

To my friends, the Leymons, whose  
"condemner" has made me  
like them very much indeed! Their  
"ethos" is OK!  
(see p 251)

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From a steel engraving in Cutts' *The Conquest of California and New Mexico*, Philadelphia, 1847.

## THE MEXICAN WAR AND THE CONQUEST OF CALIFORNIA

## STOCKTON OR KEARNY CONQUEROR AND FIRST GOVERNOR?

My interest, professional and personal, challenged by the extraordinary opposition in judgment among historians upon the important historical question whether Commodore Robert Field Stockton and the Navy or Brigadier General Stephen Watts Kearny and the Army conquered and first governed during the Mexican War the Mexican Province of Upper California from which the great States of California, Nevada, Arizona, Utah, Wyoming, and Colorado have wholly or partly been constituted; illustrated in the writings of Professor Justin H. Smith, recent historian of the Mexican War, and Professor Robert McNutt McElroy, sometime at Princeton, now at Oxford, Professor of American History; Professor Smith casting Kearny in the lowly rôle of "Lieutenant to Commodore Stockton," in the expedition resulting in the conquest; while Professor McElroy, in his *Winning of the Far West*, attributes the command of this expedition and by necessary implication the conquest and first governorship to Kearny; I searched the original documents and the testimony of Stockton, Kearny and Lieutenant Colonel John C. Frémont, the principal actors in the conquest, embodied in the proceedings of the courtmartial of Frémont, tried and sentenced to dismissal from the army for acknowledging in Stockton and denying to Kearny the chief command and the authority to govern; and became convinced that the fault lay with the historian in treating a problem, essentially legal, as purely historical; and that its solution would be furthered materially by considering it from the viewpoints of the conception of conquest and military government under our system of law; the inalienability of Kearny's powers; the issues joined by the parties and judged by the court; the three theories of Frémont's defense; and finally the extent of Upper California over which the conquest extended.

Formally the trial of Frémont, but described by him as "Stockton's in the person of Frémont" and of which Stockton testified, "I am testifying in my own case in some sort," and thus in reality the trial of Frémont and Stockton; the trial was founded upon charges of "mutiny, disobedience to the lawful commands of General Kearny and conduct prejudicial to military discipline," and arose out of the following events in American history.

Brigadier General Stephen Watts Kearny, instructed by President Polk through letters of his Secretary of War, W. L. Marcy, dated June 3, and 18, 1846, "to take the earliest possible possession of Upper California," a territory extending approximately from the western base of the Rockies to the Pacific, north of the Gila River, and south of parallel 42°, being the northern line of California extended; "and with that view to command thither an expedition" and "should you [Kearny] conquer and take possession of the province or any considerable portion to establish a civil government"; in command of the "Army of the West" left Fort Leavenworth, June 30, 1846; proceeded toward New Mexico, and during August and September conquered, occupied and set up

a civil government in that Province under an organic law then, as now, known as "Kearny's Code."

Leaving directions for troops to follow immediately to the Pacific, where the Government had advised Kearny "it was expected that the Naval forces will be in possession of all the towns on the seacoast and will cooperate with you in the conquest," and that additional forces and supplies from the fleet would await him; Kearny left New Mexico and entered Upper California in early October, 1846, in command of three hundred of the First United States Dragoons.

On October 6 Kearny received an "express" consisting of letters and reports being carried by "Kit" Carson, famous scout, to Washington from Commodore Stockton, commanding the Pacific Squadron, and Major Frémont, announcing that Stockton had during August, 1846, conquered and set up a civil government in Upper California; and acting upon this information Kearny sent back to Santa Fé two hundred of his men and continued his march to the Pacific "with a mere bodyguard of one hundred Dragoons," taking Carson as his guide.<sup>1</sup>

Moving along the general direction of the whole course of the Gila River; and arriving, December 6, at San Pascual, 35 miles east of San Diego, Kearny, to his astonishment, found himself opposed in superior force by a party of Mexican cavalry under General Andreas Pico.

Kearny immediately attacked and in several engagements drove the Mexicans from the field; his unprepared and exhausted force suffering severe losses of officers and men, himself being twice severely wounded. On December 8, after giving orders to advance, but counseled by the expedition's doctor that "to proceed would endanger the lives of the wounded," Kearny deferred action until the 10th, when he directed his force to go forward on the following morning. During the night, through an heroic act of Carson and Midshipman Beale, sent to seek aid from Commodore Stockton, the Dragoons were joined by a party of sailors and marines and proceeded without contact with the enemy, reaching San Diego on December 12.

Upon his arrival at San Diego Kearny learned that, whereas an apparent conquest of Upper California west of the Sierra and north and south of Monterey, a point equally dividing the Province, had been accomplished during August, 1846, when Stockton proclaimed himself Commander-in-Chief and

<sup>1</sup> Both Nevins and Bashford and Wagner cause Kearny to send back two-thirds of his adequate command solely upon Carson's irresponsible (but of course not irresponsible) claims of conquest. But Stockton's and Frémont's letters and *official reports* caused Kearny to do so. For Johnson's diary entry for Oct. 6 showed that Kearny went to California "with a mere bodyguard" (Benton) on Stockton's and Frémont's representations: illustrated by Kearny's report of Dec. 12, 1846, which bases his act upon an "express" borne by Carson and consisting of letters and documents from these officers, *then* of the Navy, reporting that "California had been conquered," "the war at an end," "the Mexicans surrendered," and "a government established." Hence Bashford and Wagner's allocation of guilt to Kearny for the "carnage" at San Pascual must be viewed in the light of the fact that Kearny emasculated his command upon Stockton's and Frémont's false (however, unintentionally so) claims of conquest; due regard being given to the fact that Stockton's orders to occupy the ports only, with no power to govern, and *only such ports* as he could hold, implicitly contemplated an overland expedition, with which such reckless despatches (if so be) might have, as was the fact, seriously interfered. Polk's cabinet *unanimously* supported Kearny. (See Polk's Diary.)

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Governor in California; yet during September and early October the Mexicans had expelled the Americans and had reoccupied and still held and governed the whole of that half of the Province south of Monterey except San Diego.

Finding Stockton claiming the chief command and governorship by virtue of a claim of conquest and the establishment of a government prior to Kearny's arrival in the territory, Kearny, on December 12, delivered to the Commodore his instructions to take possession and govern; and on December 29 claimed command under them of an expedition then about to start to possess itself of the country, which Stockton "agreed" to give him; and on that day the expedition started accompanied by Stockton and Kearny; resulted in the battles of San Gabriel on the 8th, and the Mesa on the 9th of January, 1847, in which the Mexicans were routed; Los Angeles entered on the 10th; a capitulation signed on the 15th; and the entire Province, east and west of the Sierra, at length acknowledged the authority of the United States.

At Los Angeles, Stockton still persisting in his claim to the supreme authority, military and civil, pretended, against Kearny's protestations, to appoint Frémont Governor and Military Commandant; and based on these pretensions Kearny later arrested Frémont and he was brought to trial in Washington before the courtmartial on the charges already stated.

The Government established its case by putting in evidence Kearny's instructions from the President; and then by showing acts of Frémont, as Governor and Military Commandant, under appointment from Commodore Stockton.

Frémont proposed three defenses, pleading the nullification of Kearny's instructions by reason of Stockton's prior conquest; an actual delegation of their powers to Stockton; and Frémont's exercise of the chief command and governorship under lawful appointment from Commodore Stockton as prior conqueror and governor.

Senator Benton, Frémont's distinguished counsel and father-in-law, formulated the argument for nullification and stated the only testimony borne to support it during Kearny's cross-examination against objection by the Judge-Advocate to a question purposed to show the exhausted condition of Kearny's forces at San Pascual and so his inability to reach the Pacific without Stockton's assistance.

"The right to establish a civil government," argued Benton, "was contingent upon the fact of conquest. Should the conquest be made and possession taken, Kearny was then to establish a government. Now if there was no conquest to be made; if the work had already been done and a civil government established, the case anticipated by the orders could not exist, and then his orders, having nothing to operate on, were null. If now General Kearny took the express to make a guide of him to the conquered territory and could not have got there without the aid of Commodore Stockton, it became a glaring case of orders suspended by events no longer in force. The first part of the case has already been made out. When General Kearny, at the outset of his march, met the express of Commodore Stockton and learned that the country was conquered and a civil

government established, and a governor at the head of it, he felt his mission of conquest was at an end — that his orders were suspended by events — and immediately acted on that conviction and sent back part of his force. The second part of the case is that far from conquering the country he was not even able to get to it.”

The Court overruled the defense of nullification<sup>2</sup> by refusing to allow the question proposed to prove it; and by recognizing Kearny's subsequent exercise of his powers and by its judgment; but allowed General Kearny “at his special request” to negative the inferences drawn by Senator Benton.

“I went to California,” testified Kearny, “in compliance with instructions to me from the Secretary of War of June 3rd and 18th, 1846. I met an express from California sent by Stockton and Frémont, on the way with dispatches for Washington. I received no information which induced me to depart from my orders. In consequence of this information, I sent back 200 of my 300 Dragoons.”

Proceeding next to establish Kearny's delegation to Stockton of his powers, Stockton testified that, “At San Diego, upon reading Kearny's instructions, I twice offered him ‘the command over all of us’ and offered to go as Kearny's aide-de-camp”; but that “Kearny said no and offered to go as my aide-de-camp.”

From this phrase only, without other expressions to support it, Stockton swore he received the following astonishing “impressions,” as he styled them: That Kearny thereby “laid aside his commission as Brigadier-General”; transferred the command of his Dragoons to Commodore Stockton, or to use Stockton's testimony, “the Dragoons, as I supposed, had been transferred to my command when Kearny agreed to go along as my aide”; and Stockton swore he retransferred command of these Dragoons to General Kearny on December 29, or as Stockton testified, “The troops which on December 29th were placed by my order under the command of General Kearny were the Dragoons, Sailors and Marines”; and Kearny became “a volunteer officer under my command.”

The Court, we confidently opine, did not err in refusing to base its solemn judgment on these “impressions” derived from so frail a premise. But the proof is incontestable that Stockton, on December 29, knew well that Kearny did not accompany the expedition as Stockton's aide; but that Kearny then claimed the full exercise of his powers; and so the “impressions” and the inferences predicated upon them must fail.

“I continued preparations for the march,” testified Stockton, “under the impression that Kearny was going as my aide-de-camp; I was confirmed in that view by a note Kearny wrote that he would give me the aid of his head and hand”; the only document in which the word aid was employed.

“It seems, however,” continued the Commodore, “that I was either *mistaken*

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<sup>2</sup> Prof. Justin Smith (*Mexican War* and in a letter to me) says that he thinks that it was “decided” that Kearny's orders were obsolete. But no decision, except the test decision, unconditionally negating Professor Smith's assertion, was ever presented to or decided by any court.

in my view or that Kearny had suddenly changed his mind; because on the morning of the day we left San Diego, December 29, Kearny gave me to understand that he would like to command the troops, and after some argument I agreed to appoint him to the command but retained my position as Commander-in-Chief."

From the use of this phrase of reservation of the command as well as from claims that Kearny subsequently acted on Stockton's orders, Frémont apparently attempted to impute to Kearny an implied recognition of Stockton's supremacy. But Kearny interpreted this phrase exactly as did the historian of California of great authority, Professor Royce, who writes that "Stockton, while giving the chief command of the government forces to Kearny, reserved to himself the chief command over the Marines"; and Kearny swore he interpreted Stockton's "orders" as "messages and expressions of opinion and suggestions to which he gladly deferred because of the large proportion of marines under his command."

But this theory of reservation is untenable under military law, since Kearny could not, by recognition, vest Stockton with an authority the creation of which was reserved solely to the President.

Under military and naval law, Stockton could not put himself on duty by virtue of his commission alone, but only by virtue of an assignment by the President; and inasmuch as his instructions, identical with Commodore Sloat's, dated March 21, May 5 and June 24, and October 17, 1845, and of June 13 and 15, 1846 (indeed the orders of June, 1846, and of July 12, 1846, did not operate in, or affect Stockton's or Frémont's judgment, in California; since they did not reach California until *after Stockton's departure*), expressly limited his operations to the occupation, but not to the government, of the ports only and contained no authority whatsoever to take possession of, conquer or govern or to operate in the interior, an authority expressly committed to General Kearny exclusively by the President, Stockton derived his lawful authority solely from General Kearny; and this lawful authority did not extend over the expedition, as we shall see from General Kearny's testimony. Further, Kearny's authority under military law was incapable of delegation.

"It is an accepted rule," writes Major-General Robert C. Davis, "that no officer of the army can put himself on duty by virtue of his commission alone. Command is exercised, not by virtue of office alone, but by virtue of assignment by authority of the President. This rule has had a place in the army regulations since 1835. An army officer could not, in 1846, and cannot today delegate his command to a naval officer without the authority of the President. Failing designation from the President, General Kearny was without authority to delegate his command to Commodore Stockton." And in the official record of the War Department it is stated that "Kearny was in command of the combined naval and army forces at the battles of San Gabriel and the Plains of the Mesa." The naval records are silent.

But the Court found "Nothing impeaching the testimony on the part of the prosecution; nothing to qualify in a legal sense Frémont's resistance to au-

thority"; and so we now turn to Kearny's unimpeached testimony for the authentic version of these events.

Kearny, his command consisting of about 80 Dragoons, Stockton's of about 400 sailors and marines and volunteers, after delivering his instructions to the Commodore, told him that "while he had authority from the President to take charge of affairs that he would not relieve him until his command was increased"; to which Stockton replied, "that he had reported the condition of affairs to Washington and that he would not permit himself to be interfered with until he had received an answer"; an expression of Stockton's unwillingness to "cooperate with Gen. Kearny in the conquest" confirmed in Stockton's letter in 1848 to the Secretary of the Navy, in which he writes that, with his convictions in 1846, he would have resisted Kearny's interference by force; and realized by Kearny in his letter of January 16, 1847, to Stockton that "in order to prevent possible civil war he would have to remain silent for the present."

On December 29 Kearny, as he swore, claimed command of the expedition under Polk's instructions, to which Stockton agreed, "giving me command over the sailors and marines, instructing his officers to look upon me as their commander," adding, "I will go along as Commander-in-Chief in California."

"I commanded the troops on that expedition; Stockton's authority and command did not extend over me or over the troops, *the sailors and marines*, the command of which he had himself given me. I considered Stockton who occupied the relation to me of a colonel in the army, Commander-in-Chief in California until he had on the 29th of December turned over to me a portion of that command, consisting of the sailors and marines and a few volunteers; and I did not on December 29th relieve Stockton of his command over the troops not moving on that expedition, of which there were some at Sonoma, Bodega, New Helvetia and a few at San Francisco, command of which I had not yet claimed; and over which Stockton exercised the chief command until January 16 when in a letter to him I claimed the full exercise of my powers," stating, "that as a consequence of the defeat of the enemy on the 8th and 9th of January by the troops under my command and the capitulation in which the people under arms and in the field finally agreed to disperse and remain quiet, the country may now, for the first time, be deemed conquered and taken possession of"; to which Stockton replied that he would do nothing at Kearny's command and that he had conquered the country and set up a government prior to Kearny's arrival in the territory.

Specifically denying Stockton's "impressions," Kearny testified that at no time did he relinquish the exercise of his powers; or lay aside his rank as Brigadier General; or assign Stockton command over his Dragoons; neither did he acknowledge Stockton's supreme authority; or consent to act under his command as an aide or a volunteer officer.

But Frémont's principal defense lay in his appointment by Stockton, to whom he attributed supreme authority under the law of nations, as prior conqueror and governor.



Stated in Stockton's testimony, "I had no instruction from the President; I founded the Government incident to conquest under the law of nations"; and narrating his reply, December 20, about, at San Diego, to Kearny's claims to authority, Stockton swore "I replied: Your instructions are 'should you conquer you will establish a civil government'; I have conquered the country and established a civil government"; and stated in Frémont's written defense, "In order that Kearny should appear as conqueror and so set up a government under his instructions, the claim has been made that Kearny commanded the troops and gained the victory of January 8 and 9. Kearny bottomed his claim for chief authority in the Province on the expedition and its results."

And the Court itself accepted the issue thus framed by the parties as decisive. "The report of the Secretary of War," said the President of the Court in rejecting reports of the *President and his Secretary* claimed to witness Stockton's conquest in August as irrelevant in view of the events subsequently materializing, "relates to the conquest of California according to such insufficient information as had been received at the Department *prior to December 1846*, and it concludes the narrative by representing that Commodore Stockton had taken possession of the country for the United States in August 1846, and had appointed Lieutenant Colonel John C. Frémont Governor under the Law of Nations. The Court has examined the entire documents and finds nothing in them applicable to the case now on trial. It is not a question here whether if Commodore Stockton, *as supposed by the Secretary of War*, had conquered California and appointed Lieutenant Colonel Frémont Governor he would have acted according to the Law of Nations. Lieutenant Colonel Frémont is charged on this trial with resisting the lawful authority of General Kearny, sent to California by order of the President, *with instructions and authority to exercise the chief command, military and civil*. Neither the alleged resistance to General Kearny by Frémont nor the appointment of Frémont as Governor by Stockton in January 1847, when General Kearny was present and claiming the chief command under special orders from the President, could be contemplated in the reports of the Secretary of War or the President himself in December 1846."

The identity then of the conqueror, Stockton or Kearny, thus became the essential issue formulated by the parties and accepted by the Court; and we now propose to epitomize the evidence offered to establish Stockton's conquest.

Lieutenant and Brevet Captain John C. Frémont, of the Topographical Engineers, "without rank in the army," during May, 1846, while in Upper California, west of the Sierra, leading an exploration party, purely scientific in character, advised in a letter addressed to him as private citizen, by Senator Benton, to keep a vigilant outlook upon the activities of foreign nations in California, approached the sparsely settled parts along the Sacramento River and at the "urgent call," as Frémont expressed it, "of the American settlers," there assumed the leadership of a revolutionary movement, professedly without the sanction or knowledge of his government, and purposed to form a republic independent of Mexico and the United States, which was accomplished without opposition July

5, 1846, when the famous "Bear Flag" of this new republic was raised at Sonoma. At that time neither the Mexicans nor the Americans knew of the commencement of hostilities.

In the meanwhile, Commodore John D. Sloat, having learned of the commencement of hostilities; and commanding the Pacific Squadron with instructions to occupy the Pacific ports only (*supra*); occupied Monterey July 7, 1846; and through Captain Montgomery, the Port of San Francisco and several other northern communities already occupied by Frémont; but after conferring with Frémont and learning that Frémont had acted without orders, "declined," according to Frémont, "his services or to have anything to do with him"; and on July 29, vesting Stockton with command of the Pacific Squadron, left California.

Stockton immediately determined, despite his limited instructions, to conquer California; adopted Frémont's occupation along the Sacramento and incorporated Frémont and his revolutionary band of Mounted Riflemen, consisting of about 160 volunteers, into his command; occupied all the Pacific ports, and on August 13 Los Angeles, thirty miles inland, without opposition; the cavalry of the enemy withdrawing into the interior "in different parties and in different directions"; the Departmental Assembly adjourning; and its members dispersing; and Governor Pio Pico retiring to his ranch seventy miles inland; and General Flores leaving for Sonora.

Stockton then proclaimed himself "Governor and Commander-in-Chief in California" under martial law which he established; formulated but *never put into operation or appointed officers* of a civil government and made no attempt to occupy any other portion of the interior, which at all times was held by the enemy. The occupation, however, of the country south of Monterey lasted but for a month; for during September and early October the Mexicans attacked and expelled the Americans from all this southern territory; defeated two attempts by Captain Mervine and Commodore Stockton to reoccupy Los Angeles; whereupon the Commodore embarked for and occupied San Diego; and Frémont returned to the Valley of the Sacramento; each officer spending the next several months recruiting and equipping their commands to resume military operations. We have already traced Kearny's march from Santa Fé and the expedition to Los Angeles.

Such were the facts professed to show Stockton's conquest and government prior to Kearny's arrival and the battle of San Pascual; and in order to determine whether these operations substantiated Stockton's claims we will outline the definitions of conquest and government controlling the Court under our system of law. And first, as to the military authority to govern.

President Polk, on July 17, 1848, wrote: "In prosecuting a foreign war we have the right by conquest and military occupation to acquire possession of the territory of the enemy, and during the war to exercise the fullest rights of sovereignty over it. The territorial governments were authorized by virtue of the rights of war. These are well established principles of the law of war and have the sanction of the highest judicial tribunal in our country." And Secretary

Marcy has written "pending the war our possession gives us such rights as the law of nations recognizes"; and the Supreme Court of the United States sustaining "Kearny's Code" (New Mexico) wrote "in virtue of the power of conquest and occupancy Kearny ordained a civil government"; and again, "shortly after 1846 the United States had military possession of all Upper California and then the President authorized the exercise of the belligerent right of a conqueror to form a government." And as respects the extent of the conquest, Halleck, authoritative publicist, writes: "An enemy only possesses a country so far as it compels the enemy forces to retire. The occupation of part with intent to appropriate the whole gives possession of the whole only if the enemy maintains military possession of no portion of the remainder." And again, "Conquest depends on exclusive possession of the conquered territory."

And now as to the duration of lawful conquest and government.

"By the Law of Nations," writes Halleck, "conquest is a valid title while the victor maintains the *exclusive possession* of the conquered territory. A conquest comes to an end when an occupant withdraws or is driven out. To render military government legal there must be an armed force in the territory occupied capable of enforcing its actual occupation against all disputants." And Kearny's government in New Mexico was sustained by the Supreme Court of the United States on the ground that the Civil Government of the Province was overthrown, "Kearny holding possession for the United States."

Such the law of conquest and government; and applying now these definitions to the facts it is plain that Stockton had not conquered Upper California west of the Sierra prior to Kearny's arrival; and the issue of conquest formulated as we have shown by the parties was resolved accordingly by the unanimous judgment of the thirteen military officers composing the court and by President Polk in favor of Kearny, as conqueror and first governor of Upper California; and the historian Bancroft is in accord with this decision when he writes that "Stockton's claims to have effected a conquest or organized a government prior to Kearny's arrival were unfounded."

But what was the actual extent of the territory conquered and governed by General Kearny east of the Sierra?

Aware that historians generally have left undecided, doubted, slurred or denied our ascription to Upper California of the territory east of the Colorado River, or have attributed it to New Mexico which Kearny entered in early October, 1846, we must burden our text with the names of the authoritative geographers and the writers justifying our judgment; and we cite: Disturnell's map, 1847, revised edition, annexed to the Treaty of Peace, purporting to be derived from acts of the Mexican Congress; and his revised editions of 1846 and 1848; Emory, 1844; Frémont, 1847; Tanner's second and third edition; Augustin Mitchell, 1847; Colton, 1849; each of these authors not only mapping the boundary as stated but expressly limiting the western line of the Mexican province of New Mexico to the western base of the Rockies; and this western line is likewise found in Arrowsmith, 1828, and Humboldt, 1804; and all these

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authors, together with the maps of Humboldt, 1811, and Arrowsmith, 1810 and 1820, and the Jesuit explorers and writers of the Eighteenth Century, cited in the writings of Hamilton and Fernandez, limit the northern boundary to Sonora, the sole Mexican province south of Upper California, east of the Gulf of California to or below the Gila River; as do the Mexican boundary commissioners in 1848 in their report to the Mexican Congress; and President Polk, in his correspondence with Slidell in 1844 and with Trist in 1848, negotiators with Mexico, and President Peña, in his address to the Mexican Congress on the Treaty, in speaking of "the separation of Upper California and New Mexico from the Mexican Union" leave no doubt that the cession of Upper California claimed and ceded by right of conquest was assumed to be the boundary now claimed.

But this vast territory, to quote Professor Smith, "uninhabited by white men"; without central or local government or administration; marked "unexplored" on the principal maps; and in part bearing the significant name "Apacheria," and bounded on the south by Sonora, stripped of its troops, sent to support Santa Anna against General Taylor's advance towards Buena Vista and against General Wool's advance into Chihuahua, to whom Kearny had sent Colonel Doniphan, who was soon to conquer and occupy that province must, by reason of its defenseless and abandoned condition, be considered constructively conquered and occupied by General Kearny when, in October, 1846, he entered it with the intention of appropriating it under Polk's instructions for the United States; in accordance with the well recognized rule of the Law of Nations expressed by Halleck in the proposition that "the occupation of part by right of conquest with intention to appropriate the whole gives possession of the whole *if the enemy maintains possession of no portion of the remainder.*"

Finally, it is to be noted, that the Executive (the Political Department) explicitly and the Judiciary implicitly have recognized Kearny's conquest and government.

The President, as reviewing authority and possessing as commander-in-chief of the Federal Army exclusive jurisdiction to appoint the governor and sanction the government of the then foreign conquered Province of Alta California, by affirming the judgment of the court martial, rejected the executive documents purporting to show Stockton's conquest and government in August, 1846, and judged Kearny conqueror and governor and explicitly denied Frémont as governor; a position confirmed by the Secretary of the Navy in these words: "There has been no approval or rejection of an organized or established form of government for the Californias in the occupation of the naval forces through this Department"; and by the Secretary of War, who wrote the President that "the Government of California was established by the *military officer in chief command.*"

Turning to the judgments of the Supreme Court which Professor Smith remarks "have held that the acquisition of California was completed the 7th day of July, 1846,"<sup>3</sup> it must be noted that the Supreme Court has explicitly and repeatedly denied its jurisdiction to determine that very question, illustrated in

the following words: "The Political Department at least appears to have designated that day as the period when the conquest of California was completed, and in this respect the judiciary follows the action of the Political Department"; and so that the Court has used some expressions as "generally regarded" when speaking of that date as the date of acquisition. And that Court's determination of the designation of that date by the Political Department is of extremely limited application and is found not in Presidential utterances but exclusively in the Congressional Act of March 3, 1851, to settle California Land Titles; an Act involved in all cases using such expressions concerning conquest; cases which affect solely the validity of land grants before or after July 7, 1846; and which Act, the Court has held, prescribed not that conquest then became effective but that July 7 was designated by the Act "as the epoch at which the power of the Mexican Governors to alienate the public domain terminated (*United States v. Pico*)."

But in *Cross v. Harrison*, arising under the Military Revenue Law and so freed from the date fixed in the Act of 1851, the Supreme Court of the United States deliberately leaves the question of conquest prior to 1847, opining that "either Upper California or San Francisco (the port of decision) was conquered in 1846"; while deciding that "*shortly thereafter*, the United States had military possession of all of Upper California and early in 1847 the President authorized the Military and Naval commanders to form a Civil government."

And we accept the judgment of the Supreme Court; for General Kearny and Commodore Shubrick "early in 1847," on March 1, by joint proclamation proclaimed Kearny Governor of Upper California,<sup>4</sup> and Kearny proclaimed a Civil Government, having governed up to that time and from January 15 under Martial Law; and so became the first Governor, as he had been the conqueror, of the territory.

THOMAS KEARNY.\*

<sup>3</sup> Of course if Professor Smith's "fact" be such (that July 7 was constituted by the Supreme Court the date of conquest) then Sloat only; and neither Stockton, Frémont nor Kearny participated in the conquest: a *reductio ad absurdum*; justifying my interpretation of the Supreme Court's decisions.

<sup>4</sup> Professor Nevins justifies Frémont's adhesion to Stockton and his denial of Kearny as his superior officer (Frémont on January 13 wrote Kearny as "Lieutenant Colonel" of the "Regiment of Mounted Rifles," an army organization constituted by Congress in *May, 1846*, of which Frémont was the first Lt. Colonel, that he, Frémont was accompanied "by 400 Mounted Rifles"), on the grounds, as stated by Nevins, that Kearny's orders were conditional on Kearny's conquest; and were alike conflicting with and earlier than Stockton's! But inasmuch as Stockton's orders of June and July (the latter giving Stockton authority to govern) did not reach California until after Stockton's departure and were never read there by Frémont or Stockton; all that Frémont read were Kearny's orders later than Stockton's and wholly consistent with them, namely that Kearny was to lead the occupying expedition and to govern and Stockton was to occupy the ports only and not to govern. Further, Kearny's orders were unconditional; for on June 18, when Kearny's orders were written, President Polk contemplated Kearny only as the potential conqueror; Polk limiting Kearny's authority to set up a government upon the "fact of conquest" as Benton knew the rule to be, and so stated (*supra*) and not upon the *person* of the conqueror, although Kearny's orders read "Should you conquer you will set up a government."

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