

## *Chapter 1*

# ORGANIZATION OF THE SUPREME COURT

American forces raised the American flag at Monterey July 7, 1846. That same day their commander, Commodore John D. Sloat, proclaimed California a part of the United States.

## HISTORICAL BACKGROUND

Sloat's proclamation notwithstanding, California did not legally pass into the possession of the United States until May 30, 1848, when Mexico ratified the Treaty of Guadalupe Hidalgo. Until that date California remained in the military possession of the United States as an incident of the war, and was governed as a conquered territory under the laws of war. When the peace treaty was signed, California's status changed; it now became a possession of the United States subject to congressional action in regard to civil government.<sup>1</sup> But Congress did not act, and California remained under military rule until December 18, 1849, when Peter H. Burnett was inaugurated as California's first elected governor.

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<sup>1</sup> See Theodore Grivas, *Military Governments in California 1846–1850* . . . (Glendale: The Arthur H. Clark Company, 1963), 80.

Before the Treaty of Guadalupe Hidalgo, the military governor, who was the commander of the American military forces in California, had no constitutional limitations on his dealings with the inhabitants. The treaty, however, placed certain restrictions on the military commander; he was now limited by the United States Constitution. Any law, including municipal laws of the province, not in conflict with the Constitution remained in force until changed by congressional action; others were illegal. In addition, political laws, such as tariffs, were automatically extended to the new territories.<sup>2</sup>

Both before and after the American occupation of California, the most important local administrative official was the *alcalde*, whose role was much the same as a small-town mayor or English justice of the peace. Sometimes the *alcalde* acted in conjunction with a town council, or *ayuntamiento*, but his jurisdiction was always limited, at least in theory. That the limitation was not always apparent, particularly after the discovery of gold, was noted by Stephen J. Field, who became *alcalde* of Yubaville (later Marysville) in 1850. He wrote that “in the anomalous condition of affairs under the American occupation, they [*alcaldes*] exercised almost unlimited powers.”<sup>3</sup>

By using the existing *alcalde* system, the military governors were not forced to develop a new system, and at the same time they were able to claim that it was a form of civil government, thereby hoping to still the demand for self-government. But this demand, together with the lack of appropriate legislation by Congress, eventually forced General Bennet Riley, military governor at the time, to call for a convention to frame either a state or a territorial government.

Riley’s proclamation was issued June 3, 1849, only two days after the news had arrived that Congress had adjourned without organizing a territorial government for California. He designated August 1 as the day for electing delegates to a convention to meet at Monterey on September 1. Riley clearly lacked the authority to call such a convention, but he apparently wanted to retain his authority and prestige by assuming leadership of the statehood movement. In assuming this position of leadership, he

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<sup>2</sup> *Ibid.*, 80–81.

<sup>3</sup> Stephen J. Field, *California Alcalde* (Oakland: Biobooks, 1960), 27.

would also enable himself to keep close to the convention proceedings and modify any possible “wild schemes.”<sup>4</sup>

The elections were held as scheduled, and the delegates met at Colton Hall in Monterey on September 3. The first serious question to be faced by the delegates was whether a state or a territorial government was to be formed. The convention opted for a state government, passing a resolution to that effect introduced by William Gwin.<sup>5</sup>

Once having made the decision to prepare a state constitution, the delegates made generous use of the handiwork of other states, particularly that of Iowa and New York.<sup>6</sup> The convention completed its work in just under six weeks, and the Constitution was submitted to the people for their approval on November 13. The delegates were so confident that the Constitution would be approved, they set the first general election for the same day. The Constitution was ratified overwhelmingly, and remained, with certain subsequent modifications, California’s fundamental law for thirty years.

## ORGANIZATION OF THE JUDICIARY

At the afternoon session of Tuesday, September 25, the Select Committee on the Constitution made its initial report about how the judiciary would be organized.<sup>7</sup> This proposed plan provided for the establishment of four judicial districts, each with a circuit judge; the four circuit judges, sitting en banc, would constitute the Supreme Court. The Supreme Court was to be a court of appeals with three justices in attendance, but no justice could sit in judgment on a case in which he had rendered an opinion in his own judicial district.

Two other plans were proposed, one from the floor of the convention, and the other by a minority of the committee itself. All plans were rejected, and that evening a Special Committee on the Judiciary, made up of Kimball H. Dimmick of San Jose, Myron Norton of San Francisco, and James M. Jones of San Joaquin, met to separate the circuit and Supreme

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<sup>4</sup> Grivas, *Military Governments*, 143–44.

<sup>5</sup> J. Ross Browne, *Report of the Debates in the Convention of California . . .* (Washington, D.C.: John T. Towers, 1850), 19.

<sup>6</sup> *Ibid.*, 22–23.

<sup>7</sup> *Ibid.*, 212–39.

Courts, “and to bring in a report on the different propositions modeled on that plan.”<sup>8</sup> The committee reported back the next day and presented a plan in which the judicial power was vested in a Supreme Court, district courts, county courts, and justices of the peace. When submitted to the convention, this scheme was adopted without debate<sup>9</sup> and became part of the Constitution.<sup>10</sup>

The Special Committee on the Judiciary did not limit the appellate jurisdiction of the Supreme Court, but on the floor of the convention Pablo de la Guerra of Santa Barbara suggested that such a limitation be included.<sup>11</sup> He claimed that limiting the Supreme Court’s appellate jurisdiction to cases where the amount in dispute exceeded \$200 would prevent capricious appeals by wealthy litigants who were not particularly interested in the amount involved, but in the satisfaction of their personal whims. De la Guerra’s view prevailed, and the fourth section of the Sixth Article gave the Supreme Court “appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost or municipal fine is in question, and in all criminal cases amounting to a felony or questions of law alone.”<sup>12</sup>

The same article gave the district courts original jurisdiction in civil cases in which the amount in controversy exceeded \$200, and unlimited jurisdiction over criminal cases not otherwise provided for, and in issues of fact joined in the probate court. The county courts had appellate jurisdiction in civil cases originating in the justices’ courts, that is, cases involving less than \$200, and original jurisdiction in such “special cases” provided for by the Legislature. The county court also acted as a probate court, and the county judge, together with two justices of the peace from the same county were to constitute a court of sessions with such criminal jurisdiction and duties as prescribed by law.<sup>13</sup>

The third section of the article provided that the first three members of the Supreme Court would be selected by the Legislature at its first session,

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<sup>8</sup> *Ibid.*, 224.

<sup>9</sup> *Ibid.*

<sup>10</sup> Cal. Const. (1849), art. VI, § 1.

<sup>11</sup> Browne, *Report of the Debates*, 225, 228.

<sup>12</sup> Cal. Const. (1849), art. VI, § 4.

<sup>13</sup> *Ibid.*, §§ 8, 9.

but thereafter justices were to be elected.<sup>14</sup> No objections were made to the direct election of justices at the Constitutional Convention, although Elisha O. Crosby, representing Sacramento, later claimed to have opposed the idea of an elective judiciary. He said that it “was not the safest, nor calculated to bring to the bench the best talent or the best decisions. That a man who depended in the popular vote for his election was likely to cater more or less to popular sentiment irrespective of the exact enforcement of the law.”<sup>15</sup>

Crosby felt that judges should be removed from the turmoil and influences of a popular election and be appointed by the governor, with the approval of the Legislature, for life or good behavior, and that they be given an adequate salary and a remittance upon retirement.

Adoption of the Constitution did not still objections to an elective judiciary. William J. Shaw, in a speech delivered before the State Senate on February 7, 1856, called for a new state constitution, which among other things, would abolish juries because he felt judges were too subservient to them, and urged that the election of judges be ended. In this latter matter Shaw agreed with Crosby that judges should be above partisan politics. The constitutional changes effected in 1862 retained the election of judges, and Shaw continued his drive, again without success, as the Constitutional Convention of 1878–1879 also provided for the election of judges in the Constitution it wrote.<sup>16</sup>

The practice of electing judges in California continues until the present time, although not without occasional recurring criticism. Hubert Howe Bancroft, in discussing the California judiciary of the 1850s, expressed his views about an elective judiciary in general:

The administration of justice, particularly of the higher courts, is beyond everything the most important part of the government. By the degree of enlightenment in the jurisprudence of the country, its advancement in national greatness is to be estimated. But it is irrational to expect of an elective judiciary, nominated in party

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<sup>14</sup> *Ibid.*, § 3.

<sup>15</sup> Elisha O. Crosby, *The Memoirs of Elisha Oscar Crosby . . .* (San Marino: The Huntington Library, 1945), 44.

<sup>16</sup> William J. Shaw, *An Appeal to Californians . . .* (San Francisco: A. L. Bancroft and Company, 1875). Shaw expressed his views on the Judiciary in this pamphlet and offered his 1856 speech as further support for his stand.

conventions, taking part in exciting campaigns, cognizant of, and sharing in the personal abuse of the rostrum, that dignity, purity, or learning which constitute an enlightened judiciary. The judicial ermine which has been dragged through the political pool in any state must have lost its whiteness.<sup>17</sup>

## THE THREE-MAN COURT

The first state legislature passed the act organizing the Supreme Court on February 14, 1850. One provision was that a quorum would consist of two justices, and another that no justice could leave the state without the permission of the Legislature.<sup>18</sup> The small number of justices proved a hardship, as due to death, resignation, or freely granted leaves of absence, there were oftentimes only two justices available to hear cases, and if they disagreed, no decision could be rendered. In the seven-year period prior to Stephen J. Field's appointment to the Court by Governor J. Neely Johnson, in October 1857, eight judges had retired from the Court. This constituted a rapid turnover because no more than three justices sat at any one time. Field's biographer has also pointed out that with this turnover, reversals of decisions were likely, and little could be done toward establishing a system of precedents.<sup>19</sup> In all, fifteen men served on the three-man Court in the fourteen-year period 1850-1863. Only twelve different men saw service on the five-man Court established by the 1862 amendments. This covered the years 1863-1879, a period of sixteen years.

An attempt was made in 1852 to aid the work of the Court by the use of temporary or interim justices, but failed. In that year Chief Justice Henry A. Lyons resigned just prior to the start of the April term, and at the same time the Legislature granted a six-month leave of absence to Justice Solomon Heydenfeldt.<sup>20</sup> Justice Hugh C. Murray became chief justice, and Alexander Anderson was appointed by Governor John Bigler to fill the remainder

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<sup>17</sup> Hubert H. Bancroft, *History of California*, vol. VII (7 vols., San Francisco: The History Company, 1884-1890), 222.

<sup>18</sup> Cal. Stats. (1850), chap. 14.

<sup>19</sup> Carl B. Swisher, *Stephen J. Field: Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 73.

<sup>20</sup> Cal. Stats. (1852), 287.

of Lyons' unexpired term. In order that there be a full complement on the supreme bench the Legislature passed an act authorizing the filling of temporary vacancies by the governor.<sup>21</sup> Governor Bigler appointed Alexander Wells to serve in Heydenfeldt's place for six months, but when the new term opened April 12, Wells said that the constitutionality of the act had been called into question, and that he would not sit until the matter had been resolved. He suggested that the attorney general be directed to initiate proceedings to test the act. The Court so ordered,<sup>22</sup> and state Attorney General Serranus C. Hastings brought the question before the Court in *People v. Wells*.<sup>23</sup> Chief Justice Murray and Justice Anderson were unable to agree, and thus no decision was rendered. Wells was told to do as he thought best, and he assumed his place on the bench May 5, 1852. When Heydenfeldt returned and resumed his seat, he prepared an opinion agreeing with Murray that the law was unconstitutional. Their reasoning was that there had been no vacancy to be filled; in order to have a vacancy, there could not be an incumbent, even though on leave. Interestingly enough, no one questioned the legality of the decisions in which Wells participated even though such participation was predicated on an unconstitutional law.

The Supreme Court could thus function with only two justices, although not with the same dispatch as it could with a full bench. If two justices were incapacitated in any way the Supreme Court could not act at all. This latter possibility occurred during the summer of 1856, when, with Heydenfeldt in Europe again, Justice David A. Terry ran afoul of the San Francisco vigilantes and was imprisoned by them for assaulting and attempting to kill Sterling A. Hopkins, one of their members. Terry was held for six weeks, during which time the Supreme Court was powerless, and could not resume deliberations until Terry was released.

## THE CHANGES OF 1862

In his introduction to volume 24 of the *Supreme Court Reports*, Charles A. Tuttle, Supreme Court reporter for the years 1863 to 1867, pointed out the

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<sup>21</sup> Cal. Stats. (1852), chap. 87.

<sup>22</sup> Order of Court, 2 Cal. 152.

<sup>23</sup> *People v. Wells* (1852), 2 Cal. 198.

need for changes in the Supreme Court, citing in particular the litigation involving land titles and mining problems:

The Court had thrown upon it the labor not only of working out the intricacies in which titles to real estate had become involved, but also, in some measure, of elaborating a new system, suited to the peculiar condition of the mineral districts. The Court, as organized, was unable to dispose of the cases brought before it with the celerity which particularly in new communities, is desirable.<sup>24</sup>

In 1861, the Legislature passed certain constitutional amendments dealing with the judiciary, as well as with the legislative and executive departments. The 1862 Legislature concurred and the amendments were presented to the people of the state at the general election of that year. The amendments were implemented in 1863 and the revised judicial system became effective in January 1864.

The Supreme Court now consisted of a chief justice and four associate justices, any three of whom would constitute a quorum.<sup>25</sup> In order to ensure the presence of this quorum, the Legislature was specifically barred from granting a leave of absence to any judicial officer, and any such officer who would be absent from the state for thirty or more consecutive days was to be deemed as having forfeited his office.<sup>26</sup> The term of office for a justice was extended from six to ten years from the first day of January after election, except for the five men elected at the first election. These justices were to classify themselves by lot so that one justice would leave office every two years; the justice drawing the shortest term was to become the chief justice.<sup>27</sup> These steps were all designed to increase the stability and continuity of the Court, as well as easing its work load. Unfortunately, there was a lack of success in at least this last matter. The new Court created by the Constitution of 1879 was made to consist of a chief justice and six associate justices who were to sit together on important cases, but on

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<sup>24</sup> 24 Cal. iii.

<sup>25</sup> Cal. Const. (1849), art. VI, § 2 (amended 1862).

<sup>26</sup> *Ibid.*, § 5 (amended 1862).

<sup>27</sup> *Ibid.*, § 3 (amended 1862).



most cases they were to sit in two departments, so two cases could be heard at once.<sup>28</sup>

As noted earlier, the 1862 amendment still provided for the election of justices, but an attempt was made to remove judicial elections from politics at least in part by having special judicial elections at which no nonjudicial officer could be elected except the superintendent of public instruction.<sup>29</sup>

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<sup>28</sup> Cal. Const. (1879), art. VI, § 2.

<sup>29</sup> Cal. Const. (1879), art. VI, § 2. (amended 1862).