaica,* 18.

Through these powers he and his successors used martial law to discipline soldiers, sailors, and even their own militia. In November 1664, the Jamaican assembly passed its first militia act.[7] The act stipulated that due to the island being in the "midst of a Subtile rich & potent Enemy" it needed to have a well-trained militia.[8] When the men were "up in arms" all of the articles of war could be applied to them including those that prescribed capital punishment. When they were not in arms, commanders could only imprison or fine their soldiers according to the laws of war.[9] The act was re-passed by the Assembly in 1671 after some debate over whether the Act of 1664 was still in operation. By the 1680s, another act was passed, which granted similar powers of martial law to militia commanders. The use of martial law was common enough that by 1667 the island had a permanent judge advocate general.[10] Jamaican governors used martial law to discipline their soldiers on several occasions in their fights against maroon communities and during slave rebellions. In 1665, 1676, and in 1685, articles of war were issued for the island's militia. In 1676, the governor Lord Vaughn ordered that the colonels of each regiment "publish the Articles of war."[11] Each regiment had a court martial that would supervise punishment for breaches of these articles, and even planters not participating in the militia could be fined by the court for not providing enough men.[12] Even in this militaristic island, governors were wary about executing men at martial law.

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[7] TNA, CO 139/1, fos. 49-51.

[8] Ibid., 49.

[9] Ibid., 50.

[10] Ibid., fos. 56-60; Sir Thomas Lynch, *The Laws of Jamaica passed by the Assembly and confirmed by his Majesty in Council* (London, 1684), 66-70 for the significance of this act see part two of this chapter; for the advocate see TNA, CO 140/1, 155.

[11] *CSPC*,1675-76, no. 820.

[12] This was ordered by Hender Molesworth, the governor in 1685, TNA CO 140/4, fo. 90v.

Jamaican governors also used martial law to discipline sailors in their "navy." By the time of Sir Thomas Modyford, who became governor in 1664, governors also became vice-admirals with powers to set up an admiralty jurisdiction on the island.[13] Later Jamaican governors were explicitly given martial law powers over their sailors.[14] During times when they wanted to raid the Spanish, governors created a navy, effectively privateers, and nominated an admiral to lead it. In 1670, for example, Modyford nominated the infamous buccaneer Sir Henry Morgan to lead the Jamaican "navy" in its raid on Panama. Morgan obtained powers to "execute martial law, according to the Articles of Warre already made, or which hereafter shall be made by his Excy the same having been first published to them."[15] The jurisdiction was just as useful for disciplining pirates as it was for disciplining soldiers or sailors.

Building Forts and Closing Courts: Jamaican Martial Law

These powers of martial law were similar to those of governors across English dominions. Where Jamaica diverged from those other places was the ways in which its governors used martial law to force the men of the island to build forts or participate in the militia through a proclamation of martial law. Let us first examine how the Crown in England and governors in the rest of English dominions managed to build forts and craft other emergency measures before we examine Jamaican adaptations to martial law.

In England, some accepted the idea that the monarch through his or her prerogative could command building or commandeer labor and material for building forts during emergencies.

[13] TNA, CO 138/1, 25.

[14] See for example the commission to the Earl of Albemarle in 1686, TNA CO 138/5, 235.

[15] TNA, CO 138/1, 48.

According to this theory, in times of crisis, the monarch came to the rescue. Monarchs protected their people through the semi-divine powers they had inherited from God as His vice-gerent on earth. These powers were folded into the idea of *imperium.* Imperium meant the power to command. It also meant absolute sovereignty. Only the person of the king or queen possessed this undivided authority.[16]

This salvatory power was most manifest in the concept of the Crown's absolute prerogative, the almost mystical powers English monarchs used to protect their people. In ordinary times, the Crown executed the laws of the realm, dubbed its "ordinary" prerogative. However, in times of emergency or distress, the Crown could commandeer provisions, ships, and labor for the safety and well-being of the commonwealth, regardless of whether or not these actions violated ordinary customs or law. These acts were dubbed the Crown's "absolute" prerogative. For the good of its people, the Crown intervened in the normal course of law and demanded extraordinary exactions.[17] The absolute prerogative was associated with but not synonymous to, the "marks" of sovereignty, made famous by the French theorist Jean Bodin in the sixteenth century. These rights included declaring war and peace, making and repealing laws, hearing appeals, and granting mercy to those convicted at law.[18] The Crown utilized this power to settle its overseas dominions and to declare possession of these settlements to other European

[16] For imperium and sovereignty, see Ken MacMillan, *Sovereignty and Possession in the English New World* (Cambridge: Cambridge University Press, 2006), 6-7. Jean Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* ed. and trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992). These concepts were beginning to be challenged in England. See Johann Sommerville, *Royalists and Patriots: Politics and Ideology in England, 1603-1640* (Harlow: Pearson Limited, 1999), 92-6.

[17] For the absolute prerogative, see Christopher Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008), 201-08; MacMillan, *Sovereignty and Possession*, 17-48; Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Belknap Press, 2010), 68-9.

[18] Bodin, *On Sovereignty*, 58ff.

princes.[19] England's legal community generally left the definitions of this absolute power mysterious, and common lawyers rarely debated them in detail. Lord Ellesmere, the lord chancellor of England under James I and one of the most prominent lawyers of the early seventeenth century declared that the absolute prerogative was "according to the king's pleasure (and is) revealed by his laws…which are laws only the king, by virtue of his superior and divine position, comprehends."[20] As Paul Halliday has noted, the absolute prerogative was often compared to a miracle: "as God performed miracles within and upon the natural world, so too did kings wield the prerogative within and upon a world that normally revolved according to law."[21]

This idea was controversial when the Crown used it to justify extra-parliamentary taxation. Governors in English dominions thus did not assume these miraculous powers lightly. Instead they usually worked with their assemblies to produce statutes that mandated material, labor, and other services from colonists for the protection of the colony during times of war and distress. The House of Burgesses in Virginia, for example, passed a statute in February 1644 that created a council of war for the purpose of administering the colony's military efforts against Native Americans.[22] It ordered that the three counties charged with fighting, Isle of Wight county and Upper and Lower Norfolk counties, form a council of war. This juridical body had powers to "leavie such and soe manie men, arms, ammunition and other necessaries as emergencie of

[19] MacMillan, *Sovereignty and Possession.*

[20] Quoted in MacMillan, *Sovereignty and Possession*, 30.

[21] Halliday, *Habeas Corpus*, 68.

[22] Wiliam Waller Henning, *The Statutes at Large; being a collection of all the laws of Virginia, from the first session of the Legislature in the year 1619* 13 vols. (new ed. Charlottesville, VA: University Press of Virginia, 1969), i. 292.

occassions shall require."[23] Ultimately the governor, his council, and the House of Burgesses had jurisdiction over the council of war. Colonists could petition these bodies if they thought that the council of war had abused its powers. In Massachusetts, the General Court similarly issued orders, including mandating labor through impressment of men and material for the colony's war efforts. In 1675, during King Philip's War, the General Court made orders for the impressment of men throughout the summer. It also legalized martial law to be practiced on its own soldiers, the punishments of which would be meted out by the Court itself.[24]

In January 1667, Modyford came up with a third solution. He declared martial law and published ordinances of war, 44 articles long, to govern Jamaica. All of the ordinances were unexceptional except the first, which declared that the common law courts,

> after this next sitting adjourne without delay and not to be resumed without new and express order from his Excellency and that in lieu thereof Courts Marshall shall be held within the Precincts of every Regimnt[25]

Modyford used martial law so he could close the courts down and thus commandeer labor to help build forts around Port Royal. Modyford had made this innovation at a time when the Crown allowed martial law to be used on soldiers, those engaging in mutiny or insurrection while the insurrection was taking place, on invaders, and on no one else. Martial law was conceived of as a mechanism to discipline soldiers and punish traitors. But Modyford was not using martial law for its punitive function. He was using it to command men and to override property protections.

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[23] Ibid.

[24] Kyle Zelner, *A Rabble in Arms: Massachusetts Towns and Militiamen during King Philips' War* (New York and London: New York University Press, 2009), 40-43.

[25] BL, Add. MS 12429, f. 72. Another copy of the ordinance can be found in TNA, CO 140/1, f. 136.

Where did he get this idea? Perhaps it came from the Jamaican experience during the 1650s. Still only a garrison ruled by martial law, the Governors during that time simply ordered their soldiers to build forts. Indeed that was probably how the first forts around Cagway were built. But Modyford did not have this option available to him. The colonists in Jamaica were no longer soldiers in pay who could be commanded at a moment's notice. He needed to work from within his commission. He could use martial law only:

> All such as shall in any hostile or mutinous manner by Insurrection or Invasion disturbe the Peace or attempt the surprise of our said Island, or any Member or part thereof, and in such occasions (when the ordinary course of Justice cannot be well and safely attended and applyed to).[26]

Through his actions, Modyford claimed he could determine when the courts were inoperable: a claim that other governors throughout the empire had not yet made. There were other materials in his commission that Modyford used to build his jurisdiction. The Crown, of course, was well aware that fortifications and defense were necessary. Indeed the commission was meant to provide "Protection, encouragement, and Assistance to our good subjects and People in and upon our island of Jamaica."[27] Specifically, the Crown gave Modyford and his council powers to,

> Build in our said island and such parts hereof as you shall iudge most convenient Forts Fortresses Castles Citties Ports Havens Borroughs Townes and Villages and them or any of them so to fortify and strengthen furnish and provide.[28]

[26] TNA, CO 138/1, 25. His instructions are much clearer that he was only to use martial law during times of invasion or insurrection, Ibid., 32.

[27] Ibid., 23.

[28] Ibid., 25.

The governor also possessed powers to destroy. The Crown allowed Modyford and his council to "disfurnish, sleight, raze or otherwise howsoever to alter as shall be most for the safety and good of our said island."[29] With these powers, Modyford was supposed to protect the island.

But the Crown had ignored the problem of what legal mechanism the governor could employ to achieve these aims. It provided 500 li. worth of tools for the building of forts.[30] However, when it came to how Modyford was to coerce the planters to labor on forts, the governor's accompanying instructions simply stated that the forts would be built at public charge with the planters being of "cheereful concurrence vnto."[31] This naivety would be of no help to the governor. Forcing all the planters on the island to give up their time, capital, or property required legal authority.

Modyford was clever but hardly majestic. He could not command in the same ways the Crown could command. Further, he had no desire to resort to Jamaica's nascent Assembly, a body first formed in October 1663 under the lieutenant governorship of Sir Charles Littleton.[32] The Assembly had from its outset desired to control taxation and many within the body opposed privateering, promoting peace and trade with nearby Spanish settlements instead. A faction of plantation owners emerged within the assembly, led by William Beeston, Samuel Long, and Sir Thomas Lynch, that supported this peaceful stance. This group fought vigorously with Modyford, who had since his arrival in 1664 been promoting war and privateering. The Assembly thus only met once during Modyford's tenure in the winter of 1664/1665, when the

[29] Ibid.

[30] Ibid., 29.

[31] Ibid., 31.

[32] Whitson, *The Constitutional Development of Jamaica*, 22.

governor attempted to pack the body with his own supporters. He unsuccessfully attempted to try Samuel Long for treason.[33] He also removed Lynch from his position as chief justice and provost marshal. The route of the Assembly gave little hope for the resolution Modyford desired. Forcing someone, or their property, to work on fortifications could be challenged in Jamaica's law courts. How had Windsor handled this difficulty? He had used his own money obtained from privateering adventures in 1662 to pay laborers to build fortifications.[34] There must be a better way! And there was, at least from Modyford's perspective. Combining his directives to build forts, destroy property, defend the colony, and to use martial law when the courts could not run, Modyford built a jurisdiction that was "absolute and uncontrollable."[35]

What kind of legal work was closing the courts down doing for Modyford and for his successor governors? In order to understand the unintended powers this idea gave to Modyford, we must return to debates in the early seventeenth century over the nature of the monarchical prerogative, control over time, and how those debates informed private property rights. As we have already seen, Sir Edward Coke argued that trials by life and limb at martial law could not be conducted unless the Courts of Westminster were closed. But others in 1610 in parliamentary debates over impositions and again in 1637 in debates in Exchequer Chamber over Ship Money used the idea of the Courts being closed to bar Stuart monarchs from engaging in extra-parliamentary taxation.

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[33] Nuala Zahedieh, "Modyford, Sir Thomas," in *ODNB*; Whitson, *The Constitutional Development of Jamaica*, 32-5.

[34] Michael Pawson and David Buisseret, *Port Royal, Jamaica*, 37.

[35] So said Hender Molesworth, the acting governor of Jamaica in 1685 in his letter to James II and his council that informed them of a slave rebellion and Molesworth's subsequent declaration of martial law. TNA, CO 138/5, fo 91.

Impositions referred to the raising of customs duties by the Crown on certain overseas imports.[36] James I, who had become king of England in 1603, was a famous spendthrift, and had decided to raise the duties in order to keep his household solvent. The mercantile community was not impressed. In 1606, the Levantine merchant John Bate failed or refused to pay the levy, and had his case heard before the chief justices of the realm sitting in Exchequer chamber. The case was decided for the Crown but did little to assuage the anger of those who felt that the king's policies were arbitrary. In the summer of 1610, after James had continued the policy of impositions, the House of Commons debated their legality. Those in favor of the Crown's position argued that his decision to raise the customs revenue argued that this was made under his absolute prerogative, which was mysterious and beyond the powers of lawyers to understand. In response, a young lawyer by the name of Heneage Finch declared that while the monarch had prerogative powers, the common law understood and bounded those powers, and lawyers through their professional reason could understand them.

For Finch, this comprehension included what constituted a state of war. For Finch, a state of war "at home" or internal to the realm, was when the "judges cannot sit at Westminster."[37] When this state of shuttered courts existed, the common lawyers had no cognizance over property, and those things which took place in states of war did not alter previous agreements. Thus, through a reading of Bracton, Finch argued that a "descent into a state of war" did not take away a presentment or any other agreement that was made during a state of peace. Nor did any action taken during war alter agreements made in peace. Thus in an *elegit* case, involving debt, a

[36] G.D.H. Hall, "Impositions and the Courts, 1554-1606" *Law Quarterly Review* 69 (1953): 203-4.

[37] *Proceedings in Parliament, 1610* 2 vols.(New Haven: Yale University Press, 1966), ii. 236.

tenant was not exempted because he was disturbed by war.[38] The point of this exercise was to prove that lawyers had crafted and delimited states of exception to common law. But through this examination, Finch also admitted that such a state existed.

This line of argumentation was also adopted by Oliver St. John in the debates over Ship Money held in the Exchequer Chamber in the summer of 1637. Ship money referred to a power the Crown had to command coastal towns to provide a ship so the Crown could maintain its rights over the sea against its enemies.[39] These levies had generally only been used during times of war or emergency, like the years immediately preceding the Spanish Armada of 1588. Charles I claimed he was using the levy in 1634 to combat pirates, although it also had concerns about Dutch control over the British Channel, as well as maintaining a navy to combat potential threats from Catholic enemies, like France and Spain.

The Crown levy was controversial because it was innovative. While it had been used in medieval times and during the reign of Elizabeth, Charles' use of Ship Money required funds for the maintenance of ships, not *actual* ships. It was also much more pervasive, as all counties of England eventually had to pay the levy, and not just coastal towns. The levy, especially by 1637, seemed to be something more akin to a permanent tax, as it had been ordered by the Crown each successive year since 1634.[40] Its controversial nature led Charles to ask his judges for an opinion on the levy's legality in February 1637. They concluded that it was legal. However, continued

[38] Here, Finch cited a case from the reign of Edward II which can be found in Anthony Fitzherbert, *Graunde Abridgement* (London, 1514), "Execution" no. 246.

[39] For the case, see Brooks, *Law, Politics and Society in Early Modern England*, 201-08.

[40] The arguments for why the levy was controversial are clearly elucidated by Henrik Langeluddecke, "I finde all men & my officers all soe unwilling:" the Collection of Ship Money, 1635-40" *Journal of British Studies*, 46 (2007): 509.

unhappiness over Ship Money by August 1637 finally forced Charles to allow the judges to hear a case over its legality. That month a writ was issued against John Hampden, a man who had refused to pay the levy. Thus began, as the legal historian Christopher Brooks has noted, "one of the longest hearings in early modern legal history."[41]

The Ship Money case was amazing not simply because of its length but because of the topics both the Crown lawyers and those for Hampden ended up debating. The Crown's mystical absolute prerogative became subject to legal review. The fundamental issue in the case was the Crown's claim to the property of its subjects when it deemed that property necessary for the safety of the kingdom. The Crown's lawyers, using an impressive array of medieval sources, argued that the Crown's absolute prerogative allowed it to take the property of its subjects when it deemed that an emergency was at hand. Further, only the Crown could make this determination and it did not need to follow any one specific channel, like asking parliament for subsidies, to obtain the funds or goods necessary for the kingdom's defense. The argument laid forth by the Crown's lawyers was successful. The Ship Money levy was ruled legal and the Crown continued to employ it through 1640.[42]

However, for our purposes, the losing arguments in the case are more interesting. For in them, the absolute prerogative of the Crown was not mystical but well outlined and constrained by English law. Oliver St. John and Robert Holborne, Hampden's defense council, maintained that the king, and only the king, had the responsibility to see that the kingdom was safe from danger. As Oliver St. John put it in his opening speech in defense of Hampden's non-payment,

[41] Brooks, *Law, Politics and Society*, 201. For an analysis of the arguments made in the Ship Money Case, also see Conrad Russell, "The Ship Money Judgments of Bramston and Davenport" *The English Historical Review* 77:303 (Apr., 1962): 312-18.

[42] Ship Money was eventually overturned by the Long Parliament.

"Neither… is there any question to be made but the law hath intrusted the person of his royal majesty, with the care of this Defence. The Defence and Protection which we have in our bodies, Lands, and goods, against any within the realm, we know it is from him."[43] But the question for St. John was the means by which the king obtained the goods and services he required to defend the realm. And in this area, St. John had also collected an impressive number of medieval precedents to show how in times of emergency the king could obtain what he needed without resorting to the innovatory measures embedded within the Ship Money writ. The message was clear: the king could act to protect his kingdom, but he could do so according to the laws of the land.[44]

St. John made one important exception. He admitted that private property was a human creation, that in certain instances of danger "all things are again resolved into the common principles of nature."[45] But even these circumstances had been well-defined by precedent. Citing the famous reversal of the conviction of Thomas of Lancaster, St. John declared that a legal state of war existed only when the Courts of Westminster were closed or when the king raised his standard on a battlefield. During these periods, the Crown could appropriate the property of its subjects, burn the property down, or do anything else necessary for the survival of the kingdom. In these times, the Crown, or even subjects "with power" could commandeer property.

How could he prove such a claim? The centerpiece to St. John's argument relied both on English law and Roman history. He claimed,

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[43] *Cobbett's Complete Collection of State Trials* ed by William Cobbett, Thomas Bayly, and T.B. Howell 10 vols. (London, 1816) , iii. col. 859.

[44] Ibid., col. 861.

[45] Ibid., col. 903.

> My Lords, in these times of war I shall admit not only his majesty, but every man that hath power in his hands, may take the Goods of any within the realm, pull down their houses, or burn their corn, to cut off victuals from the enemy, and do all other things that conduce to the safety of the kingdom, without respect had to any man's property… And although in that foreseen and lingering War of Hannibal's whereof I have before spoken, the Senate could not charge the people, yet when there was a "Tumultus Gallicus" that is, when the Cisalpani their neighbours, on the sudden, as sometimes they did, assaulted the city; by the same Author the case was otherwise.[46]

With his use of Roman history, St. John had made a conflation between *tumultus* and internal war. The Roman idea of *tumultus* granted more discretion to the magistrate. A *tumultus* could be declared not due to inoperability but upon the magistrate's discretion. A magistrate in this declared emergency could then declare a *iustitium*, or vacancy, and close down the courts.[47] St. John employed these Roman concepts to constrain the Crown's absolute prerogative. But, as we can see, he also offered advice: just close the courts down and even a governor could claim extraordinary power.

The language relating to property that St. John and Finch used was incorporated into Jamaican discourse. Modyford's commands during the closing of the courts have not survived to the detailed extent of his successors.' But we can get a sense of the influence of English debates through the commands of Sir Thomas Lynch, who was appointed governor in 1671. We also know that Lynch had looked back to Modyford's adaptations as a paradigm. In one of his commands, Lynch ordered that "the chief officer resideing in Port Royall haue (in case of invasion) full power and authority to burn or pull down any House, to press shipps and.. to do

[46] Ibid.

[47] For the concepts of tumultus and iustitium, see Gregory Kung Golden, "Emergency Measures: Crisis and Response in the Roman Republic (From the Gallic Sack to the Tumultus of 43BC) (unpublished PhD Dissertation, Rutgers University, 2008); A.W. Lintott, *Violence in Republican Rome* (Oxford: Clarendon Press, 1968).

everything which may be for ye preservation of the place"[48] This lineage becomes even more clear in the 1680s, when the assembly incorporated Jamaican martial law into statute, allowing the governor when the courts were closed "to Act and do with full Power and Authority all such things as he and the said Council of War shall think. Necessary and Expedient for his Majesties Service."[49] In these times of distress private property was removed into the public domain.

To ape Ellesmere's phrasing, the governor's martial law powers were revealed through the laws he made which were derived from his absolute powers that were only known to him. Modyford thus combined the idea of actions taken during a *tumultus* when property distinctions ceased, the powers he had to build fortifications and raise buildings, and the martial law powers from his commission which he reinterpreted to suggest he could decide when the courts could not operate. The product was a form of martial law designed to allow Jamaican governors access to the private property of those they governed. Modyford did not create new law for Jamaica. Instead, he took a long held legal discursive tradition that a state of war could not exist unless the courts of Westminster were closed. Then he transformed that tradition, without changing it, from a blockade against the use of martial law into a weapon for its expansion. Rather than taking martial law to be a complementary jurisdiction that disciplined soldiers and supervised trials of certain types of treason, Modyford crafted a local form of martial law that allowed Jamaican governors access to labor so that they could protect their colony.

Once made, Modyford's successors, even those who had opposed him during his regime, found Jamaican martial law useful. We can track how often his successors used the jurisdiction through a report made by the assembly of Jamaica to the governor-general, the Earl of Carlisle,

[48] TNA, CO 140/1, 260.

[49] Lynch, *The Laws of Jamaica*, 68.

in 1679. The assembly was opposing the Crown's and thus Carlisle's attempts at centralized reform.[50] But for our purposes what is intriguing about the document is that it included a history of martial law on the island from the moment Jamaica became a civil polity in 1661. Surprisingly enough, the planters were not complaining about its usage. Rather, they claimed that their endurance of martial law showed their loyalty and willingness to sacrifice their own private gain for the good of the English Crown. They recalled how in the winter of 1667 under Modyford, the "whole island was putt vnder law Martiall."[51] The courts were closed until May, when Modyford, due to complaints from planters, reopened the courts.[52] Sir Thomas Lynch in 1673 declared martial law again. Sir Henry Morgan, the lieutenant governor and famed pirate, declared martial law in 1678. Finally under the Earl of Carlisle, martial law was the only law of the island for three months in 1679.

Modyford and his successors used martial law to commandeer labor, both slave and free, to build and repair fortifications.[53] As the planters noted in their petition to Carlisle in 1679, under martial law, they had used "our own Servants Negroes Horses even all that we have to your majestys service."[54] Under martial law, Jamaican planters had enclosed Fort Charles, which

[50] TNA, CO 1/43 no. 157 II; for the constitutional conflict between the Jamaican Assembly and the Crown see Agnes M. Whitson, *The Constitutional Development of Jamaia*, 70-110. The historiography on Jamaican political history is fairly old except for Webb, *The Governors-General*, 151-313.

[51] TNA ,CO 1/43 no. 157 III; the planters actually say 1665 and 1666; however, while martial law was used on militia in 1665 while they were combatting maroon communities, there is no evidence the courts were closed; by 1666 they were referring to their own system of dating where the new year did not begin until 25 March.

[52] On 27 March 1667 Modyford declared that the courts would reopen in May of that year. TNA. CO 140/1, fos. 166-7.

[53] Modyford's predecessor, Lord Windsor had used monies gained from plundering Spanish territories to build forts, thus not having to rely on martial law, See the journal of William Beeston, BL, Add. Ms. 12430 fos. 26-7.

[54] BL, Add. Ms. 12429 f. 94v. This was another petition by the planters protesting their loyalty and commitment to Jamaica to the governor.

was near Port Royal, and had made breast works around Port Royal under Modyford. Under Lynch, they had built Fort James, another citadel near Port Royal and had thrown up defenses around the city's harbor. In 1678, they had built Fort Rupert and Fort Carlisle, both again to protect Port Royal, and made new lines at Fort James. In 1679, yet another fort was built under martial law, this time named after the infamous privateer and lieutenant-governor, Sir Henry Morgan.[55] William Beeston described the imposition of martial law in 1678, upon pretext of a war with France:

> Accordingly the council of warr met where it was concluded that on the 10th April, the Civil and Common Law should be layd by and the Articles of Warr to be in force 20 dayes and the island in a military posture and that in that time all possible industry should be used to fortifie all partes of the island for the doing of which every tenth negroe in the country and every fourth negroe at Port Royal were to Labor on the publick works and accordingly the 10th day it was put in execution and every one applied themselves heartily to their business.[56]

Beeston and the other planters must have been well aware that almost all of the fortifications they were forced to work on were concentrated on Port Royal, the focal point of privateering activity in the Caribbean, and the key target for Spanish or French reprisals.

Indeed, Jamaica's precarious geography was not the sole reason why its governors used martial law so often. Its usage was also a product of an increasingly tense fight between two economic groups on the island, the great privateers of Port Royal and the struggling planters in the hinterland. While Jamaica was to become a great sugar producer in the eighteenth century, in the 1660s and 1670s sugar production was not nearly as successful as privateering and

[55] Ibid*;* for an overview of the fortifications of Port Royal, see Michael Pawson and David Buisseret, *Port Royal, Jamaica*, 37-42.

[56] Journal of William Beeston, BL Add. Ms. 12430, f. 35.

contraband trade.[57] Port Royal, and the Jamaican white population generally, exploded after initial English settlement due to its contraband trade, not due to sugar planting.

Those who were planting were often struggling in the first decades and deeply resented the periods of martial law. John Style, a self-styled "poor planter" wrote to Sir William Morrice, one of Charles II's secretaries of state in January 1669 to report the "tyranny" of the governors of Jamaica.[58] Style described how Modyford had forced planters "to come down 20 and 30 miles to keep guard, not one Christian must be left at home." Style blamed Modyford's actions on the "old soldiers", presumably he meant former Cromwellian officers now living in Port Royal, who used martial law to "ruin" their neighbors by not allowing them to work on their own crops.

The use of martial law was probably not a conspiracy to ruin the planters, but it was a mechanism to commandeer labor, whether or not any real danger threatened the island. In 1679, the Earl of Carlisle recorded in a letter to the Privy Council in July 1679 that the council had decided to declare martial law for thirty days, "I being very glad of this opportunity to carry on soe necessary a work, which otherwise would have gone on very slowly and now is a great satisfaction and encouragement to their resolution to defend the place."[59] After the 30 days had expired, the council decided to extend martial law, which relieved Carlisle because "without

[57] Nuala Zahedieh "Trade, Plunder, and Development in Early English Jamaica" *The Economic History Review* 39:2 (May, 1986): 239-61; Zahedieh, "The Merchants of Port Royal, Jamaica, and the Spanish Contraband Trade, 1655-92" *The William and Mary Quarterly* 43:4 (Oct., 1986): 570-93; in 1662 roughly 3,500 whites and 500 slaves in Jamaica, the population by 1690 had increased to around7,300 whites and 40,000 slaves. See Trevor Burnard, *Mastery, Tyranny, and Desire: Thomas Thistlewood and his Slaves in the Anglo-American World* (Chapel Hill and London: University of North Carolina Press, 2004), 16.

[58] John Style to Sir William Morrice 14 January 1669 TNA, CO 1/24 no. 8; *CSPC,* 1669-74, 3-5.

[59] TNA, CO 138/3 f. 171.

continuing it some days longer the new Battery would not have bin finished."[60] Martial law provided cheap and plentiful labor.

Governors continued to use martial law because it was acceptable. About the Crown and its council's attitude, we know little. Modyford sent his 1667 articles of war to James, the Duke of York and future king of England.[61] He also relayed his tactic to the Duke of Albemarle, a member of the Privy Council and his patron, in January 1667, when he told his relative that the council on Jamaica had "unanimously concluded to put this island in a military posture of defence, (to) silence the common law courts."[62] We only have one hint, in 1678, that the Crown was concerned about the use of martial law. In that year, Charles II ordered Sir Henry Morgan to re-open the courts after Morgan had closed them down.[63] But the next year, the new governor, the Earl of Carlisle, closed the courts down once again. The Crown, on the whole, seemed to permit these declarations. It did so because it had given governors the powers to defend, build forts, and to declare martial law. The Crown had not intended for these powers to be packaged together. Nevertheless, the governors were not necessarily subverting Crown authority.

While some like Stile opposed martial law, the elite in Jamaica also generally assented to the emergency measures. Indeed, during the late 1670s and early 1680s, the Jamaican assembly defended the governor's powers from any attempts by the Lords of Trade to constrain them.[64] Beginning in 1676, the Lords of Trade had decided to reign in the Assembly's legislative

[60] Ibid., f.172.

[61] TNA, CO 140/1, f. 159.

[62] Sir Thomas Modyford to the Duke of Albemarle, 14 January 1667 *CSPC, 1661-68*, no. 1383; Modyford was probably protected by Monck who was his cousin see Nuala Zahedieh, "Modyford, Sir Thomas" *ODNB*.

[63] TNA, CO 140/3, 659.

[64] Objections to the martial law clause. See *CSPC*, Oct. 1679, no. 1141.

powers, and attempted to pass a bill through the Assembly that mirrored Poynings' Law in Ireland. Poynings' Law allowed the English Privy Council to inhibit any original bills from being produced by the Irish legislature.[65] Everyone outside the Board of Trade and Plantations, including the current and former governors of Jamaica, thought the plan ill-advised because Jamaica was too far away from England.[66]

In this period of crisis, the Privy Council, with the help of the Earl of Carlisle and Sir Thomas Lynch, who was now in England, attempted to pass a new militia bill for the island. The Assembly refused to pass it. Initially their intransigence was part of a strategy to avoid the precedent of the Lords of Trade making bills for Jamaica. But after the Lords of Trade abandoned its attempt to enforce Poynings' Law in 1680, the Assembly still debated the passage of the bill for two reasons. First, the bill bound the governor's discretion. The governor, according to the bill, had to follow the king's instructions for the regulation of the militia and could not act on his own discretion or to the advice from his council of assembly. Second, the Assembly wanted to make sure that the governor could not violate the laws of England when governing the militia. Eventually, after some back and forth, the Lords of Trade accepted the revisions the Assembly made toward the bill.

During the regime of Sir Henry Morgan, the militia bill passed and was accepted by the Lords of Trade and printed in 1684.[67] This new ordinance gave the governor powers to declare

[65] For Poynings' Law in Ireland, see James Kelly, *Poynings' Law and the Making of Law in Ireland, 1660-1800* (Portland, OR: Four Courts Press, 2007).

[66] Whitson, *The Constitutional Development of Jamaica*, 70-128.

[67] The act was passed by the Jamaica Assembly in 1681 under Sir Henry Morgan. But the Lords of Trade did not approve of it until the spring of 1684 after Sir Thomas Lynch had successfully passed a new revenue bill more amenable to the Lords of Trade through the Jamaican legislature. Ibid., 125-6.

martial law upon any "apprehension" of danger.[68] Further, once martial law had been proclaimed, the governor had powers to command slaves, subjects, and commandeer horses and cattle and "do with full Power and Authority all such things as he and the said Council of War shall think Necessary and Expedient for his Majesties Service and Defence of this Island."[69] The debates over the militia bill had not involved these clauses as one might expect. Indeed, the colonists had won their battle to get their revisions in the bill. The final clause of the militia act stated that the commander could not, "do any other act or thing contrary or repugnant to unto the known Laws of England or this island."[70]

Jamaican martial law was not repugnant to English law, at least not according to the Jamaicans who approved the Militia Bill. Sir Thomas Modyford had appropriated ideas about the absolute prerogative. He had combined these ideas with martial law, which he could operate through his commissioned powers when the ordinary courts of justice were closed. In making this new form of martial law, Modyford gave himself and those that followed him an all-encompassing version of martial law.

Jamaican Martial Law and its Limits

Governors faced repercussions if they used martial law to achieve ends not sanctioned by the Crown or by the populace. From one such controversy, we can see how Jamaican legislators had adapted time to meet their particular needs. In 1689, the lieutenant governor Sir Francis Watson found martial law useful to maintain power in an increasingly bitter faction fight on the

[68] Lynch, *The Laws of Jamaica*, 67.

[69] Ibid., 68.

[70] Ibid., 72.

island. Watson had been lieutenant to the Duke of Albemarle, who had arrived in Jamaica in 1685, and had immediately aligned himself with the faction around Sir Henry Morgan. Morgan, the former lieutenant governor and infamous pirate, had been displaced from his post by Albemarle's recently deceased predecessor, Sir Thomas Lynch, who had aligned himself with the less adventurous and increasingly wealthier planter faction on the island.[71] Along with Morgan, Lynch had removed Morgan's followers, including one of the most notorious men on the island, the lawyer Roger Elletson. During Albemarle's reign, the fortunes of the Morgan faction were reversed, and by 1688 Elletson had gained the prestigious post of attorney general. All of the men under Lynch's faction, now led by the planter Hender Molesworth, had been removed from power. The only problem for the faction in power was that Albemarle had died in October of that year and it was unclear who would replace him.

That autumn, James II ordered those purged returned to office, and declared to Watson that Hender Molesworth would return to Jamaica and rule as lieutenant governor.[72] In a later missive in December, the Crown ordered Roger Elletson to be removed from office. By now William of Orange had invaded England. He eventually would topple James. The regime change did not help Watson and his faction. In February 1689, the new king repeated James' commands to remove Elletson from office, after petitioners in Jamaica had once again complained about Watson's "arbitrary" rule.[73] Upon receiving this new command, Watson refused to comply,

[71] Immediately after Lynch's death, Hender Molesworth assumed command of the island until Albemarle's arrival in 1687. Lynch had banned Elletson from practicing law. See Blathwayt to Lynch, 28 June 1684 Colonial Williamsburg Foundation, Blathwayt Papers. Hender Molesworth to Blathwayt 8 September 1684 Colonial Williamsburg Foundation, Blathwayt Papers. Albemarle named Elletson as his chief justice, reversing his ban on practicing law, in February 1688. *CSPC*, 1685-88, no. 1646.

[72] The King to Deputy Governor Sir Francis Watson, 30 Nov. 1688, *CSPC*, 1685-88, no. 1940.

[73] The King to the President and Council of Jamaica 1 Dec. 1688, *CSPC*, 1685-88, no. 1943. Petition of Planters and Traders of Jamaica in London to His Highness the Prince of Orange 11 Jan. 1689 and The King to the President and Council of Jamaica, 22 Feb. 1689, *CSPC*, 1689-92, nos. 7, 29.

arguing that the command had not been stamped with the Great Seal. The faction out of power became furious. In order to quell the uproar, Watson in a letter told the Crown that he proclaimed martial law. Belatedly, he also added he had worries about the Spanish and the French.[74]

In his justifications, Watson explained that martial law had been necessary to put the island in a "posture of defence."[75] Indeed by 1689, the French were at war with the English and were terrorizing English settlements in the Caribbean. As in other times of martial law, the lieutenant governor had ordered citadels to be repaired with new lines of defense being added to Fort Charles. However, many within the island believed that Watson's use of martial law was a desperate attempt to hold on to power. In March 1689, the attorney general of the island claimed that Watson used martial law in order to help Elletson, who was deeply in debt, avoid prosecution, and escape from the island.[76] In May 1689, Smyth Kelly, the former deputy provost marshal who had been deposed by the Albemarle faction, wrote to William Blathwayt, the former and future secretary of war, and claimed that Watson and his council of war had kept the planters oppressed under martial law. They were in arms "night and day."[77] Watson, who was only supposed to be acting as president of the council, had taken the title of governor. His council of war, according to Kelly, was full of indebted, lowly men. Further, Watson ruled by the sword, and "court marshalls are held in all ye parishes of ye island ye offices being most of them

[74] Sir Francis Watson to Lords of Trade and Plantations, 15 Mar. 1689, *CSPC*, 1689-92, no. 52.

[75] TNA, CO 137/2, fos. 22-v.

[76] The Attorney General of Jamaica to Lords of Trade and Plantations, 12 Mar. 1689, *CSPC*, 1689-1692, no. 50.

[77] Mr. Smyth Kelly to William Blathwayt at Whitehall 27 May 1689, Colonial Williamsburg Foundation, Blathwayt Letters; Blathwayt had been replaced as secretary of war in April 1689 for John Temple, but was subsequently reappointed, Barbara C. Murison, "Blathwayt, William" in *ODNB*.

ye meanest tradesmen."[78] As it was useful in building forts, so was martial law useful in faction fights.

From the perspective of the planters, Watson's chief legal advisor, Roger Elletson was the chief architect of this desperate attempt to stay in power. Elletson had been an unpopular figure for some time in Jamaica, and when Watson finally succumbed to pressure and re-opened the courts in June 1689, the assembly called for Elletson to be tried for treason.[79] They jailed him and issued a long treason indictment, which included 22 charges. The twenty-first article accused Elletson of contriving to rule the island by the sword.[80] The planters accused Elletson of betraying the stipulations for using martial law outlined in the Militia Act and in the king's commission to the governor. Elletson had declared martial law in spite of the fact that "no appearance or apprehension of any enemy abroad or Insurrection or rebellion at home" had taken place. This unprovoked decision was a "manifest subversion of the English laws Rights Libertyes and Propertyes" of the great planters.[81] Unfortunately we do not know what the English Parliament thought about these arguments, or if it ever heard them. We do know that the new governor, the Earl of Inchiquin, thought little of either faction, and had Elletson deported without trial in 1692.[82] We can learn from this incident that while the governor had discretion to close the courts down, he did not have unlimited discretion. His actions were liable to

[78] Mr. Smyth Kelly to William Blathwayt at Whitehall, 27 May 1689, *Colonial Williamsburg Foundation*, Blathwayt Letters.

[79] They first petitioned the king about his illegal activities, TNA , CO 137/2 no. 16.

[80] TNA, CO 137/2, fos. 107-108v.

[81] Ibid.

[82] Whitson, *The Constitutional Development of Jamaica*, 132.

investigation both by the Jamaican Assembly and the Crown. The governor's use of martial law was neither unlimited nor was it absolute.

In granting the general powers to proclaim martial law, the planters of Jamaica maintained expectations that those powers were nevertheless delimited. The constraints – both for when martial law could be declared and how the governor could use it – remained and the obligations of the governor or the general to follow the rules and procedures of martial law had not been lifted. For example, when Sir Henry Morgan declared martial law in the spring of 1678, the first action he took was to issue the ordinances of war. After his declaration, Morgan wrote into his order book the oaths that those sitting as judges had to take before sitting on a court martial. Each had to swear to "promise before God vpon his Gospell that I both will and shall judge uprightly according to ye Laws of God, our Nacon and these Laws of Warre."[83] The judge could not take bribes nor decide in anger; he was bound to see justice done. Martial law was thus not a monolith. It was not simply emergency power. Rather it was a fusion of a longstanding legal tradition with components of the Crown's prerogative power.

This discretion was extensive, but not unlimited. Theoretically it meant the vacation of all other forms of law. The only laws were the articles of war. These rules governed military action: desertion, mutiny, insubordination and the like. It also included other crimes common to other forms of law like theft, murder, and blasphemy. It had no rules for property law. It had no regulations for labor, debt, finance and contract law, or torts. In general, martial law had traditionally been a complementary jurisdiction. Now those using martial law were theoretically

[83] TNA, CO 140/3, f. 648.

free from constraint in all areas of law outside of the articles of war. Was martial law in Jamaica a mechanism to enable sovereign discretion, and thus the legal system altogether?

Even in this theoretically legal vacancy, normativity guided action. We can see the structure of unbounded martial law through its use in Jamaica. Modyford in 1667 had issued the laws of war and had closed the court down with the first article. Sir Thomas Lynch and Sir Henry Morgan had done likewise. By 1684, with the passing of the new Militia Bill, the governor's ability to close the courts during times of distress became enshrined in statute.[84] In 1667, it was unclear that Jamaican militia officers could appropriate or destroy property. In 1671, Lynch through proclamation clarified that they could take such measures. By 1684, the Militia Act authorized these actions.[85] By the late 1660s, Modyford ordered slaves and other workers to build forts. Later governors turned this innovation into a custom, making the work expected. By 1684, this activity was authorized by statute.[86] Reaction to crisis generated law which became customary and which eventually generated a statute, normalizing and regulating activities in even the most chaotic of circumstances. All-encompassing martial law was not simply unlimited power. Governors abused it, and they would continue to abuse it. But even when they had ulterior motives for declaring martial law, they had to follow accepted norms when using it. Law, like nature, abhors a vacuum.

Legacy

[84] TNA, CO 140/1, f. 159; BL Add. Ms. 12429 f. 75; TNA, CO 140/3, 648; Lynch, *The Laws of Jamaica*, 67.

[85] TNA, CO 140/1 f., 260; Lynch, *The Laws of Jamaica*, 67-8.

[86] TNA, CO 1/43, no. 57 II; TNA, CO 140/3, 651; Lynch, *The Laws of Jamaica*, 68.

This adapted form of martial law was useful. Already by 1690, governors used it for building forts, for conscripting men to fight and catch runaway slaves, and finally for a faction to cling desperately to power. Slowly, the Jamaican paradigm would be used more and more often throughout the empire.

The most common reason why governors employed all-encompassing martial law in the eighteenth century was during so-called slave "conspiracies:" fears, imagined or real, that slaves were plotting to overthrow the government and murder their white owners.[87] Already in 1685, the governor of Jamaica Hender Molesworth closed the courts down and declared martial law during a slave uprising. Martial law allowed Molesworth to command all the planters of the island to assist in the fighting and catching of slaves.[88] It also allowed him to force planters to send their white workers into town for militia and guard duty. Throughout the eighteenth century, Jamaican governors continued to employ this strategy, declaring martial law so they could force men into militia duty. Other governors followed the Jamaica paradigm. The governor of Bermuda in 1761 closed the courts down and declared martial law during a slave conspiracy. The governor of Montserrat did likewise in 1768. The governor in Antigua 1736 did likewise. Merchants often complained, but governors continued to use martial law. Indeed, it is probable that governors often used martial law proclamations to help influential but indebted planters get off the island before they were brought to court for debt.

This shift took place because it was useful to Caribbean governors. But it also happened because the legal definition of a state of war utilized by Modyford, that it existed when the courts

[87] For slave conspiracies and the use of martial law during them, see Jason Sharples, "The Flames of Insurrection: Fearing Slave Conspiracy in Early America, 1670-1780" (unpublished Ph.D. diss. Princeton University, 2010), 180-96.

[88] TNA, CO 138/5, f. 91.

were closed, was becoming more and more popular. William Noy's interpretation of a state of war – that it could be used by a commander of an army in the field confronting an enemy whose banner was raised – was slowly dying during the Restoration. James II was one of the last to use it, when he only allowed his soldiers in the field against the Monmouth rebels in 1685 to be disciplined at martial law.[89] More often, English lawyers used the idea that a legal state of war only existed when the courts were closed. Sir Matthew Hale, in spite of being Selden's executor, had appropriated this alternate idea in his work on English common law.[90] The idea was most successfully communicated through the writings of Sir Edward Coke, who had used it in his *Institutes*.[91] We shall recall that both Members of Parliament and the St. Helena petitioners had mimicked Coke in their attacks on the East India Company's use of martial law in 1689.

The medieval usage of military courts had revolved around the king's or the commander's personal body. By the sixteenth century, this verge jurisdiction had generally been replaced by powers of martial law delegated by legal commission. Now, in the latter stages of the seventeenth century, Jamaican governors turned martial law into a jurisdiction dependent upon the status of the courts, which they could close. This innovation was the product of reading an old discourse in a new context. Without the king's protection, without an agreeable assembly, Modyford had used the powers in his commission to craft a legal alternative to the complementary framework of Tangier, Virginia, or even England. Others, including army

[89] See for example TNA, WO 89/1, 84-5, where the court martial described its jurisdiction in a case against two soldiers speaking malicious words against the king as being "the rules and articles for the better government of his Majesty's land forces *in pay during the present rebellion.*"

[90] Sir Matthew Hale, *The History of the Common Law of England* ed. by Charles M. Gray (Chicago: University of Chicago Press, 1971), 27.

[91] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: W. Clarke & Sons, 1809), 52-3.

commanders and threatened governors in the eighteenth, and nineteenth centuries also discovered and “invented” all-encompassing martial law on their own. Thus British commanders throughout the eighteenth century claimed the closing of the courts as a rationale for trying by martial law civilians or soldiers for wrongs that in other instances required action at common law. Once essentially a criminal law jurisdiction, martial law in Jamaica now encompassed the entire legal landscape.

Chapter Ten:
The Rise of Martial Law: The Mutiny Act and Beyond

The post-1689 Parliaments overturned the constraints on martial law jurisdiction crafted in the 1628 parliament. They did so with reservation. And they often did so with embarrassment. But by 1718, Parliament through statute had authorized martial law to be used on soldiers irrespective of time, and granted its local officers powers of summary execution in order to quell rioting. Further, the discourses of the courts being open, which had always been meant to constrain, was now replicated more and more by military officers as a discourse of justification for martial law jurisdiction. These innovations meant those living in the eighteenth century would live under or with martial law jurisdiction far more often than their seventeenth century predecessors.

Parliament began its assault on the constraints on martial law in 1689 when Parliamentary soldiers were mutinying across England.[1] In response, it authorized martial law for mutiny and desertion. In granting martial law this heavily circumscribed jurisdiction, Parliament nevertheless reversed late seventeenth century interpretations of the Petition of Right. That the Revolutionary Parliament – the same Parliament that passed the Bill of Rights –expanded martial law jurisdiction has caused consternation among English historians and legal scholars working in the eighteenth and nineteenth centuries.[2] According to their progressive, or whiggish, theory of history, the great parliaments in English history were supposed to reaffirm the liberties their predecessors had established for the English people, and then advance those liberties even

[1] 1 Wil & Mar. c.5. The best, albeit brief, account of the making of this statute is in John Childs' work on the army of William III. Childs, *The British Army of William III, 1688-1702* (Manchester: Manchester University Press, 1987), 86-7. I will expand on his argument in this chapter.

[2] The Revolutionary Convention passed the "Declaration of Rights" which was accepted by William III in February 1689. The Declaration of Rights passed as a statute, "the Bill of Rights" in December 1689. For their history, see Lois G Schwoerer, *The Declaration of Rights, 1689* (Baltimore: Johns Hopkins Press, 1981).

further.[3] The makers of the Mutiny Act had, while Members of Parliament during the reigns of Charles II and James II, seemingly supported ideas like the rule of common law, and argued against authorizing martial law jurisdiction. Instead of understanding them to have changed their minds once in power, historians have insisted that the makers of the Mutiny Act could not have overturned the Petition of Right. In order to execute this sleight of hand, some argued that the Mutiny Act had not authorized martial law. Instead, the writers of the Mutiny Act authorized "military law."[4]

Thus, to this day, most historians of the Mutiny Act declare it to be the "great dividing point" between the arbitrary martial law of the sixteenth and seventeenth centuries that had been banned by the Petition of Right and the military law that operated from the end of the seventeenth century to the present day – a form of law that the 1628 MPs had not banned.[5] In part, their argument rests on a modern notion that the military should be punished by a different form of law than civilian law, and that this law was different than the modern law of martial law. Finally, these scholars have ignored the Riot Act of 1715, which, while not explicitly stating it authorized county officers martial law jurisdiction, authorized its local officers powers of execution should rioters resist apprehension.

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[3] For whiggish history see Herbert Butterfield, *The Whig Interpretation of History* (new ed. New York: AMS Press, 1978).

[4] The phrase military law was used in the seventeenth century. But it was not contrasted with martial law in the same way that we do now. Instead, "military law" meant courts martial that did not possess powers of capital punishment. John Childs, *The Army of Charles II* (London: Routledge and Paul, 1976), 78.

[5]C.M. Clode, *The Administration of Justice under Military and Martial Law* (London: J. Murray, 1872), 10; R.E. Scouller, "The Mutiny Acts" *Journal of the Society for Army Historical Research* (1972), 268; D.L. Keir noted with confusion that military law was not used in the early eighteenth century. Keir, *The Constitutional History of Modern Britain, 1485-1937* (London: A and C Black, 1938), 305; F.H. Dean, "The History of Military and Martial Law" in *A Guide to the Sources of British Military History* ed. Robin Higham (Berkeley: University of California Press, 1972), 617.

Parliament did not make new military law. It authorized and modified the law of martial law. In doing so, it overturned the law of martial law crafted by the MPs in 1628 that were meant to constrain martial law jurisdiction. Through Parliamentary statute, martial law remained one of many English laws. Through the discursive tradition of the Petition of Right, commanders and governors justified all-encompassing martial law.

Not a Law at All

In his biography of the great Restoration jurist Sir Matthew Hale, Gilbert Burnet told a story about how Hale had upheld the rule of common law throughout the 1650s in the face of what he considered to be the martial polity of Cromwell. Hale had accepted Cromwell's offer to ride circuits on the Crown Side, which meant he would hear cases that involved life and limb. But Hale, according to Burnet, often used his powers to undermine the military regime. In 1653, he arraigned two soldiers for the death of "one of the king's party." The soldiers had attacked the man because he, contrary to proclamation, was carrying arms. The jury convicted one of manslaughter and the other of murder. Their commander, colonel Whalley, made a scene in the courtroom, and declared the soldiers were only following orders. Hale was unmoved, and had the man immediately executed so that he had no chance to obtain a reprieve from the Lord Protector. Burnet's moral of the story was clear: through Hale, the law triumphed over military power.[6]

Most restoration jurists likewise believed they needed to uphold the law against soldiers who threatened to undermine it. Independence from the law had, in their belief, led to the destruction of the monarchy, the rise of arbitrary government, and near-constant political instability. They understood martial law jurisdiction as one manifestation of this tyranny. In

[6] Gilbert Burnet, *The Life and Death of Sir Matthew Hale, knight* (London, 1683), 25-6.

order to prevent future conflict, they demanded the restriction of martial law jurisdiction, and the end to any claims of exemption by the remaining soldiers in pay. Common law would be the law by which all men and women were tried by life and limb in England. Peace would be maintained not by military rule but through the practice of law. As the chief justice of Common Pleas, Sir Orlando Bridgeman, noted to the Lord Chancellor, the Earl of Clarendon, in discussing a case where a soldier claimed exemption from common law, "a single judge a justice of the peace wth his warrants…may supresse any force that can be raised by the enemy."[7] It was thus not the enemies but the king's own army acting in his name that he needed to fear.

The instability of the Civil Wars led many – jurists, MPs, and statesmen – to want an end to the practice of keeping a standing army in England.[8] They feared a return to the chaos of the 1650s. They also worried that they might become "slaves" like the subjects of European monarchs, especially France.[9] These twin fears led to strong protests by men in Parliament when Charles maintained many of the men originally raised for the Third Dutch war in 1674. By the late 1670s, this suspicion towards the standing army was increased due to the revelation that the Duke of York, Charles brother and successor, was Catholic. Wild conspiracy theories circulated throughout the late 1670s – the most notable being the Popish plot – that Catholics were going to murder Charles II and install an arbitrary Catholic king onto the throne of England. The soldiers would only be ruled by martial law and be exempt from common law. Worse, in the minds of

[7] Orlando Bridgeman to Clarendon, 4 Sept. 1663, Bodl., Clarendon Ms. 80, f. 176.

[8] The best source for this discourse is Lois Schwoerer, *No Standing Armies! The Antiarmy Ideology in Seventeenth Century England* (Baltimore: Johns Hopkins Press, 1974). For anti-popery hysteria, see J.P. Kenyon, *The Popish Plot* (London: Heinemann, 1972).

[9] For English perceptions of European polities in this period, see For English perceptions of European polities in this period, see Steven Pincus, "From Butterboxes to Wooden Shoes: The Shift in English Popular Sentiment from Anti-Dutch to Anti-French in the 1670s" *The Historical Journal* 38:2 (Jun., 1995): 333-61.

some, the army might rule English men and women through martial law, ending the rule of civilian law. The foundational documents that protected English liberties like Magna Charta and the Petition of Right would be set aside.[10]

In this context Sir Matthew Hale gave a reading of martial law that put its jurisdiction outside the realm of law.[11] It has stuck ever since. The famed antiquarian jurist had trained with William Noy during his early years. By the 1640s, after Noy had passed away, he was friends with John Selden, and became the executor of his will. Hale also was clearly influenced by the writings of Sir Edward Coke. But his interest in martial law was much more personal than simply having engaged in abstract conversations with learned jurists. During the 1650s, Hale had confronted the High Courts of Justice. He had defended Christopher Love before the tribunal in 1651. Gilbert Burnet even claimed he was in line to defend Charles should the king have recognized the court. He refused, after accepting a judicial position with the Protectorate, to participate in any of the proceedings before the High Court of Justice. He loathed the creative jurisdictions of the Commonwealth and Protectorate, and sought to restrain them.[12]

For Hale, martial law "in Truth and Reality it is not a law, but something indulged rather than allowed as a Law."[13] This maxim has been much quoted but rarely understood. Hale did not, as Selden did, think that martial law was simply a power of execution and not a power of adjudication. He also understood that martial law was necessary to govern soldiers. Indeed, Hale

[10] Schwoerer, *No Standing Armies!*, 95-136. J.G.A. Pocock, "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century." *William and Mary Quarterly* 3rd ser. 22:4 (Oct., 1965): 560.

[11] Sir Matthew Hale, *The History of the Common Law of England* ed. by Charles M. Gray (Chicago: University of Chicago Press, 1971), 26-8.

[12] Gilbert Burnet, *The Life and Death of Sir Matthew Hale;* Alan Cromartie, *Sir Matthew Hale: Law religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995). Alan Cromartie, "Hale, Matthew" in *ODNB.*

[13] Hale, The *History of the Common Law*, 27.

recognized that part of what comprised the law of martial law were the ordinances of war which he recovered from reading the medieval black book of the admiralty. Those soldiers in pay who broke these ordinances were subject to court martial. However, martial law was not truly a law because of its temporal restrictions. As it related to life and limb Hale only allowed martial law jurisdiction when the courts of justice were closed. Due to necessity, the Crown or its generals could employ martial law jurisdiction to discipline their soldiers and subdue their enemies. Jurists from 1660-1688 agreed with this reading of martial law jurisdiction.

The Crown could not get around the temporal boundaries placed on martial law. Instead, the Crown resorted to the articles of war issued earlier in the reign that only gave its commanders powers to discipline for misdemeanor.[14] The Duke of Albemarle, the lord general of Charles II's army, thus ordered in 1663 that "any person is to suffer the paines of death no tryall execution or proceeding be made thervpon but according to the knowne lawes of the land…"[15] Albemarle then issued a shortened code to govern the army, which contained no punishments of death or loss of limb. This code was the primary source for military discipline within England until 1689. Attempts by the Crown to authorize the use of martial law for soldiers in England in both the first and second Anglo-Dutch Wars failed. In the 1670s, the lord keeper Orlando Bridgeman

[14] Childs, *Army of Charles II*, 78.

[15] "Militarie Orders and Articles made by his Majestie" 17 March 1663, TNA, SP 29/69, f. 81ff. Powers of life and limb were only granted to generals during expeditions abroad. See TNA, C 66/3205, m. 1-2d; TNA, C 66/3201, 7d. The printed articles of war reflect this distinction. Contrast those articles sent to the governor of Tangier and the general of the 1678 expedition to Scotland, and with those articles of war that governed soldiers stationed in Ireland with that issued in 1663 for soldiers in England. TNA, CO 279/1; *Articles and Rules for the Better Government of his Majesties Land Forces during this Present War* (London, 1673); *Rules and Articles for the Better Government of his Majesties Army in his Kingdom* (Edinburgh, 1678); *Rules and Articles for the Better Government of his Majesties Army in this Kingdom* (Dublin, 1685). In 1688, James issued articles of war to his soldiers stationed in England in anticipation of the Dutch invasion that prescribed the death penalty. It is unknown if his commanders executed soldiers based on these articles. *Rules and Articles for the Better Government of his Majesties Land Forces in Pay* (London, 1688).

refused to authorize commissions of martial law for Charles' generals in 1672.[16] His stance successfully barred martial law jurisdiction from English soil, although it perhaps cost him his position in the government.[17] The Crown was thwarted whenever it desired to find an alternative to common law to discipline soldiers.

The Crown in this period also removed riots to common law jurisdiction, and punished the leaders not by summary martial law process but at jury trials. This resort to common law process meant that if the Caroline regime wanted to use exemplary punishment to terrify the disobedient into loyalty, it had to do so through jury trials. Thus, in the aftermath of the first major political rioting of Charles' reign, the so-called "bawdy house" riots of 1668 – which were attacks by dissenting protestant apprentices on the brothels of London in order to protest the licentiousness of the court - Charles and his legal officers had the leading rioters tried for treason at common law.[18] The old way to terrify apprentices was to issue proclamations that threatened execution by summary martial law if the rioters refused arrest or refused to disband. This option was no longer available to the king and his council during the Restoration.

For sailors, the Restoration Parliament was more accommodating in passing legislation that authorized martial law jurisdiction. But it still refused to grant martial law jurisdiction *in* England. Instead, naval commanders could punish their sailors who were on board their ships at sea.[19] The naval articles of war were included in the Act – a shorter set of articles than that of the

[16] TNA, SP 104/77, fos. 59v, 92-v. Bridgeman claimed that martial law commissions violated the Petition of Right. Apparently there was some dispute on this point, and that others examined the commissions Charles I granted his generals during the Bishops' Wars.

[17] Childs, *The Army of Charles II*, 81; K.H.D. Haley, *The First Earl of Shaftesbury* (Oxford: Clarendon Press, 1968), 304-5.

[18] Tim Harris, *London Crowds in the Reign of Charles II: Propaganda and Politics from the Restoration until the Exclusion Crisis* (Cambridge: Cambridge University Press, 1987), 82-91.

[19] 13 Car. II. C.9.

army. The articles on the whole were more brutal than their land equivalents, as death comprised two thirds of all punishments. But this severity was mitigated with discretion: Parliament wrote the laws to allow the court to punish by "death or such other punishment as the offence shall deserve."[20] Once again, England had been preserved from martial law jurisdiction.

When it came to enemies, however, the Crown still used martial law as a strategy of terror. Gerbrandt Zas and William Arton, two men commissioned by the Prince of Orange to convince members of Charles' government to make peace in 1672, found this fact out the hard way.[21] During the height of the Third Anglo-Dutch War in December 1672, Zas and Arton were ordered by the Crown to depart from Harwich because Charles' spy networks had learned that these two men had been spying in England. Zas left in December 1672.[22] But he returned shortly thereafter on instructions to use up to one million guilders to convince Charles' government to make peace.[23] On 16 January, they were taken in Harwich, and examined by Crown officers. The Privy Council ordered their arrest, and interrogated them before they were interrogated again in the Tower on 27 January.[24]

On 14 February, Charles and his ministers decided that they would try Zas by a court martial.[25] Charles' attorney general, Heneage Finch, advised they be tried at martial law for

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[20] Ibid.

[21] For this episode, see K.H.D. Haley, *William of Orange and the English Opposition, 1672-4* (Oxford: Clarendon Press, 1953), 67-87.

[22] A passport was issued to Zas on 12 December. He was required to leave England within 24 hours. *CSPD*, 1672-3, 270. It was reported that he left by 19 December. Silas Taylor to Williamson, 19 Dec. 1672, *CSPD*, 1672-3, 293.

[23] Haley, *William of Orange*, 76.

[24] Silas Taylor to Williamson, 16 Jan. 1673, *CSPD*, 1672-3, 428. Zas to Arlington, 16 Jan. 1673, *CSPD* 1672-3, 438. They were examined in the Tower on 27 January. *CSPD*, 1672-3, 484. Haley, *William of Orange*, 84.

[25] The commission for the trial is in TNA, C 66/3152, 9d. The orders for the trial can be found in BRO, D/ED/056. These instructions are in the papers of the Trumbull family. A summary of the draft commission on 14 February and the final version on 24 February can be found in *CSPD*, 1672-3, 556-7, 605.

spying.[26] Military officers served as commissioners. John Russell, the colonel of the Cold Stream Guards and the son of the Earl of Bedford served as president. Three Civil lawyers attended the court. Charles empowered this tribunal, which sat in the Tower, to hear and determine all things against the two alleged spies. They had powers to torture the spies – provided that they did not take their lives or limbs – into revealing what their plans were in England and on what information they had obtained.[27] They had to seek the king's approval before they convicted the men of life or limb. The Commissioners recorded that they asked, over and over again in the month of March, three questions: what were their instructions; who gave them their instructions and what were they planning on doing with the money they had been authorized to spend when Crown officers detained them.[28] It is likely that the two were tortured by the commissioners seeking these answers. It is unlikely that Charles or his council ever seriously considered killing the two men. Already by the end of March, the Privy Council was in negotiations with the Dutch for a prisoner exchange.[29] The negotiations dragged on for a year before Zas was finally exchanged in March 1674. Enemies like Zas were the only ones subject to martial law in England during the reign of Charles II.[30]

Martial Law in the Reign of James II

[26] Haley, *William of Orange*, 84-5.

[27] Alan Marshall, *Intelligence and Espionage in the Reign of Charles II, 1660-1685* (Cambridge: Cambridge University Press, 1994), 128.

[28] The examination records are in *CSPD, 1673*, 6, 53-4, 95. Haley, *William of Orange*, 84-6.

[29] Sir J. Barckman Leyenbergh to Williamson, 16 May 1673, *CSPD*, 1673, 257.

[30] A warrant for Zas' release is dated 12 April 1674. *CSPD*, 1673-5, 223. Arton escaped from the Tower in the autumn of 1673. Haley, *William of Orange*, 86.

James II succeeded his brother to the throne in 1685. He attempted to maintain a much larger standing army than his predecessor. At the beginning of his reign, James inherited an English army of around 8,800 men. In the spring of his first year a major rebellion broke out in the west of England – now known as Monmouth's Rebellion. James raised a considerable number of men to put down the rebellion, and continued them in pay after the rebellion had ended. By the end of 1685, he had increased this army to around 20,000. By November 1688, when William of Orange's invasion force landed at Torbay, James had increased his army to just over 34,000 men.[31] This experiment raised several legal issues involving the army that the makers of the Mutiny Act in 1689 attempted to resolve. We will examine three of them: trials by court martial that involved life and limb, desertion, and finally punishing soldiers for misdemeanor.

In spite of his arbitrary reputation, James and his legal counsel used martial law to prosecute by life and limb in a manner consistent with early Stuart interpretations of the Petition of Right. The army, at least until James became aware of William of Orange's planned invasion in the autumn of 1688, generally did not punish by life and limb at martial law. The only firm evidence we have of courts martial punishing with death during James' reign comes from the summer of 1685, during James' campaign against the Earl of Monmouth. During the rebellion, James' military commanders arraigned soldiers before courts martial on several occasions. At the opening of the court, the president justified the proceeding by stating it was enforcing "The rules and articles for the better government of his Majesty's land forces in pay during the present

[31] John Chiles, *The Army, James II, and the Glorious Revolution* (Manchester: Manchester University Press, 1980), 1-3.

rebellion."[32] This usage was consistent with Noy's idea that an army "chasing enemies or rebels" could be disciplined at martial law. After the rebellion had ended, James sent out general directions to his commanders about the punishment of soldiers. All cases involving life or limb were now to be handled at common law.[33]

James' interpretation of martial law jurisdiction exempted civilians from being tried for life and limb at courts martial. Soldiers and only soldiers were to be tried at martial law for felony. In a robbery case in August 1685, for example, William Blathwayt, James' secretary of war, ordered a colonel to hand over two men accused of the crime because one was not a soldier in pay.[34] Further, if a soldier had committed a felony against a civilian, he could not be tried at martial law. On the Isle of Guernsey, James possessed a garrison which could use martial law by life and limb. But on several occasions James through William Blathwayt reprimanded the colonel there overextending his martial law jurisdiction. Blathwayt reminded the colonel that "his Maty pleasure is that when any Inhabitants or other person not being a Soldier shall be wronged by a Soldier, the Tryall and Punishment of such Soldier be left to the Civill Justice."[35]

What is most amazing about Monmouth's rebellion is that James refused to use martial law on rebels. Beginning in the 1490s through the 1650s, those committing treason through armed rebellion in England were subject to martial law. The makers of the Petition of Right had sought to stop this practice. For Noy, Selden, Hale, and most common law jurists, martial law could be used when the armies were arrayed in battle, but prisoners taken after the battle had

[32] TNA, WO 89/1, f. 86.

[33] TNA, WO 4/1, f. 12.

[34] Ibid., f. 15.

[35] Ibid., 4/1 f. 47. Also see Ibid., fos. 15, 56-7.

ended should be subject to common law. James and his legal counsel followed this prescriptive advice in 1685.[36] This reservation did not mean that the rebels got off with their lives. The so-called "bloody assizes" have gone down in the annals of English history as an example of James' arbitrary tendencies and of his bloodthirstiness. Yet, these were trials at common law. The rebels came before the Chief Justice of King's Bench, George Jeffreys, who heard and determined the treason trials. The summary executions of traitors by martial law of the sixteenth century were not an option for James II.

Soldiers during times of peace were tried at common law for felony. Many within the army were not happy about this policy. Since the Restoration, many within the armed forces believed themselves fully exempt from civilian law. Soldiers made their opinions felt through action. Often they broke fellow soldiers who had been imprisoned out of civilian jails. Captains purposely hid escaped soldiers from civilian authorities. This attitude of defiance towards the authority of the Common Law in turn caused consternation amongst the leading lights of the Restoration legal regime. In 1663, only three years after the Restoration, Orlando Bridgeman, the Chief Justice of Common Pleas, complained to the Earl of Clarendon, the Lord Chancellor of England that a soldier accused of rape was being protected by his commander, the Earl of Oxford, who refused civilian authorities jurisdiction.[37] Clarendon intervened on behalf of the civilian authorities.

James' government continued Clarendon's policy. In December1686, a soldier stationed in Loughborrough was accused of murdering a townsman. After he was arrested, his comrades helped him escape from jail. His commander then protected him from being caught by putting

[36] For the punishment of the Monmouth rebels, see John Tutchin, *The Bloody Assizes* (Toronto: Law Book, 1929).

[37] Bodl., Clarendon Ms. 80 f. 176-v; *The Autobiography of Sir John Bramston, K.B.* ed. Thomas William Bramston, ESQ (London: Camden Society, 1845), 126-7.

him under military guard. Blathwayt, on the orders of James, reprimanded the commander for failing to punish those who had helped break the soldier out of prison and then instructed him that the soldier needed to be caught and returned to the civil authorities.[38]

The one point of contention between James and common lawyers over felony cases was over punishment of desertion.[39] From the middle of the fifteenth century, English parliaments had granted common law courts jurisdiction over deserting soldiers. Soldiers and sailors in pay who had run away from wars abroad were guilty of felony without benefit of clergy. In successive reigns from Henry VI to Edward VI, parliaments made statutes authorizing common law to punish desertion as a felony.[40]

From a seventeenth century perspective, all of these desertion statutes were problematic. Those made in the reign of both Henry VI and Henry VII contained language that suggested that only soldiers *departing* England could be tried for desertion. The Act of Henry VII read that any soldier "pressed to serve the king upon the sea or upon the land beyond the sea, departs out of the king's service, without license of his captain, that such departing be felony without privilege of clergy."[41] The judges of the seventeenth century interpreted this clause to exclude soldiers pressed to serve *in* England. In the reign of Henry VIII, parliament passed a more extensive statute, which declared that any soldier in pay or pressed to serve the king "upon the sea, or upon the land, or beyond the sea" could be prosecuted for desertion.[42] However, all of the statutes

[38] TNA, WO 4/1 f. 42-43.

[39] Sir William Holdsworth, *A History of English Law* 12 vols. (London: Meuthen, 1922-38), vi. 227-9.

[40] 18 Hen. VI c. 19; 7 Hen. VII c. 1; 3 Hen. VIII c. 5; 2&3 Edw. VI c. 2. The Edwardian statute was repealed by 1 Mar. C. 1 and revived by 4&5 P.&M. C. 5 Another statute, 5 Eliz. c. 5 legalized desertion for the reign of Elizabeth.

[41] 7 Hen VII c. 1.

[42] 3 Hen VIII c. 5.

regarding felony made in the reign of Henry VIII were overturned by the first parliament of his son, Edward VI.[43] In the second year of Edward's reign, another desertion statute was passed, but like the statute made in the reign of Henry VII only specified soldiers serving abroad.[44] The status of desertion was unclear at the outset of the seventeenth century.

In 1601, the chief justices of the realm debated this issue. The chief question was whether or not soldiers meant to go to Ireland to serve in Elizabeth I's wars against Irish rebels could be punished for desertion if they abandoned the army after they had received pay but prior to embarkation.[45] There had been a reading of the desertion statute of Edward VI in 1596 that had affirmed its continued legality in Elizabeth's reign. However, the judges in what came to be called the "Case of Soldiers" dismissed that statute, saying it only involved soldiers deserting after they had gone abroad to serve the Crown in its wars. The judges instead focused on the statutes made in the reigns of Henry VII and Henry VIII, which according to Edward Coke, was "all of one and the same effect, and penned in the same words."[46] Because these two statutes were effectively the same, the statute of Edward VI which declared all statutes made in the reign of Henry VIII relating to felony null and void did not apply to the desertion statute. Thus the Crown could punish deserters who had not departed England at common law for felony.

However, the issue was not resolved. For Restoration jurists disagreed with the decision made in *The Case of Soldiers*. Sir Matthew Hale argued that the desertion statute made in Henry VIII was in fact voided in the reign of Edward VI. *Pace* Coke, Henry VIII's desertion statute was

[43] 1 Ed. VI.

[44] 2&3 Ed. VI c. 2.

[45] Co. Rep. vi. 27; HEHL, Ellesmere Ms. 1686.

[46] Co. Rep vi. 27.

different from that made in the reign of his predecessor because this statute applied to men serving in England and abroad, not just abroad. Further, the statute of Henry VIII declared that it was felony to desert one's lieutenant, where Henry VII's declared it was desertion to abandon one's captain. Hale believed this distinction to be important because this divergence meant that the statute of Henry VIII was in fact introducing a new felony, and therefore would have been voided in the reign of Edward VI.[47] Therefore, for Hale, the desertion statute of Henry VII remained in force: men deserting the Crown's armies abroad could be punished at law for felony. But no statute remained in force that allowed for deserting soldiers stationed in England to be punished at law for felony.

In 1684, the last year of the reign of Charles II, the regime contemplated these varied interpretations after a soldier named James Walden was caught after he had deserted his regiment for the second time. The first time Walden deserted, he had been stationed in the isle of Guernsey, and was thus subject to a court martial. The court decided upon mercy, and allowed him to return to military service. In 1683, Walden was moved to the garrison at Windsor, in England. For the second time, he ran away, but was caught again. William Blathwayt was confused about what to do with Walden and submitted the details of his case to the attorney general, Robert Sawyer. Sawyer argued that Walden could be tried at law for a desertion according to 3 Henry VIII. His reasoning was that the statute "extends to Retainers for land

[47] Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (London, 1778), 671-8. Hale did not explicitly state why he thought the distinction between lieutenant and captain was important, but presumably he had in his mind the distinction between serving a lord lieutenant, who controlled the county militia, and a captain in pay in the army. This distinction would have made sense in the seventeenth century but not in the sixteenth century when the statute was made.

Service within the Realm, as beyond the Sea which the statute of 7 Henry VII Cap: 19 doth not."[48] Sawyer's interpretation was consistent with that of Coke in the 1601 Case of Soldiers.

Throughout James' reign, he and his lawyers interpreted 3 Hen. VIII to be in force during times of peace. During the summer of the Monmouth rebellion – a time of war - James ordered that soldiers in pay in the army against Monmouth could be tried for desertion by court martial.[49] However, those serving in the king's garrisons, who were not chasing after rebels, were to be tried at law for desertion. On 25 July, the king sent a missive to his garrison commanders, who had notified the king of multiple desertions in their ranks. James ordered them to keep caught deserters in custody "to the end they may be punished according to law."[50] That summer, the Old Bailey heard two desertion cases, against the soldiers Samuel Anderton and John Somerset. In both the former soldiers were found guilty by a jury and sentenced to death.[51]

Trying soldiers for desertion at law only became controversial in 1686. Our sources for the controversy are not entirely reliable. According to an anonymous news-book, James in June 1686 ordered that soldiers accused of desertion should be tried at courts martial, "his Majesty finding rather encouragement given to than justice done upon, deserters by the judges at Common Law."[52] It is unclear why James would have become skeptical towards the efficacy of

[48] TNA, WO 26/6 fo. 7.

[49] Ibid., 50-1.

[50] Ibid., 55.

[51] *Old Bailey Proceedings Online*, July 1685 trial of Samuel Anderton (t16850716-20) and trial of John Somerset (t16850716-35).

[52] *CSPD*, 1686-87, no.149.

the law. Another news-book reported that a soldier in September 1686 was executed for desertion at martial law in Plymouth.[53]

In the same month a controversy over punishing soldiers for desertion erupted in London. The new recorder of the City, Sir John Holt, doubted whether the soldier could be tried at law. We do not have a detailed record of his opinion, but it seems likely that Holt's skepticism mirrored Hale's: 3 Hen. VIII had been invalidated during the reign of Edward VI.[54] Holt informed the Lord Chancellor, Baron Jeffreys, who called in nine justices to make a determination. All but Holt declared it was legal for the soldier to be tried. Ultimately a jury found the soldier guilty and he was executed. Three others were executed at the Old Bailey for desertion shortly thereafter.[55] In January 1687, William Blathwayt responded to legal questions raised by one of James' garrison commanders. He instructed them that all soldiers who deserted their colors were to be tried at law.[56] Common law once again could hear and determine cases of desertion.

The issue was not entirely resolved. In April 1687, the attorney general for James brought a case relating to desertion before King's Bench. The soldier, William Dale, had been convicted for desertion at the Reading assizes.[57] However he had been reprieved because the Crown

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[53] Ibid., no. 961.

[54] *CSPD*, 1686-7, no. 962; *The Autobiography of Sir John Bramston*, 245-6.

[55] *CSPD*, 1686-7 no. 962.

[56] TNA, WO 4/1, 45.

[57] There are four reports of this case. *Modern Reports, or Select Cases adjudged in King's Bench, Chancery, Common Pleas, and Exchequer sing the Restoration of Charles II (*hereafter *Mod. Rep*.) ed Thomas Leach, 12 vols. (London, 1793), iii. 124; Sir Bartholomew Shower, *The Reports of Cases adjudged in the Court of King's Bench: during the reigns of Charles the Second, James the Second, and William the Third*, 2 vols. (London, 1794) ii. 653-4; Harvard Law School, Ms. 1071, f. 9v; Lincoln's Inn, Ms. 375, f. 43. There is also correspondence to James'

wanted him to be executed before his regiment in Plymouth, not in Reading, the site of his conviction. Here we have a clear example of the martial philosophy of exemplary punishment. It was no use, according to commanders, for Dale to be punished away from his regiment. Instead, he needed to be killed in front of them, so that they could learn from his execution not to do what he had done.

This rationale was the pretext for bringing Dale before King's Bench. But there was perhaps another, more political, reason for bringing Dale into King's Bench. By the spring of 1687, the very powerful Lord Chancellor of England, Baron Jeffreys, had become deeply dissatisfied with his former protégé, the current chief justice of the King's Bench, Sir Edward Herbert. Aligning himself with the Earl of Sunderland, James' Secretary of State and one of Jeffreys' chief rivals on the Privy Council, Herbert had attacked Jeffreys earlier in the year by "laying open his bribes and corruption" from when he had presided over the western assizes in the summer of 1685.[58] It was even rumored that Herbert would soon replace Jeffreys as Lord Chancellor. That spring, in response to this threat from his younger colleague, Jeffreys attempted to have Herbert removed from his position as chief justice of King's Bench, and to have him replaced with Sir Robert Wright. Herbert sustained this initial attack and remained on King's Bench, while Wright was named chief justice of Common Pleas.[59]

Herbert would not survive Jeffreys' next attack on his position. On 15 April, Dale was brought before King's Bench. The attorney general made a motion that the court should order the

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diplomat the Marquis D'Albeville, probably from Robert Yard. 15 April 1687, LL, D'Albeville Ms. Sometimes the reports the soldier's name to be William Beale. Others claim his name is William Dale.

[58] Quoted in Jeffrey R. Collins, "Herbert, Edward" in *ODNB.*

[59] Anonymous to D'Albeville, 15 April 1687, LL, D'Albeville Ms.

defendant to be executed in Plymouth. According to several reports of the case, Herbert, "in some heat" responded that the motion was highly "irregular, for the prisoner was never before the Court."[60] In one account of the proceedings, an anonymous correspondent told one of James' envoys, the Marquis D'Albeville, that Herbert shouted at the attorney general that "difficultyes were throwne upon the Court on purpose to embarrasse them by people that had cinical ends."[61] Presumably, Herbert believed that Jeffreys knew he would not side with the king's demands. One of the deputy justices, Sir Francis Wythens, also became enraged over the proceedings. Observers speculated that he was incensed by the advancement of Wright to chief justice of Common Pleas. The justices refused to hear the case against Dale.

The Crown did not give in. Three days later, the Attorney General brought in the prisoner through a writ of Habeas Corpus. The records of Dale's trial were brought in for review through Certiorari. The justices now were willing to hear the case, but they refused to side with the king. Both Herbert and Wythens insisted that Dale could not be executed at Plymouth. He either had to be executed in Berkshire (of which Reading was the county seat) or in Middlesex by the prerogative of King's Bench.[62] More importantly during the hearing, both expressed reservations about whether desertion could be punished at common law. In the end both refused to answer the question, instead demurring. Justices continued to hesitate over whether desertion was a felony at common law.

The king was incensed by their actions. The following day, he removed Herbert to Common Pleas, and installed Wright as chief justice of King's Bench. He also removed Wythens

[60] *Mod. Rep.* iii. 124.

[61] Anonymous to Albeville 22 Apr., 1687, LL, D'Albeville Ms.

[62] *Mod. Rep.* iii. 124.

from the bench.[63] Citing numerous precedents, Wright approved the transfer of the execution site to Plymouth. Dale would die in front of his former colleagues so "that by this example other souldiers might be deterred from running from their Colours."[64] Herbert did not take his new position well. One observer noted that "my lord chancellor has got the ascendant ouer the Ch. Justice Herbert which does not a little mortify the latter."[65]

Desertion was punishable at law during James' reign, but a tradition of opposition to its legality remained vibrant. As late as the summer of 1688, juries in London convicted soldiers of desertion at the Old Bailey.[66] These men hung for their crime. But we also have some evidence of resistance: in at least one other desertion case, the grand jury refused to find a true bill.[67] More importantly, very serious legal minds – who in other instances agreed with James' policies – did not think desertion was punishable at law. Hale, Holt, and seemingly Herbert and Wythens, all disagreed that 3 Henry VIII c.5 was a valid authorization to punish desertion as a felony.

Both Charles and James carefully adhered to the dictate that no man be tried for life or limb except by the laws of the realm in times of peace. The conflict over jurisdiction arose over misdemeanor offences. By the 1670s, Charles had re-introduced the Petitioning System, which required that civilian authorities ask permission before they prosecute soldiers for

[63] Anonymous to D'Albeville 22 April 1687, LL, D'Albeville Ms.; *Mod .Rep*. iii. 125.

[64] *Mod. Rep.* iii, 125.

[65] Anonymous to D'Albeville 3 May 1687 LL, D'Albeville Ms.

[66] *Old Bailey Online* May, 1688, trial of Simon How (t16880531-14).

[67] *Bramston's Autobiography*, 276. A judge also attempted to reprieve a soldier for desertion in August 1687 but the king refused to pardon him. Anon. to the Earl of Huntington, 20 Aug. 1687 HEHL, HA Ms. 6999.

misdemeanor.[68] Charles II made his policy regarding misdemeanor clear through a Royal Proclamation he issued in 1672. Charles' army had been miniscule in his first decade of rule, but after declaring war on the Dutch in 1672, he levied more troops and had them stationed throughout England with a plan that they might invade the European continent. Charles declared that his subjects, "when and as often as they shall receive any kind of Injury or Abuse from any of the Souldiers under his Majesties Pay, forthwith to make their Complaints unto the Officer or Officers under whom such Souldiers shall serve."[69] At the outset of James' reign, the king issued a nearly identical proclamation.[70] This petitioning system meant that the army officers stood as gatekeepers for any non-capital suit against soldiers.

We can see how the petitioning system worked during the reign of Charles II through a case heard at the Old Bailey in 1678. In December, two soldiers were indicted for misdemeanor riots.[71] They had attempted to break their friend named Sparks out of a London jail. The two defendants accosted the Constable who had arrested Sparks and told him he was not allowed to arrest a soldier. The constable declared that he did not think Sparks was a soldier and demanded to see the imprisoned man's name on a muster roll. The defendants then flew into a rage, gathered ten of their friends, and threatened to burn down the jail. The constable alerted the Court of Alderman of London. They in turn contacted the Lord General, the Duke of Monmouth, who cashiered the twelve men, and allowed them to be prosecuted at law. The men were fined

[68] The only scholar who has noted the Petition System is John Childs, and only for the reign of Charles II. Childs, *The Army of Charles II*, 78-80.

[69] *By The King. A Proclamation for Prevention of Disorders which may be Committed by Souldiers* (London, 1672).

[70] James II , *By the King: A Declaration* (London, 1685).

[71] *Old Bailey Online* Dec. 1678 (16781211).

50li. However, they were only prosecuted after Monmouth had *given* the London magistrates permission.

In James' reign a more centralized war administration heard and determined petitions made against soldiers. In part the increased supervision of the army by James and his council was related to the personality of the king himself. James was a military man, and wanted to be deeply involved in running the army. Not all complaints against soldiers were funneled into Westminster. But many were.[72]

Let us look at an example from Chester to understand this legal procedure better. In 1688, a long-running feud between a quartermaster, John Eames, and a constable of the town boiled over. In January, Eames with two of his soldier friends ambushed and brutally beat the constable of the town. The governor made a formal complaint to the king, through William Blathwayt. James examined the case, and on 14 February, Blathwayt reported to the commanding colonel, the Earl of Huntington, that James had made a decision. Eames was suspended without pay for 15 days, and that 30 shillings of his pay be given to the injured constable. But before the deal could be accepted, "releases are to be given on all sides, that no further prosecution be had att the Quarter Sessions or else where in relation to this business."[73] Common law had been circumvented.

The chief officer of Eames' regiment had also been circumvented. Through the officer's response, we can understand why the mayor bypassed him, and why the War Office ended up handling many of these misdemeanor cases. About a week before Blathwayt informed the Earl of

[72] See for example, Anonymous to D'Albeville 26 April 1687 LL, D'Albeville Ms.

[73] Blathwayt to Huntington, 14 Feb. 1688, HEHL, HA Ms. 837.

Huntington of the decision against Eames, the acting commander of the regiment, Henry Hastings, complained that he had been left out of the process: "I extremely wondered how a complaint of that kind should happen and I know nothing of it." Hastings then expressed his disapproval that Eames was being prosecuted at all. According to Hastings, the constable had been shouting expletives out of the window at him and had not revealed that he was an officer of the law.[74] Apparently, this omission justified the beating he ended up receiving. Had the matter simply been left to his commander, the constable would not have received justice.

The supervision over military-civilian conflicts was sophisticated. In the spring of 1687, for example, William Blathwayt sent Edward Sackville, a brigadier in the army, on a mission to Salisbury.[75] The town government had complained to Westminster on several occasions about outrages committed by the soldiers stationed in the city against its citizens. Sackville was to "use the best ways and means for the discovery of the truth in relation to any complaint that shall be brought to unto you concerning Our forces in those parts."[76] Sackville was to return with enough information so that James or one of his advisors could resolve the disputes. In other cases, the Crown allowed prosecutions to continue at common law. For example, in January 1686, William Blathwayt informed Lord Dunbarton, the commander of a regiment stationed in Exeter, that upon "information given to his Matie of an assault" made upon a citizen by a lieutenant and nine soldiers, the king commanded that the ten men face trial at law. The lieutenant was to take a recognizance to appear at the next assizes, while the nine soldiers were to be tried at the Mayor's

[74] Hastings to Huntington 8 Feb. 1688, HEHL, HA Ms. 5622.

[75] TNA WO 26/6, f. 112.

[76] Ibid.

Court.[77] Even in this instance, where soldiers were to be tried at law for misdemeanor crimes, it was this process of inquiry that decided it. Law could only function against soldiers when the king or his ministers allowed it.

What happened when civilians refused to ask permission to prosecute soldiers? In the reign of Charles II, the king's Privy Council heard cases where civilians had arrested soldiers without permission. In March 1675, the Council oversaw two cases where civilians had arrested soldiers in London. They ordered the suitors and the bailiffs to attend the Privy Council to resolve the cases.[78] Unfortunately, we do not have any records of further proceedings, if there were any. It is unclear if the suitors were punished for their disobedience to the proclamation.

During the reign of James II, the number of cases of civilians arresting soldiers without permission rose dramatically. How many civilians did James apprehend for illegally arresting soldiers? The number is unclear because colonels in regiments probably handled at least some of these cases locally. These local resolutions were probably more common in garrisons far away from London. In July 1687, for example, one of the Earl of Huntington's surrogates named Ingram reported from Carlisle that one of his soldiers had been arrested by two bailiffs. In spite of the bailiff's "insolence" Ingram managed to free the soldier. He promised to report the two to the High Sheriff so he would "punish ye offenders for arresting ye soldier without leaue."[79] Unfortunately, we do not know how these men were to be punished. And we do not know how many of these cases there were.

[77] TNA, WO 4/1 f. 26.

[78] TNA, PC 2/64, f. 364.

[79] Ingram to Carlisle 4 July 1687, HEHL, HA Ms. 6998.

We know for certain that the War Office issued warrants to apprehend no fewer than 145 men and women for arresting soldiers without permission.[80] These warrants only exist for James' reign. They have been completely ignored by historians. But along with providing new opportunities for understanding civil-military relations, these sources offer problems.

The warrants always commanded one of James' chamber messengers in ordinary to apprehend between one and five people who had been involved in an arrest of a soldier. It usually commanded the messenger to apprehend the suitor and those that had actually arrested the soldier: the bailiffs or constables involved. Sometimes, the warrant was signed by the Earl of Sunderland, one of James' secretaries of state, signifying that he perhaps had the responsibility of overseeing these cases. But the warrant suggests that the king was personally involved. It commanded the messenger to bring those named "before us to answer for their contempt."[81] We do not know, with one exception, where the alleged crime took place. And we do not know how the civilians were punished for arresting the soldier, although we can guess that they served a short time in jail for contempt.[82] We do not know what types of crimes the soldiers had supposedly committed in order to get themselves arrested. However, it is likely that many were arrested for debt. The Crown's finances, while better off than in the early seventeenth century, were not stable. Soldiers' pay was in at least four months in arrears after 1667.[83] Soldiers would thus often fall into debt with the civilian inhabitants of towns near where they were stationed, leading to indebtedness and eventually jail time unless the Crown intervened on the soldier's

[80] All of these warrants can be found in TNA, WO 26/6.

[81] See, for example, TNA, WO 26/6, f. 73.

[82] We can make this guess because the Privy Council imprisoned civilians for other crimes against soldiers, like taking their horses for brief periods of time. See TNA, PC 2/71, f. 434.

[83] Childs, *The Army of Charles II*, 50-53.

behalf. Further, we only have one record of an actual hearing taking place as a result of civilians being apprehended. In December 1687, a messenger in ordinary apprehended John Harper, who was eventually brought before the king in council to answer for arresting Robert Meldrum, a servant in Colonel Hamilton's regiment.[84] The Privy Council decided that Meldrum, because he was only a servant of the regiment, was not exempt from prosecution. Unfortunately, Meldrum's civilian status prevents us from seeing what would have happened to those apprehended had they actually arrested a soldier in pay without permission.

The final problem with the warrants is that they end abruptly in the spring of 1688. The final warrant does reveal a potential reason for why they end. On 12 April, the Earl of Sunderland issued a warrant for the king's chamberlain to apprehend John Wilks, a bailiff, for arresting a soldier without leave of his commanding officer and carrying him to Newgate.[85] The warrant also stated that Wilks, and "all Justices of the Peace" were to attend a court martial at the Horse Guards. This is the one and only warrant that references a court martial, and it is the only warrant that references Justices of the Peace. It seems unlikely that the soldier had been tried. Instead, it is more likely that the JPs had agreed to imprison him in Newgate. It appears that these cases were now going to be heard by a sitting court martial in London. It is likely that the Judge Advocate, or the presiding officer of the court, now issued the warrants of apprehension. These records have not survived.[86]

[84] TNA, WO 26/6, f. 117; TNA, PC 2/71, f. 565.

[85] TNA, WO 26/6 f. 123.

[86] The only record for this court martial is a warrant from the lord general to the judge advocate general to convene a court martial to try misdemeanor offences in July 1688. BL, Add. Ms. 9760, f. 7.

Indeed, we have no records of this court. But we do know that it was formed in March 1688. The Judge Advocate General of James' reign, George Clark, mentioned in his autobiography that all legal issues involving the army from that period forward were heard before the Horse Guards court martial.[87] This claim was not strictly true. John Bramston, in his memoirs, reported that the court martial only had powers to hear and determine all "misdemeanors of Officers and Souldiers; as also to heare and determin all petitions or compleints that shall be brought before them by any other person."[88] Felonies remained in the purview of common law courts. Further, the king, ever concerned about civil-military relations, only allowed the court to make recommendations: he would make the final decision in cases involving civilians. By the summer of 1688, civilians were coming before courts martial in England. Judging from the warrant issued by Sunderland in March, the court martial had the powers to punish, if only by imprisonment, those who had arrested soldiers without leave of the commanding officer. Further the court would make all recommendations for civilians seeking redress against soldiers. This fact is at first glance chilling. But the Stuarts and their army officers had been taking misdemeanor cases out of the hands of civilian legal officers for a long time prior to 1688. The sitting Horse Guards court martial was simply the centralization of a pre-existing process.

There is no evidence that legal officers provided a systematic protest against the Stuarts' policies. Indeed, we have already seen that London magistrates in 1678 very carefully obeyed the petitioning system. Likewise, the governor of Chester, before he did anything to the

[87] "The Autobiography of George Clark" in *HMC* Leyborne-Popham MS, (London, 1899), 265.

[88] *The Autobiography of John Bramston*, 306; Narcissus Lutrell, *A Briefe Historical Relation of State Affairs from September 1678 to April 1714* 6 vols. (Westmead, Farnborough, Hants.: Gregg International Pubishers, 1969), i. 434; Childs, *The Army, James II, and the Glorious Revolution*, 91-2.

troublemaker John Eames, petitioned the king for justice. Nevertheless, some of the most prominent judges of the Restoration made it clear that they believed the petitioning system was illegal. It should surprise us little by now that Sir Matthew Hale was one of the chief opponents of this system. In Michaelmas 1674, a captain of one of Colonel Russell's companies stationed in London and his sergeant came before King's Bench, of which Hale was chief justice. In the so-called "case of Captain C", the soldiers were accused of rescuing soldier who had been imprisoned for debt.[89] When asked to answer for his actions, the captain replied that "his soldiers had done well and he would justify it."[90] He argued that while he did not know the law very well, he was under the impression that a civilian officer could not arrest a soldier without "leave of his officer." He was therefore justified in breaking him out of jail.

Hale did not like this answer. With every justice reportedly agreeing with him, Hale replied that "every officer and soldier is as liable to be arrested as a tradesman or any other person whatsoever."[91] He was just getting started. Hale scolded the soldiers, telling them that as the king's servants they were required to uphold the laws of the king, not to "exempt yourself from the authority of the laws." The petitioning system as outlined by Charles' proclamation was at best a "a civility" between civilian and military authorities, but it was not a law. Hale then told the soldiers that they should be tried for treason. Ultimately, they were tried for riot, a misdemeanor offence.

The justices of King's Bench during James' reign also had reservations about the petitioning system, although they were not as diametrically opposed to it as Hale. In the spring of

[89] "The Case of Captain C" I Ventris 25 Chas. II, 167-8.

[90] Ibid., 168.

[91] Ibid.

1686, King's Bench heard a request from James to commit a constable who had arrested a soldier without permission from the king.[92] To make matters worse, the constable had arrested the soldier, while his regiment was drawn up for review in Hyde Park. The king assured the chief justice that "he would not protect any one of his guards against the course of the law no more than the meanest of his Subjects." But the constable had attempted to arrest the soldier in one of the king's parks, outside his jurisdiction. The report is unclear on what happened after this assurance, but it seems as though the justices complied with the king's wishes.

However, the justices of the King's Bench refuted the legality of the warrants of apprehension issued by the War Office. In Michaelmas 1686, Samuel Corbett sued for a writ of Habeas Corpus.[93] The War Office had issued a warrant of apprehension for him on 8 October for arresting John Brooks, a soldier in Werden's regiment of horse.[94] King's Bench reviewed the apprehension warrant. The justices bailed Corbett and ruled that the warrant was not legally valid because "the warrant was under the king's own hand, without seal, or the hand of any secretary or officer of state, or justice."[95] The report of this case is cryptic. Further, the War Office warrants are only records, often shorthand records, of the issued warrant. It is not clear if the warrant issued against Corbett was simply defective or whether justices could bail others along a similar rationale.

Others apprehended also sued for Habeas Corpus. That same term, Charles Wilson, John Latham, Edward Sommers, William Armstrong, and Elizabeth Bayly all sued for Habeas

[92] Harvard Law School, Ms. 1071, fos. 6v-7.

[93] TNA, KB 21/29/145/HC (Michaelmas, 1686)

[94] TNA, WO 26/6, f. 101.

[95] Sir Bartholomew Shower, *Reports*, ii. 638.

Corpus.[96] A warrant of apprehension had been issued for all five of them on 6 October for being involved in the arrest of George Hule, the master gunner of Chepstow castle.[97] It is unclear whether the justices bailed the prisoners. Wilson, one of the arresters, continued to pursue legal action against Hule. The next year, Wilson sued an outlawry against Hule for assault and battery. Once again the War Office issued an apprehension warrant for Wilson.[98] He was ordered to appear before king and council. As always, we have no record of what happened to Wilson during this hearing.

These Habeas Corpus records suggest some conflict between the judiciary and the War Office, but not outright revolt. In general, James wanted the soldiers' wrongs redressed, but not always at common law. He never attempted to remove soldiers who had committed felony from the purview of the law. Indeed the opposite was true: James sought to help civilian officers imprison soldiers accused of felony. His more centralized administration also provided relief for those seeking redress against soldiers who had committed misdemeanors, even if that same system removed soldiers from the purview of common law. Soldiers could not hide behind sympathetic local officers, a practice that was loudly complained about during the 1620s. Indeed, one of the most controversial legal questions had nothing to do with martial law or exemption. Instead it was whether common law had cognizance over desertion.

Making the Mutiny Act

[96] TNA, KB 21/29/145/HC (Michaelmas, 1686).Two others, Charles Fisher and Robert West, also sued Habeas Corpus after having been apprehended. TNA, WO 26/6, f. 99; TNA, KB 21/29/145/HC (Michaelmas, 1686).

[97] TNA, WO 26/6, f. 101.

[98] TNA, WO 26/6, f. 113.

James' reign did not last long.[99] With the birth of a son in the summer of 1688, Protestant Englishmen and women began to realize that they might permanently live under Catholic monarchs. Further James' policies of religious toleration towards Protestant dissenters and Catholics alienated many of the conservative Tory Anglicans who had supported him early on in his reign. By 1688, the ecclesiastical establishment was in full revolt against the king. Seven Anglican bishops issued a pamphlet explaining why they refused to proclaim James' Declaration of Indulgence – a proclamation that set aside the penal code against Catholics and dissenters. James charged them with seditious libel. But he could not gain a conviction. On the day the bishops were acquitted, seven alienated nobles sent a letter to William of Orange that invited him to invade England. Several months later, William obliged, in no small measure because English resources would help him in his war effort against Louis XIV of France. Many officers within the army abandoned James, who quickly fled.[100] By February 1689, a convention Parliament had named William of Orange and Mary king and queen of England.

As part of the deal, William and Mary agreed to the Declaration of Rights, which among other demands asserted that no standing army could exist in England without the consent of Parliament. With this new found power over England's military forces, Parliament now also had the responsibility over its discipline. It thus inherited many of the headaches that the Stuart monarchs endured due to undisciplined soldiers.[101]

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[99] The best narrative history of the Glorious Revolution is Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685-1720* (New York: Penguin Books, 2006). For a controversial new interpretation of the Revolution, see Steven Pincus, *1688: The First Modern Revolution* (New Haven: Yale University Press, 2009). For a new interpretation of the Revolution that stresses its reactionary nature, see Scott Sowerby, *Making Toleration: The Repealers and the Glorious Revolution* (Cambridge, MA: Harvard University Press, 2013).

[100] For the conspiracy amongst army officers against James, see Childs, *The Army, James II, and the Glorious Revolution*, 138-67.

[101] Childs, *The British Army of William III, 1688-1702*, 86.

Throughout the winter of 1689, English soldiers mutinied and deserted in large numbers due to continued loyalty to James II, and resistance to attempts by William III to ship them to the Netherlands to fight the French. On 1 March, the MP Hugh Boscawen spoke against the depredations committed by soldiers who had deserted their regiments. Bands had killed a man in Cornwall. Many soldiers were fleeing to Scotland.[102] Others in the Commons worried about the implications of Boscowen's speech. Surely, he did not mean the legalization of martial law?[103]

On 13 March Parliament attempted to resolve the growing disorder in its armies. It ordered a committee to draft a bill that would legalize punishment for mutineers and deserters.[104] Understanding the composition of the Committee will help us understand the nature of the Mutiny Act. The Commons delegated the responsibility of crafting this bill to some of its most important MPs.[105] Many of the men on the committee had helped craft the Declaration of Rights. Four names in particular stand out. On the committee sat Sir John Holt, William Sacheverell, Sir William Williams, and Sir Thomas Lee. Holt, we will recall, had refused to convict a soldier of desertion at the Old Bailey in the fall of 1686. His obstinacy eventually led to his resignation as Recorder of London. Holt, in only a couple of months, would become the Chief Justice of King's Bench. But for now, he sat on the Committee that by the end of the month would authorize martial law in England. Lee, Sacheverell, and Williams were part of the opposition to Charles II's policies in the 1670s. All three had been vociferous opponents of Charles' standing army. Lee made no less than 18 speeches in the Commons throughout the 1670s attacking the standing

[102] Anchitell Grey, *Debates of the House of Commons from the year 1667 to 1694* 10 vols. (London, 1763), ix. 131.

[103] Ibid., 132

[104] *CJ*, x. 47.

[105] *CJ*, x. 47. The members of the committee are briefly discussed in Schwoerer, *No Standing Armies*, 152.

army. Sacheverell made 16.[106] Williams had also made speeches in the 1670s against the standing army. All had argued for disbanding the army and replacing it with a militia. All had argued that soldiers should be subject to common law, not to martial law. But others on the committee, at least the first committee that met, would have been more in favor of the legalization of martial law. Several of the committee members were former army officers under James II who had deserted the king immediately prior to William's invasion.[107] Through this combination of men who probably possessed wildly different ideas about jurisdiction, a bill was crafted.

We know almost nothing about the details of the making of the bill. On 15 March, the Commons learned of a major mutiny in Lord Dunbarton's Regiment at Ipswich. Many MPs became more urgent about the passing of a Mutiny Act. On 19, the bill was read a second time and recommitted to a slightly different committee. Holt, Lee, Williams, and Sacheverell remained on the committee, but the military officers were excised. On 28 March, Parliament passed the Mutiny Act, which legalized the punishment of life and limb by court martial for desertion and mutiny, and sedition.

In spite of the fact that we know little about its making, we can nevertheless understand the provisions in the Mutiny Act by contextualizing it within a seventeenth century martial law tradition. We can understand some of the provisions as attempts to resolve the legal problems of James' reign. And we can guess at why specific language was written into the Act through our knowledge of some of the members of the committee who wrote the bill. We will do this first by examining the justifications the crafters used for martial law, their reaffirmation of the Petition of

[106] Schwoerer, *No Standing Armies!* 96.

[107] For their mutiny, see Childs, *British Army of William III*, 86.

Right's ban on exemption, how they circumscribed martial law, and finally the procedural changes they made to courts martial.

The preface of the Mutiny Act was a meditation on the Petition of Right. The writers began by asserting, as signified by the Declaration of Rights, that a standing army was only legal in England if it was authorized by Parliament. It then declared that punishment of life and limb by martial law was illegal in England, as was made clear in the Petition of Right. The Mutiny Act was crafted for one reason: to punish deserters and mutineers by martial law. Yet the only time the writers actually wrote the phrase martial law, they did so negatively. The crafters did this because many of them had fought for much of their political careers attacking the idea of a standing army and the legalization of martial law – a key symbol of military despotism. Now they were legalizing it. The law of martial law that had been generated in 1628 embarrassed MPs, but it could not stop them from legalizing martial law through statute.

The preface provided two justifications for the use of martial law. The first had to do with the current "state" of England. The country was in a "state of war." The crafters defined the state of war by identifying the threat of James II's hostile forces that had gathered in Ireland, which threatened the "Common safety of the Kingdome" and the "Protestant Religion."[108] The makers were thus making a claim that the uncertainty of the current state of affairs justified martial law. And we can see that its crafters thought it to be a temporary alternative to common law because they only allowed the statute to remain in force for six months.

The significance of the Mutiny Act's temporal justification was its complete abandonment of the notion of "internal war." Forces arrayed in another kingdom that perhaps

[108] Ibid.

threatened England was by seventeenth century standards a stretch for the allowance of martial law. The tradition of Coke, and one taken up by Hale, was that martial law could only be used when the Courts of Westminster were closed. For Noy, it was when an army was arrayed in the field against an invading enemy or rebel army with their banner raised. In the empire, it was during a state of rebellion or insurrection. But now war alone, not internal war, justified martial law.

The second justification for the use of martial law was that it, unlike common law, would instill order in the English army through terror. The Act declared that martial law was necessary so that soldiers who stirred up sedition, mutiny, or who deserted "be brought to a more Exemplary and speedy Punishment than the Usuall Formes of Law will allow."[109] We can detect the influence of the military men on the committee through this clause because this justification was a standard military rationale for martial law. In order to teach soldiers how to behave in the martial polity, commanders had to swiftly, brutally, and visibly punish those who broke the rules. Common law could not teach such a lesson because it was too slow. Therefore martial law was necessary.

The Act gave martial law a circumscribed jurisdiction. It circumscribed it first by only allowing martial law to be used on soldiers. Soldiers were defined by those who had voluntarily signed up for the army, who had taken the oath of a soldier, and who had the articles of war read to them. If these qualifications had not been met, a court martial could not try someone.[110] However, this qualification was not new to the history of martial law. The Crown had often

[109] Ibid.

[110] In our first complete set of courts martial records in England, from the reign of George I, the court always asked the defendant if they were a soldier in pay, and if they had taken the oath. TNA, WO 71/122.

delimited martial law jurisdiction to soldiers in its overseas dominions. And James II, as we have seen, was very careful until 1688 not to involve civilians in courts martial. It seems likely that the makers of the Mutiny included desertion due to doubts over whether soldiers in England could be punished at law for it. Given that Holt was an influential MP, it seems likely that his interpretation that common law had no cognizance over desertion had prevailed with the 1689 Parliament. Further, we know that no desertion cases were heard at the Old Bailey in the 1690s. Martial law, albeit for temporary periods, now had jurisdiction over desertion.

This measure was initially meant to be a stop-gap. But in the end – due to the continued re-passage of the Mutiny Act in the eighteenth and nineteenth centuries –the resistance by Hale, Holt, Herbert, gave common law jurisdiction a self-inflicted wound. Had these jurists followed Coke's decision in the Case of Soldiers, they could have continued a tradition dating back to the middle of the fifteenth century of common law courts hearing and determining cases of desertion. Instead, their refusals put the Revolutionary Parliament in a legal quandary that was resolved in favor of martial law.

While the crafters of the Mutiny Act temporarily overturned the Petition of Right's provision that no man be tried by life and limb except by the laws of the realm, they reaffirmed the Petition's demand that no man could claim exemption from the laws of the land. It seems as though the Mutiny Act failed to remove the petitioning system completely. While the warrants of apprehension so apparent in James' reign cease in William's, commanding officers still expected to be notified before a civilian magistrate arrested a soldier for misdemeanor.[111] In Carlisle in 1690, soldiers broke one of the supposed companions out of jail, claiming the man was a soldier

[111] BL, Add. Ms. 9760, fos. 7-9.

who had been arrested without permission of his commanding officer. The magistrates, rather than citing the provision in the Mutiny Act, which had been re-passed in 1690, instead justified their jailing the man by claiming he was not in fact a soldier in pay. Tensions over misdemeanor crimes committed by soldiers continued throughout the 1690s. The Mutiny Act was not a cure-all for civil-military relations.

The Mutiny Act mandated that all courts martial contain at least thirteen members and that in cases involving life and limb, the court martial needed nine votes for conviction in order to pass the death penalty. Those who made the Mutiny Act wanted to ensure that at least twelve men heard and determined a trial. Courts martial might not be the law of the realm, but it could be construed as a trial by peers if twelve men heard a case. Both of these stipulations suggest the discomfort the makers of the Mutiny Act had towards martial law procedure. Just like the Parliaments of the 1640s that mandated twelve to sit before a quorum was met in their garrison court martial, the 1689 Parliament wanted to make courts martial a trial by peers.

Beyond 1689

Six months turned into nine years. By 1698, the Mutiny Act had been passed and re-passed, with Parliament still justifying the measure due to England's continued military engagement against the king of France. The sun, however, could still set on the sunset clause. When war ended in 1698, some Members of the Commons and the Lords fought to end the practice of the standing army in England.[112] They succeeded in ensuring that the Mutiny Act did not get re-passed. When war broke out again in 1702 in the reign of Queen Anne, once again

[112] Schwoerer, *No Standing Armies!* 155-87.

Parliament re-passed the Mutiny Act.[113] Through the remainder of Anne's reign, the Mutiny Act was continually re-passed with the same justification. War – no longer internal war – was a successful discursive strategy for authorizing martial law. But by 1718, England was once again at peace. The nation had survived the Hanoverian succession – which gave the throne to the German George I instead of the Catholic Stuart heirs of the dispossessed James II – and had survived the wars against the French. But George and his advisors still wanted a standing army in England. They wanted to punish those soldiers at martial law.

Many within the House of Lords believed that this authorization was a betrayal of those sacred documents – Magna Charta, 25 Edward III and the Petition of Right – they wanted to uphold. A group of Lords, who opposed the renewal of the Mutiny Act, declared that "the Exercise of martial law in Time of Peace, with such power as is given by this bill…[is] repugnant to Magna Charta, and inconsistent with the Fundamental Rights and Liberties of a free people."[114] This group, however, could not convince the rest of their colleagues, who argued that martial law was necessary to keep the soldiers in due awe and obedience. The resulting Mutiny Act made no temporal claims to jurisdiction. Instead, it claimed that "no man may be subjected in the time of peace to any kind of Punishment within the Realm by Martial Law.' Nevertheless, the Act went on to declare that was necessary to punish soldiers by martial law to keep them in obedience. In other words, Parliament thought martial law was illegal unless it declared it to be legal. From this point forward the Mutiny Act was more or less automatically re-passed on an annual basis.

[113] For an overview of the passage of the Mutiny Acts in this period, see Frederick Bernays Wiener, *Civilians under Military Justice: The British Practice since 1689, Especially in North America* (Chicago: University of Chicago Press, 1967), 6-31.

[114] *LJ*, xx. 618.

Martial law jurisdiction expanded in the early eighteenth century. The most infamous expansion was the Riot Act, which was passed in 1715 so that local justices of the peace could suppress disorders in the aftermath of successive pro-Jacobite riots immediately preceding and succeeding George I's coronation in 1715.[115] The powers of summary martial law – while not explicitly stated – were granted in the Act, which stated that the current punishments for riot "are not adequate."[116] It commanded that JPs and other local officials could order gatherings of more than twelve men to disperse. They would do so by publicly proclaiming that the king ordered the rioters to disperse. If after an hour the rioters did not disperse, the magistrate could apprehend the rioter, and bring them before a justice of the peace or other law officer so that they might be tried for felony. These officers had a pre-emptive pardon should they kill or maim Resistors of arrest. Through this measure, not all that different from the martial law proclamations aimed at rioters in the 1590s, the army and other magistrates obtained powers of conviction by the senses.[117]

Even the Mutiny Acts – designed to restrict martial law to soldiers – began to grant commanders a wider cognizance. By 1716, the Mutiny Acts restricted martial law jurisdiction to those wrongs which English common law "did not know."[118] By 1720, commanders began claiming that their cognizance was widened provided that the civilian courts were closed, un-

[115] 1 Geo. St. 2 c. 5.

[116] *An Act for Preventing Tumults and Riotous Assemblies, and for the More Speedy and Effectual Punishing Rioters* (London, 1715), 243.

[117] Rioting in the eighteenth century has received widespread attention from historians, most notably by E.P. Thompson. "The Moral Economy of the English Crowd in the Eighteenth Century" *Past & Present* 50 (Feb., 1971): 76-136. H.T. Dickinson, "Popular Politics in the Age of Walpole" in *Britain in the Age of Walpole* ed. Jeremy Black (Basingstoke: Palgrave, 1984), 45-68; The most notorious use of the riot act came in 1819 when Manchester magistrates attempted to quell a worker's protest which caused the so-called "Peterloo Massacre." See Robert Walmsley, *Peterloo: The Case Reopened* (New York: A.M. Kelly, 1969); F.M. Leventhal, "Why a Massacre? The Responsibility of Peterloo" *The Journal of Interdisciplinary History* 2:1 (Summer, 1971): 109-18.

[118] Wiener, *Civilians under Military Justice*, 14-15.

cooperative, or non-existent. According to article of war 44, if civilian courts refused to try a soldier within eight days, the commander could try him by martial law. Quickly, the eight days provision was dropped. After 1722, in the garrisons of Minorca and Gibraltar "or in other places beyond the Seas" commanders had powers to put their troops to trial by martial law for those wrongs usually reserved for common law prosecution because civilian jurisdictions were not in operation.[119] It is not difficult to trace where this discourse came from: the reversal of the trial of Thomas of Lancaster. The courts being closed, martial law became an acceptable alternative to common law. This experiment, which we have already seen in operation in Jamaica, was being replicated by English commanders who replicated the technology and disseminated it through printed articles of war. But could commanders punish civilians at martial law when the civilian courts were inoperable? Commanders and governors said unequivocally yes. Judge advocates general stationed in England said no. Over the course of the eighteenth and nineteenth centuries a conflict of interpretation raged between those stationed in England and those commanding troops abroad who used discourses relating to the Petition of Right to justify an all-encompassing form of martial law that included civilians.[120]

The 1628 law of martial law shackled monarchs, but only embarrassed MPs. With its new charge to take command of the army in 1689, MPs, within months, overturned through statute those constraints which many of them had fought tooth and nail to maintain during the reigns of Charles II and James II. Internal war became war. War became peace. Mutiny and desertion became the entire articles of war. Riot could now be punished by summary execution.

[119] Wiener, *Civilians under Military Justice*, 14. The number of the article changed with each new printing of the articles of war.

[120] For these disputes in the eighteenth century, see Wiener, *Civilians under Military Justice*, 32-165.

Innovation, to paraphrase the 1628 MP Robert Mason's phrase, comes in gently at first, and grows strong by degrees.

The irony of the history of martial law in the eighteenth century is that the arguments made in 1628 survived more often post-1689 as discourses that justified martial law and not as discourses that restrained its jurisdiction. Parliament overrode the boundaries set in 1628 through statute. But governors and generals in English dominions abroad maintained them so that they might use martial law for all kinds of legal problems when the courts were inoperable, non-existent, or inconvenient. This military takeover of the legal apparatus – how we now conceive of martial law – was the product of using an old discourse in a new way. By the early eighteenth century, the seeds of modern martial law had been sown.

Conclusion

In 1588, the Court of Star Chamber heard a case against two London sheriffs who had summarily whipped two women for being "harlots." The court found that the sheriffs, who had convicted the women by their senses, had failed to prosecute according to law, and ordered them to make a public apology to the women. William Cecil, Lord Burghley, argued in the case that the two sheriffs had violated chapter 29 of Magna Charta, which protected subjects' "freedom" from arbitrary imprisonment and conviction without process. According to Cecil, "Noe countrye butt ours (noe nott Fraunce) can challenge [but] by the laws of their Realme."[1] Historians have often read this decision as Cecil defending due process. Yet, he made this statement, after all, in a prerogative court that had just convicted two officers who had probably been arraigned not by an indictment proven true by a grand jury but by an informal plaint or information. Further, only a year later, Cecil participated in the authorization of much more expansive summary powers – albeit ones supervised by the Privy Council – to provost marshals across the realm. By the 1590s he was a participant in granting city marshals in London, who had responsibilities not dissimilar to the sheriffs he helped punish in 1588, summary martial law powers against vagrants and rioters. Punishment by the laws of the realm in 1588 was not the same as punishment by what we would now call due process.

Instead, the laws of the realm were many, and used many types of process. Martial law was one of them. Its rules and its jurisdiction – while under near constant transformation – guided those empowered with martial law. Through them, Crown officers exercised judicial powers meant to terrorize subjects into obedience through exemplary punishment of offenders who were potent threats to Crown authority. Martial law was not a means by which monarchs

[1] Quoted in Christopher Brooks, *Law, Politics and Society* (Cambridge: Cambridge University Press, 2008), 403.

avoided or bypassed law. They had no need to bypass laws, for English monarchs possessed them, and channeled their power through them. Martial law instead allowed them to bypass legal appointees who might engage in lawlessness: jurors.

The fights over martial law jurisdiction in the seventeenth century have obscured our understanding of martial law's place within the English legal universe. These debates produced pithy platitudes that legal historians have subsequently taken as truths about English law: "England knew no martial law," "martial law was not a law at all," and martial law was simply the will of the commander. These statements have come down to us pretending to be explanations of martial law's nature and of its incompatibility with the English legal tradition. This myth has been perpetuated by the tradition of anti-standing army rhetoric. The various non-monarchical governments in the aftermath of 1649 earned the perhaps undeserved reputation of being puppets to an arbitrary military power. Because martial law was associated with the army, jurists, from the Restoration onwards, associated martial law with the arbitrary power they believed had destroyed the monarchy. This association has only become stronger as time has passed. With the solidification of the military/civil distinction at the end of the seventeenth century, jurists and political theorists have understood that the civil power was the legitimate and law-wielding form of government that had to at all costs control the military power, a necessary if dangerous force that threatened arbitrary dictatorship if left unchecked. Martial law was a part of this power, and thus divorced from the field of law.

Far from being incompatible with the English legal tradition, martial law – unlike so many of the other jurisdictions on William Fleetwood's list – has survived because it is such an alluring complement to trial by jury. As long as grand and petty juries possessed discretion to determine verdicts, as long as common law process was seen as being too slow, and as long as

common law substance was seen as being too lenient, Crown officers, members of Parliament, and colonial governors have been tempted to employ martial law either as an all-encompassing replacement to common law or as a complement to common law process for certain offences. The granting of discretion to the often unreliable juror has in turn created the desire in certain instances to prevent the delegation of that same discretion.

While common lawyers triumphed in jurisdictional battles over other courts of law, Parliament, through statute, preserved martial law as one of the laws of the realm. Since A.V. Dicey, scholars of the law have often argued that Parliamentary sovereignty complemented the "rule of law:" an idea that the discretion of all political leaders were bound by abstract rules.[2] Yet at least when it came to common law jurisdiction, Parliament authorized through statute martial law, and in so doing, overturned the law of martial law created by lawyers who had sat in the 1628 parliament, and who had participated in crafting the Petition of Right. In doing so, Parliament granted martial law a lasting jurisdiction in England even while common law subsumed the jurisdictions of other courts. MPs were not always the friends of the common law tradition that scholars have made them out to be.

Rather than being the conceptual opposite to law, the Crown made martial law, and incorporated it into a complex, multi-jurisdictional, multi-procedural legal order that little resembled the accounts of Crown versus Parliament or ancient constitution versus prerogative that fill the constitutional histories of the seventeenth century. Instead, some of the most pivotal moments of the seventeenth century can only be understood through a multi-jurisdictional framework. The politics of martial law in 1628 were not fought through the prism of the ancient constitution. They were fought over the parameters and jurisdiction of the Court of the Verge: a

[2] A.V. Dicey, *Introduction to the Study of the Law of the Constitution.* London: Macmillan, 1924.

court that has now largely been forgotten. The trial of Charles I was an exemplar of the multiple procedural forms lawyers had at their disposal in 1649; so too were the high courts of justice, which have for so long been derided and ignored by legal historians. The politics over jurisdiction and procedure were intense; they were also complex. No summary understanding of the "common law mind" will help us recover these battles. Nor will an anachronism like the Ancient Constitution explain seventeenth century legal debates. Instead, "constitutional historians" need to become legal historians.

Part of this recovery of the jurisdictional politics of the seventeenth century includes a politics of what constituted a state of war. Rather than understanding time as uniform, or as under the discretion of the monarch, jurists and subjects from England, Ireland, Virginia, St. Helena, and Jamaica debated, contemplated, and adapted temporal concepts when they engaged in jurisdictional politics. In other words, time did not necessarily differentiate between a zone of law and a zone of lawlessness, but rather differentiated jurisdictions. Ideas about time, and who controlled it were many. Some thought the Courts of Westminster signified – either by being open or by being shut – states of time. Others looked either to the king's banner, or that of the enemy. Some, including William Noy, granted powers of time to the enemy, and in so doing successfully circumscribed martial law jurisdiction.

So much of what was known about martial law in the seventeenth century has now been forgotten. But it is impossible to fully understand the history of English laws without remembering how martial law was made, why it was used, and how – and how successfully – it was circumscribed. Many of the great political clashes of the seventeenth century included debates over martial law. The English Commonwealth used it as one among many legal strategies when it tried Charles I. Governors and Chartered Company officials utilized martial

law throughout English dominions abroad. Most of the great rebellions in both England and its empire have involved the use of martial law. And, while English legal commentators have wished otherwise, martial law continued to be a useful strategy for the Crown, Parliament, colonial governors, and post-colonial states into the twentieth century. It remains one of many English laws.

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