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E. J. Sullivan

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The Colorado River Basin in Wyoming covers about 17,000 square miles, which is approximately 18% of the area of the state. The Colorado River Basin in its entirety covers 242,000 square miles, or approximately one-twelfth of the land area of the United States. If the Upper Colorado River Basin Compact is concluded, vast development will be permitted in the upper basin which will take 50, 75 or 100 years for its completion, and which will develop tremendous new resources of agriculture, power and industry, and which will support many thousands of people in addition to the present inhabitants of the area.

Those of us who are engaged in the negotiation of the Upper Colorado River Basin Compact believe that we are making good use of the so-called compact clause of the Constitution, and one which will result in a vast agricultural and industrial development in the upper basin of the Colorado.

## THE TIDELANDS QUESTION

E. J. SULLIVAN\*

On June 23, 1947, the Supreme Court of the United States decided the case of *U. S. v. California*<sup>1</sup>—the “Tidelands Case” in favor of the Federal Government. In doing so, the Court raised a startlingly new and alarming concept of property rights—the concept of the “paramount right” of the Federal Government to take natural resources based on the Government’s need for those resources, even though it could not establish its title to these resources or the soil from whence they come.

In its suit, the United States asserted that it is “the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California.”<sup>2</sup> In its prayer to the Court, the United States asked for “a decree declaring the rights of the United States in the area as against California and enjoining California and all persons . . . in violation of the rights of the United States.”

In deciding against California, the Supreme Court found ownership in neither the State nor in the United States, but gave dominion and control over the lands to the federal government. This decision, as read by Mr. Justice Black, was based on an entirely new and un-

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\* of Casper, Wyoming, member of the Wyoming State Bar.

precedented philosophy of property rights; namely, that the federal government needs the oil contained in the lands for national defense and for conducting this country's international relations. This need, said the Court, transcends the rights of a mere property owner.

The case was not one which had come up suddenly. It had been in the making for years. Twice before, in recent years, Congress had refused to grant specific authority to the Attorney General of the United States to sue California for these lands. Only last year, a resolution was passed by both House and Senate recognizing state ownership of these lands and quitclaiming them to the states. President Truman, however, vetoed the bill.

The implications of the decision in this case are far reaching and of vital importance to every state and to every citizen of every state. The philosophy of federal control based on need clearly opens the way to complete nationalization of all natural resources. If California is made to give up her oil, why should it not be possible for the United States to lay equal claim to minerals and other resources of other states, coastal or upland? There is reason enough for all the states to be alarmed. The implications are staggering. Before these implications are analyzed in detail, however, it would be well to go back and pick up the original concept of state ownership of submerged lands, to summarize California's defense, and to review the Court's decision.

It should be remembered that under the Common Law of England, before the Revolution, submerged lands under navigable waters, including coastal waters, belonged to the Crown and by the Declaration of Independence, the original thirteen colonies severally acquired ownership of these lands from the Crown. All states subsequently admitted have come into the Union on an equal footing with the original thirteen, including the ownership of submerged lands under their coastal waters and other navigable waters, and the court decisions in both federal and state courts for a century and a half uniformly support this rule.

From the time of the American Declaration of Independence until the decision against California in the Tidelands Case, state and federal governments had recognized state ownership of all submerged lands within their respective boundaries. The term "submerged lands" is acknowledged to include not only those lands beneath inland waters but also those beneath the marginal seas which are part of the boundaries of coastal states. (These boundaries, originally set by the distance of a cannon shot from shore are, in most states, held to extend seaward a distance of three miles from ordinary low water mark.)

Since the beginning of the Republic, state ownership of submerged lands, inland and in principle offshore, has been confirmed and reaffirmed through 52 Supreme Court decisions, 244 federal and state court decisions, 49 Attorney General opinions, and 31 Department of

Interior opinions. During all this time, a monumental precedent was built up without a single dissent. In the face of such precedent, the complete reversal of thinking evident in the Tidelands decision is disturbing indeed.

When the United States filed suit against California asserting claim to the submerged lands within the boundaries of that state, the Attorneys General of the other states went promptly to the aid of California. They chose Attorney General Price Daniel of Texas as their spokesman to argue the case before the Supreme Court.

At the beginning of his argument, Price Daniel declared that in his opinion and the opinions of the Attorneys General of the other states, the Court could not decide against California, unless it found that the original thirteen and subsequently admitted coastal states did not own the land under marginal seas within their boundaries. He pointed out that, although only 3000 square miles of California tidelands would be directly affected by the Court's decision, an additional 62,000 square miles of tidelands along the coasts of the other littoral States would be indirectly affected, making this the largest land case that had been before the Court within the past hundred years. United States Attorney General Clark had already said, before the case was tried: "the decision of the Supreme Court, we hope, will settle the question as to all the coastal states of the Union."

Daniel expressed genuine alarm that the hitherto unchallenged property rights of the states and of thousands of individuals and corporations who hold under the states would be challenged by the federal government. In his own words, it was ". . . unique because the government cites not one single case in the 160 years of American Jurisprudence which supports its contention against state ownership of lands under their navigable waters, and cites not one single case in support of its own claim of federal ownership."

To refute the plaintiff's statement that only a small portion of the disputed property is being used by the states, and bearing directly on the legal point that billions of dollars worth of property rights have vested under a long recognized rule of property law which should not be disturbed by the Supreme Court, Daniel cited a few cases of states uses and property rights:

1. Each of the coastal states exercises jurisdiction, ownership, and control within their boundaries over one or more of the following: fisheries, kelp, seaweed, shell, sand, oyster beds, clam beds, and sponges. By numerous previous decisions of the Supreme Court, those states have the right to limit the taking of such property to its own citizens and receive large sums annually from leases, license fees, and taxes. In California, fishing is a bigger business than oil in coastal waters. Fishing is also an important item of revenue in other coastal states. (Although

the United States' suit was based on oil alone, federal control over the land for oil would necessarily mean control over all other resources in the area.)

2. Large areas of filled-in land below low tide are now covered by highways, railroads, and industries which bring the coastal states large revenues each year.
3. Cities, counties, port authorities, and states have spent billions of dollars on recreational and commercial facilities which extend seaward below low tide.
4. Oil leases bring large revenues annually not only to California, but to Texas, Louisiana and other gulf coast states.
5. Some states have provided that all revenue from such lands go to certain state funds. In Texas, since 1900 this revenue has gone to the public school fund. Oil and other leases are made by the State School Land Board.

Going back to his original contention that the whole case depended on states ownership of these lands, Daniel cited a number of Supreme Court decisions holding that ownership did lie with the states:

Mr. Justice Field in *Weber v. Board of State Harbor Commissioners*:<sup>3</sup> "By that law (the common law) the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters, is, in England, in the King, and, in this country, in the State."

Mr. Justice McKinley in *Pollard v. Hagan*:<sup>4</sup> "First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively."

Mr. Justice Curtis in *Smith v. Maryland*:<sup>5</sup> "Whatever soil below low water mark is subject of exclusive propriety and ownership, belongs to the State on whose maritime border and within whose territory it lies . . ."

Mr. Chief Justice Waite in *McCready v. Virginia*:<sup>6</sup> ". . . each State owns the beds of all tidewaters within its jurisdiction."

One of the prime agitators of this latest federal move has been ex-Secretary of the Interior Harold L. Ickes, and yet, in 1933, when certain individuals were attempting to obtain leases from the federal government with respect to submerged lands off the shore of California, Mr. Ickes himself wrote a letter upholding state ownership of lands beneath tidewater. I should like to read this letter to you.

"The Secretary of the Interior  
Washington, December 22, 1933

"Mr. Olin S. Proctor,

"Long Beach, Calif.

"My Dear Mr. Proctor:

"I have received, by reference from the Department of State, copies of your letters of October 15 and November 22.

"As to the jurisdiction of the Federal Government over lands bordering on tidewater, the Supreme Court of the United

States has held in the case of *Hardin v. Jordan*,<sup>7</sup> as follows: "With regard to grants of the government for lands bordering on tidewater, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States.'

"The foregoing is a statement of the settled law, and therefore no right can be granted to you either under the leasing act of February 25, 1920,<sup>8</sup> or under any other public-land law to the bed of the Pacific Ocean either within or without the 3-mile limit. Title to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State. A permit would be necessary to be obtained from the War Department as a prerequisite to the maintenance of structures in the navigable waters of the United States, but such a permit would not confer any rights to the ocean bed.

"I find no authority of law under which any right can be granted to you to establish your proposed structures in the ocean outside the 3-mile limit of the jurisdiction of the State of California, nor am I advised that any other branch of the Federal Government has such authority.

"Sincerely yours,

"Harold L. Ickes,

"Secretary of the Interior."

Nevertheless, as submerged coastal lands, not only California but of Louisiana and Texas, became increasingly valuable because of their known or potential oil and gas possibilities, Mr. Ickes and other individuals in various bureaus of the Federal Government, ever anxious to increase the power of the Federal Government even at the expense of the power and rights of the several states and local communities and private persons within the states, set about to see if they couldn't grab for the federal bureaucracies these valuable lands even though Mr. Ickes himself was on record that on the basis of settled law the Federal Government had no right thereto.

An attempt was made in Congress in the late 30's to take away these rights from the states and vest them in the Federal Government and this was defeated. When it became apparent that they could not achieve their ends through Congress, these persons then turned their attention to what might be done through the courts, especially in view of the fact that the federal courts had, to a large extent in later years, lost their independent character and had become in effect merely another arm of the executive branch of the government. The end result was the institution of the case now being considered.

At the conclusion of Mr. Daniel's argument, three of the justices asked a number of questions.

"Justice Black: If the states have the right to preclude the Federal Government from getting oil within the 3-mile limit, why would they not have the right to preclude the Federal Government from getting oil 50 miles away?"

"Mr. Daniel: I don't believe the state has the right to preclude the Government from getting oil anywhere within the borders of a state. If it is for national defense, there are means by which the Federal Government can get all the oil it needs, and that was proved during the last war, it seems to me. Not only did they set the price, not only was the price fixed, but a priority was given to the Federal Government to buy from private owners. There is nothing involved here preventing the Federal Government from getting this oil out of that marginal sea through purchase from the legal owners when needed for national defense.

"Justice Black: There is something if the states have a right to say who shall get it to the exclusion of the Federal Government."

The questions and answers continued and in response to another question by Justice Black, Mr. Daniel replied in part as follows:

"Certainly, there is no doubt that the Federal Government has the right to defend those shores and protect in international law the claim out to three miles, but by the Federal Government exercising such constitutional right and authority does that mean it should take the ownership of the property away from us?"

After another exchange of questions and answers, Mr. Daniels made the point that the bottom of the sea has been divided up with respect to oyster beds and Justice Black inquired if the states had regulated submerged lands as to fishing, to which Mr. Daniel replied that they had. The questions and answers then continued as follows:

"Justice Black: Suppose the Government were at war and decided it needed these fish, and fenced it off and began to catch the fish. Would it have to pay the state for the fish?"

"Mr. Daniel: Well, sir, I would think so. I believe under our type of government, Mr. Justice Black, for the Government, the Federal Government, to get any property—it can get any property it needs, but I believe we recognize that it should pay the owner.

"Justice Black: I believe the Constitution says, 'for private property.'

"Mr. Daniel: Also there is a provision providing it shall pay for state property.

"Justice Black: Yes.

"Mr. Daniel: Property obtained from the state for certain purposes, and it lists those purposes, ports, and so forth, I don't believe that our country has ever recognized any right

to, because of a need, no matter how great the need—to take the property without ever giving compensation to the rightful owner.

“Justice Black: That depends on what the property is.”

The questions and answers continue.

“Mr. Daniel: Mr. Justice Black, oil under the surface, under the bed of rivers and under the soil, has been held by this Court time and again to be property that goes with the soil.

“Justice Black: Well, I don’t know that it has been held that the oil goes with the soil. Suppose they discovered something about four miles under the surface of the earth. Do you mean that the old property concept would have to apply to that, even though it were something the Government desperately needed?

“Mr. Daniel: I think so. We are going two miles underneath the surface to get the oil now in several places.”

At this point the questioning was taken up by Mr. Justice Frankfurter.

“Justice Frankfurter: Why can’t you recognize title as to oyster beds but not title as to oil wells?

“Mr. Daniel: Because the title goes with the ownership of the soil.

“Justice Frankfurter: You could have different layers of title, this layer belongs to the state, this to the Government, because it is oil.

“Mr. Daniel: Mr. Justice Frankfurter, there is no need of me telling you the well recognized property law of this land, that those various stratas, beneath and above, have long been recognized to be with the owner of the surface of the soil. That has been the Government’s position where the Government has been owner.”

You may have surmised by some of my tones in reading the foregoing questions and answers that I am astounded at some of the words used by Mr. Justice Black because of the amazing implications of those words with respect to theories of property ownership evidenced thereby. These questions foreshadowed the opinion which was handed down on June 23rd.

And now I would like to quote from that opinion. Mr. Justice Black delivered the opinion of the Court which was that of six members thereof, Mr. Justice Jackson taking no part in the consideration and decision of the case and Mr. Justice Read and Mr. Justice Frankfurter dissenting. Some pertinent quotations from the opinion are as follows:

“The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dan-



gers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it. \* \* \* In the light of the foregoing, our question is whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited."<sup>9</sup>

Then after commenting upon the three-mile marginal belt of jurisdiction seaward, the opinion continues:

"The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars raged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use."<sup>10</sup>

Shortly after the above quotation the following sentence appears:

"The very oil about which the state and nation here contend might well become the subject of international dispute and settlement."<sup>11</sup>

After more legal and illegal wanderings, the opinion, as to the main issue of the case, concluded as follows:

"Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."<sup>12</sup>

The fact that the court did not use the word "ownership" to characterize the rights and powers of the United States is not, in my opinion, encouraging. On the contrary, it demonstrates to me that the majority of the Supreme Court Judges recognize that they cannot reconcile what they had determined to give to the Federal Government with any possible construction of indisputable legal principles. Much as the court would have liked to, it simply couldn't say that the territory in dispute was "owned" by the United States.

How is property ownership acquired? It is acquired by revolution, cession, succession, conquest, condemnation, prescription, purchase, gift and descent. There are numerous variations of these methods but by none thereof could the court say that the United States owned this territory. Consequently, the court had to invent a new kind of proprietorship and the numbo-jumbo which it found necessary to that end is to me more frightening than would have been a decision of the court declaring plain or "mere" ownership in the United States based on an overruling of the prior decisions of the Supreme Court.

The issues here involved go beyond a dispute as to which, as between the individual states and the Federal Government, is the owner of certain oil and gas rights. The quotations which I have read to you from the oral argument before the Supreme Court and from the decision in the case clearly demonstrate that the federal bureaucracy, in part at least, backed by the Supreme Court, is contending for unlimited power and dominion over all of our resources. Remember what Mr. Justice Black said in the opinion: that the United States possesses "the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean." And remember further that he did not qualify that assertion of unlimited power with any requirement that the government reimburse any property owner whose property ownership is adversely affected by the exercise of that unlimited power and dominion. The statement just above quoted was immediately followed by that other short sentence which is confusing, and which reads: "The government also appears in its capacity as a member of the family of nations."

The reasonable interpretation of the above quotations is that by reason of our proximity to the sea, and, hence our vulnerability to attack from the sea by hostile powers, the Federal Government possesses this unlimited and unqualified full power and dominion. But let us not forget that we are now in an air age and that any and all parts of our country are just as open to attack from the air as are the coastal states open to attack from the sea. If the United States possesses unlimited and unrestricted power and dominion over coastal areas because of the vulnerability of such areas to attack from the sea, then it has equally as much unlimited power and dominion over every inch of the United States because of the danger of attack of any and all parts thereof from the air.

In another one of the quotations from the opinion which I have heretofore given, Mr. Justice Black again adverted to the necessity of the Federal Government having the powers which he conferred upon it in the opinion because it is necessary that the National Government be able to protect the Nation. Thus remember that he said: "The three-

mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts."

Again I point out to you that the same argument would apply to every portion of the United States by reason of danger from wars waged in the air above the United States.

Remember also Mr. Justice Black's question to Mr. Daniel when he asked:

"Suppose the Government were at war and decided it needed these fish, and fenced it off and began to catch the fish. Would it have to pay the state for the fish?"

The plain implication of the question in its full context, all of which I read to you earlier, is that in Mr. Justice Black's opinion the government would not have to pay anyone for the fish.

Bringing the matter home, I would now like to suggest to our sheep men: How would they like Mr. Justice Black to ask that same question with reference to wool which the government might need for the uniforms of its soldiers in the next war; or to the cattlemen, how would they react to a like question from Mr. Justice Black with respect to meat which the United States might need to feed its armed forces in the next war; or how the gold, silver and copper miners of the Rocky Mountains would like Mr. Justice Black to ask them for their gold and silver to prosecute the next war, all without any compensation to them for it? Like questions could be posed to the producers of sugar from sugar beets, to our grain farmers, in fact, to every person who produces anything.

The oil lands of the Rocky Mountain area will be no more immuned to the rapacity of the Federal Government than are the oil lands of the coastal states. Remember that there were large flying fields in all of the Rocky Mountain states during the last war. What is to prevent the Federal Government from saying in the next war, or even in preparation for or to prevent another war, that it needs the oil lands and the refineries of the Rocky Mountain area to supply the requirements of these flying fields?

Under the decision of the Supreme Court in this case there is no requirement that the United States reimburse anyone for the federal taking of the tidelands and there would be no more reason or compulsion upon the United States to reimburse the owners of any of the commodities and resources taken from the inland states, whether such owners be private individuals or state or municipal governments. The effect of the California case is to take these valuable lands from those

who have heretofore been regarded as the owners thereof, whether those owners be the state or persons claiming through the state, and transfer all of the benefits of such ownership to the United States Government without payment to anyone.

1. 332 U. S. 19, 67 Sup. Ct. 1658, 91 L. Ed. 1889 (1947).
2. *Id.* at 22.
3. 18 Wall 57, 21 L. Ed. 798 (1873).
4. 3 How. 212, 11 L. Ed. 565 (1845).
5. 18 How. 71, 15 L. Ed. 269 (1855).
6. 94 U. S. 391, 24 L. Ed. 248 (1876).
7. 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428 (1891).
8. 41 Stat. 437 (1920), 30 U. S. C. A. Sec. 181.
9. 332 U. S. at 29.
10. *Id.* at 35.
11. *Ibid.*
12. *Id.* at 38.

## INTERNATIONAL ORDER AND JUSTICE UNDER LAW

ORIE L. PHILLIPS\*

We live today in a troubled world. The balance between peace and war is so delicate that no one can forecast the future with certainty. Yet, if we strive to the utmost to bring about and maintain peace in the world, I believe there is basis for reasonable hope of attaining those objectives.

International wrongs can be redressed and international rights enforced through force by a nation powerful enough to compel by force.

International wrongs can be redressed and international rights vindicated through peaceful processes if the nations of the world will, in good faith, commit themselves to the principle of international justice and ordered liberty under law, made effective by conciliation, arbitration, and adjudication.

The first of these alternatives means war with all its tragedy, destruction, and misery; it means the sacrifice on the altar of war of the flower of our young manhood and womanhood; it means the useless exhaustion and destruction of material resources; it means the economic, social, physical, mental and moral repercussions that follow in the wake of war; it means a struggle of might with the most destructive agencies that the ingenuity of man can devise, the cumulative effect of which we do not yet fully understand; it means death and destruction and misery in both combatant and noncombatant areas; it *may* mean the end of the American way of life, the loss of our free institutions and our precious liberties.

The other alternative means international justice and ordered liberty under law for all the nations of the world. It assures respect

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\* Chief Judge, United States Court of Appeals, Tenth Circuit.