1 Making martial law

It is not a coincidence that one of the earliest known usages of the phrase “martial law” came in a debate over process. The debate was between Sir Thomas More and Christopher St. German over procedures in the king’s ecclesiastical courts. They were controversial because ecclesiastical judges could arraign a suspect based upon secret information that was transformed into a formal accusation by an officer of the court through the power of his office (*ex officio*). Further, judges, and not juries, determined the case. While in some ways unique, the ecclesiastical courts shared much in common with other courts that utilized procedure by information. Heavily critical of it, St. German argued that “cruell judges” might be able to punish innocents through these procedures because they granted them too much discretion. More responded that


if clerics used the more elaborate procedures demanded by St. German, “the stretys were lykely to swarme full of heretykes.”\(^5\) Faced with yet another attack by St. German, More, in his *Debellation of Salem and Bizance*, continued his defense of ecclesiastical procedure by comparing it to the procedures the king used to punish treason.\(^6\) While indictments were generally the best way to proceed, nevertheless sometimes “judges myght procede and put felons to answere without endyghtementes/ as in treason is vsed in thys realme by the lawe marshall vppon warre rered.”\(^7\) More concluded his thought by stating that though it was good to trust juries, and that common law was in general better than martial law, sometimes “yet myght we truste the iudges as well.”\(^8\)

Martial law was the most drastic measure the Tudors used to control juries.\(^9\) While St. German’s position was in this moment on the side of Henry VIII, the king and his successors at various points throughout the sixteenth century agreed with More that judges alone should be entrusted with determining cases of treason and of felony. The reformations loomed large in their decisions to use these swifter and more controllable procedures. Wars with France, Spain, and Scotland, and rebellions in Ireland likewise contributed to further experimentation with martial law. In difficult cases involving potential blood sanctions where Crown authorities did not want the delay of common law procedure, when they worried that juries might refuse to convict defendants, or when they believed juries might be overzealous in their prosecutions of soldiers, they opted for procedure by written information or public suspicion instead of an indictment by grand jury where a Crown judge instead of a petty jury heard and determined the case and was allowed to punish by taking the life or limb of a convict: martial law. Before we see how martial law was used, let us first examine how the Crown delegated its jurisdiction.

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The first commissions

The similarities between a commission of martial law and a commission of oyer and terminer are striking. The differences are just as striking. Let us examine a commission issued to Sir Edward Bellingham, the new lord deputy of Ireland, in 1548 in order to better understand the relationship between martial law and common law.

The commission was not unusual for its time. But because of the relative newness of the concept of martial law, the writer of the commission, who was probably the clerk of the Crown Office in Chancery, Edmund Martin, outlined in very specific terms what he believed constituted martial law.

The commission, written in Latin, gave Bellingham the power to hear and determine cases within the army. 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 the “legem & consuetudinem mariscalcie... vocat marciall lawe.”

How strange! In a commission written in Latin, Martin kept “marciall lawe” 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 tradition emphasized military law more by its substance and by its jurisdiction than by its unique procedure. But the phrase is not to be found in English legal documents. Nor did martial law derive from “lex martialis.”

10 TNA, C/66/812, m. 1d. A similar commission is calendared and translated in CPR, Edward VI, 1:133. 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/66/897, m. 19d; TNA C/66/917, 22d; TNA C 66/1013, m. 4d–5d. Starting with Mary, clerks often wrote the commissions in English. English martial law commissions were the norm by the middle of Elizabeth’s reign.


12 TNA, C 66/812, m. 1d. 13 Ibid.


14 This post-classical phrase means “law of war.” Thus some scholars have attempted to confute the laws of war with martial law. This is at best confusing as martial law was not substantively or procedurally consistent with the international laws and rights of war. This conflation can be found in W.F. Finlason, Report of the Case of the Queen v. Edward John Eyre (London, 1868), xii; and Finlason, The History of the Jamaica Case (London, 1903), 120–121.
In particular, English clerks never used *lex martialis* in legal documents like commissions that delegated martial law 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 some of the Latin text from other legal documents. For example, the Crown commanded Bellingham to “hear and determine” 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 wrongs 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, Ranulph Crewe, and others 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. 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 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 in 1513 in the absence of the marshal of England. In both of these commissions, the Crown allowed the commissioner to hear and determine all complaints between and about soldiers within the host. Bellingham’s commission likewise

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contained such a clause. The commission of martial law was a new thing made from old things.\(^{17}\)

Knowing where the maker of the commission 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 recognized a similar function between that of Bellingham and of an assize judge. Granted, he circumscribed Bellingham’s powers in different ways. Bellingham could only use his 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.

The maker of the commission 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 by which he would execute those responsibilities. Laws associated with war – the laws of war, the laws of chivalry, and the ordinances of war – were not foremost 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? Martial law commissioners were to hear all “causas” and “querelas” that arose within the army.\(^{18}\) Martial law procedure, in other words, was allowed to operate by more informal plaints, complaints, or informations, and not by indictments. Martial law can thus in part be traced to the medieval itinerant courts of the hosts that in turn were likely adapted from the Court of the Verge. It can also be situated with 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 frequently utilized information procedure in matters where defendants could lose life or limb should they be convicted.

It was this difference that made martial law an alluring alternative to common law for the Tudors when they believed sharper measures were necessary or when they thought juries might be unreliable. Let us now look to how Bellingham might have used his powers of martial law on soldiers.


\(^{18}\) TNA, C/66/812, m. 1d.
Martial law: soldiers and sailors

In instances where they lived under martial law, soldiers present at a court of the marshal were supposed to learn that the commander both possessed severe powers of correction and was just. In order to teach these lessons, martial law commissioners tried to obtain proof before they convicted defendants. Martial law process was shorter than common law process. It granted more discretion to judges than common law. But it was not arbitrary.

Soldiers often but not always were disciplined by the customs of the marshal. Commanders of royal hosts usually had martial law jurisdiction over soldiers in pay. They also, by 1588, had martial law jurisdiction over rebels and enemy invaders. In garrison towns, however, a complex network of jurisdictions supervised soldiers that only sometimes included martial law. Both the mayor of the town and the marshal of the garrison supervised the garrisoned soldiers. Soldiers in Berwick-upon-Tweed, for example, came before city courts in cases of felony. They were, however, usually exempt from prosecutions of debt at civilian courts. The infuriated townsmen instead had to petition the commander for redress. In Chapter 4, we will examine more closely the controversial “petitioning system” that regulated misdemeanor charges against soldiers. It suffices to say for now that multiple jurisdictions in Berwick clashed with one another over how to supervise soldiers.

In Ireland, on the other hand, the Crown exempted its soldiers completely from Irish common law only in 1543, when the marshal of the army complained to Henry VIII that he could not punish his own soldiers because of the interference of common law officers. Soldiers in Scotland under Edward VI were likewise under the discipline of martial law. When the king either thought his soldiers needed to be disciplined by a more severe process or worried about the interference of juries, he granted martial law jurisdiction to his commanders.

While many jurists in the seventeenth century employed the 1389 statute that restricted the High Court of Chivalry to claim that martial law should only be used in criminal cases outside of England, in the sixteenth century no such geographical distinction existed. In Edward’s reign, during his war with France, the king commanded that the workers

19 LPL, Ms. 247, fos. 5–7, 9–11v.  
20 TNA, WO 55/1939.  
21 Henry VIII to the Deputy and Irish Council, August 1543, TNA SP 60/11 f. 81v. Henry VIII to the Irish Council, August 1546, TNA, SP 60/12, 318. The 1550 instructions to Anthony St. Leger declared that soldiers had been troubled by too many vexatious lawsuits and therefore should only be governed by martial law. HEHL, El Ms. 1700, f. 5v.  
22 Edward VI to James Wilford, captain of Haddington, BL, Lansdowne Ms. 155 A, f. 320v.
on his fortifications in Cornwall be governed by martial law. Meanwhile, in 1596, Elizabeth I 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 mutiner.” A marshal’s 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. Further, it seems likely that martial law was practiced at the Tilbury camp in 1588. 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.

This was also true of sailors and “soldiers on the sea.” We know even less about when and for what purposes commanders utilized martial law on board ships in the sixteenth century. In general, sailors were governed by the laws and customs of the sea, often referred to as the Laws of Oléron. Like the army these were ordinances that governed life on board ships. Some of the laws and customs of the sea were similar to the ordinances of war. But what differentiated the laws and customs of the sea from martial law was that the death penalty was rarely handed down on board ships. And the records we have of trials that did involve a potential blood sanction – the most famous being Drake’s prosecution of Master Thomas Doughty – often involved the impaneling of juries. In general, the masters of ships had much less authority over their sailors. It was generally true that on board Crown ships, discipline was more strictly enforced. But even on these ships, capital punishment was probably rarer than in armed camps. Naval commanders only occasionally received martial law powers when the Crown felt it urgent to use more severe measures to discipline its sailors. On the other hand, generals on military expeditions almost always possessed martial law powers. In these

24 “The Svall Regiments of the Army,” SRO, D593/S/4/6/34. Another copy of this manuscript can be found in FSL, Ms. v.b.142, f. 20. A copy of Essex’s commission can be found in TNA, SP 12/257, fos. 31–33v.
25 Matthew Sutcliffe, a judge marshal, was paid for his services there. See page 39.
instances, martial law procedure was used to prosecute wrongs like mutiny.29

When they fell under martial law jurisdiction, soldiers and sailors were tried before a court of the marshal. Unfortunately, few full courts-
martial records have survived from the sixteenth century.30 Therefore we will have to rely on the prescriptive literature and a few descriptions of cases that commanders relayed to the Privy Council through correspondence.31

The martial law commissioner judged fact and law. They were in many ways perceived as a “fountain of justice” and could act as eyewitnesses and judges simultaneously if the wrong was committed before them. 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” – possessed


30 The only actual surviving court-martial record from the army is so terse that it is barely helpful. “Court-Martial of Lt. Hudson, 21 Oct. 1591,” HH, CP 168/54.

pursues, and then to hear and determine cases that fell under their jurisdiction. Often, the general or the marshal subdelegated these powers to assistants or to subordinate commanders stationed in garrisons away from the army royal. Usually, their power was absolute, but in delicate cases, martial law commissioners sought advice from the Privy Council. They had the powers to convict and convey the death penalty. The lord general also possessed the power to pardon.

Arraignment procedure granted discretion to the martial law commissioner. According to Matthew Sutcliffe, an experienced martial jurist, those with martial law powers could use “all means of examination, and trial of persons accused dilated, suspected, or defamed.” The commissioner of martial law thus had flexibility when it came to the manner in which he brought suspects to trial. A formal accusation sufficed. A written information would have also worked. This was the most common way suspects were brought before a court in the seventeenth century. So too did “public fame” – where the public suspected that a person had committed a wrong – that triggered inquisitorial process. All of these methods produced a charge that did not require confirmation from a grand jury.

The rules of evidence of martial law resembled those of common law: there were few formal rules of evidence. At common law, because the Crown assumed juries were self-informing, it developed few formal rules relating to proof. This relative laxity contrasted with Roman Law, which had “laws of proof” that mandated that the judge either obtain a confession or receive testimony from two eyewitnesses to the crime. Martial law commissioners, while they did not need to meet this high bar, still needed to obtain eyewitness testimony conducted upon oath or

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32 The commission to Edward Bellingham, for example, gave him and his marshal powers of martial law. TNA, C 66/812 m. 1d. Through the sixteenth century, the Ordnance 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 officers according to the ordinances of war. Cruikshank, *Army Royal*, 100–1. The rules outlining the Ordnance Office’s jurisdiction in the 1590s can be found in BL, Lansdowne Ms. 70/11.

33 *Sutcliffe*, 339. For Sutcliffe’s service see page 39 and Chapter 3.


35 For an examination of common law criminal procedure in the sixteenth century, see Langbein, *Prosecuting Crime in the Renaissance*, 5–125. As John Langbein noted, “[t]o 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* (2nd ed., Chicago, 2006), 78.

a confession. Suspicion alone, while it could provoke detainment, was not enough to convict. Thus, occasionally drastic measures like torture were deemed to be necessary in order to acquire the proof necessary for conviction. According to Matthew Sutcliffe, a commissioner could use torture “where presumptions are sufficient, and the matter heinous, by racke or other paine.” Presumptions were a form of proof. Often they mirrored what we now describe as circumstantial evidence, and certain types of presumption could be used in common law courts as evidence in felony and treason trials. In general, they alone were not enough for a martial law commissioner to obtain a conviction.

One of the few examples of martial law commissioners using torture comes from a report on treasonous activity in 1586 from Ostend, one of the cautionary towns held by the English during Elizabeth’s war with Spain. Thomas Wilford, the military governor of the city, uncovered a conspiracy by one “Joise Lews” and his son to take the city and deliver it to the Spanish. According to Wilford, the Spanish had promised Lews that he would “be made a great person.” Wilford had caught the man with “treasonous” letters written by 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 had failed several times to get his father to confess under torture. There was nothing in the letter to suggest the son was involved in the conspiracy, although he may have been. Wilford made Lews watch, presumably to persuade him to confess so that his son might be relieved of his pain, and to see his reaction if the son implicated him. The son, who was blindfolded, finally confessed to his father’s participation in the conspiracy. Wilford adjudged the father guilty and sentenced him to death, but because of the importance of the case relayed his actions back to his commander, the Earl of Leicester, before he proceeded to the sentence. In other words, martial law commissioners wanted to obtain evidence before they gave judgment. The bar was just not that high.

Martial law commissioners often had assistants who helped them obtain evidence and evaluate cases. These legal aids were dubbed judge marshals. The sixteenth-century prescriptive literature rarely described the position. Nevertheless, enough sources exist to suggest

37 Sutcliffe, 340.
41 Sutcliffe, 339; LPL, Ms. 3470 (Fairhurst), f. 1. Markham was one of the first authors to write extensively on the judge marshal. Markham, *Five Decades of Epistles of Warr* (London, 1622), 109–12.