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# ARTICLES

## THE BELLONI DECISION: A FOUNDATION FOR THE NORTHWEST FISHERIES CASES, THE NATIONAL TRIBAL SOVEREIGNTY MOVEMENT, AND AN UNDERSTANDING OF THE RULE OF LAW

BY

CHARLES WILKINSON\*

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\*Distinguished University Professor Emeritus, Moses Lasky Professor of Law Emeritus, University of Colorado Law School. This was delivered as the Keynote Address of the *U.S. v. Oregon*: 50th Anniversary Symposium at Lewis & Clark Law School, Portland, Oregon, on October 18th, 2019. This well-attended gathering marked a seminal moment in the history of the Pacific Northwest: so much justice and accomplishment flowed from the Belloni decision. Many people came and it was an emotional occasion. We had a lot to celebrate.

I will start by saying it was good to have so many tribal people in attendance. I will offer high gratitude to just one Native person, my friend and colleague, Delvis Heath from Warm Springs, but I will send out this spirit and thanks to all of the tribal members I have had the pleasure of working with over my nearly fifty years with Indian people. Thank you, Delvis, for the many jars of huckleberries, the long, easy conversations, the medallion you blessed me with, and the words you said to me that evening and also for your wisdom, your courage, your total dedication to tribal culture and sovereignty, and for the *fun*. Thank you!

Thank you, Lewis & Clark, for all you have done for the past four decades, especially your splendid, pathbreaking work on Pacific salmon, which is just as good as law and policy scholarship and public assemblages can be. I appreciate the advice on my talk from Laurie Jordan and Mike Blumm, who has long been unequaled in his work on Pacific salmon and related issues. Thanks to Lucy Brehm for many contributions, including this celebration. I have long benefitted from the research of Laura Berg; her oral histories of Judge Belloni and Judge Panner were invaluable to me here.

Thanks to the Columbia River Inter-Tribal Fish Commission (CRITFC) for your enormous and unique contributions since 1977. You have always had terrific tribal participation; staff excellence by Laurie Jordan, Rob Lathrop, and many others; and executive leadership that has always been strong and still is with Jamie Pinkham, who is the gold standard in tribal and intertribal management.

*Judge Belloni's decision in United States v. Oregon, handed down a half-century ago, has been given short shrift by lawyers, historians, and other commentators on the modern revival of Indian treaty fishing rights in the Pacific Northwest. The overwhelming amount of attention has been given to Judge Boldt's subsequent decision in United States v. Washington and the Passenger Vessel ruling by the Supreme Court affirming Judge Boldt. I'm one who has been guilty of that.*

*We now can see that United States v. Oregon was the breakthrough. In those early days, Judge Belloni showed deep understanding of the two key bodies of law and policy—classic Indian Law dating back to John Marshall and the new ideas just beginning to remake public wildlife law and policy. We can fairly doubt that Judge Boldt and the Supreme Court would have ruled as they did if Judge Belloni had not written his profoundly insightful and brave opinion. Further, the Belloni decision reached beyond Indian treaty rights per se, energizing the emerging broad and fundamental movement for Indian tribal sovereignty that has revitalized Indian Country. Even more broadly, the decision led the way in the long and difficult chain of events that finally allowed the beauty of the rule of law to rise above the contentious and seemingly insolvable disputes over Indian fishing rights in the Pacific Northwest.*

\* \* \*

I often came to Oregon during 1971 through 1975 as an original Native American Rights Fund attorney to work with several tribes, most deeply the Warm Springs, Siletz, and Klamath. I then joined the law school faculty at the University of Oregon in 1975 and spent twelve years embroiled in the raging and formative tribal, national forest, and salmon issues of the time. I've continued to work with tribes and have written quite a bit about the Pacific Northwest. I'm now finishing up a book on the Boldt decision, which is so tightly tied to the Belloni decision. My experiences in this green and giving landscape here stuck with me and always moved me so.

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And our appreciation goes out to the tribal and federal lawyers. Oh, how we wish we could have had with us Owen Panner, the ultimate gentleman who brought people together to reach consensus on implementation of the Belloni decision and will always stand as the ultimate model, over his many years with Warm Springs, of what an attorney-tribal relationship should ideally be.

And, please pardon me if I slip in what might be seen as a brag, though I surely don't mean it that way. Can you imagine how blessed a person would feel to have, as students and research assistants and close lifetime friends, Howie Arnett, Vernon Peterson, John Volkman, Rex Armstrong, Monte Mills, now on the faculty at Montana, Suzy Driver, and Craig Dorsay? That's the best part of being a law professor.

I can only put it this way. I've had a number of recent assignments the past couple of years that I've treasured. Your asking me to give this keynote address is my favorite. And you won't find me saying words like that anywhere else. Thank you so much for having me here today.

Today, I would like to present to you three convictions about the *great* 1969 Belloni decision.<sup>1</sup> First, it stands tall in its importance in American law, jurisprudence, and history. Second, moving beyond court cases, the Belloni decision played a central role in generating the historic national tribal sovereignty movement. Third, the Belloni decision, and the ways that Oregon's legal community, government, and citizenry reacted to it, offer a valuable and profound example for understanding and addressing the wrenching crisis each of us personally feels at this moment over the United States' current commitment to the rule of law.

Sometimes I will assess the Belloni decision alone, but in other instances I will refer to the Belloni decision and the 1974 Boldt decision in Washington together, for as a matter of law, history, politics, and the societies and economies of the Pacific Northwest, these two historic cases are interdependent on each other—symbiotic.

\* \* \*

The Northwest Tribes were Salmon People: ever since time immemorial, salmon had been at the heart of their diets, commerce, and spirituality.<sup>2</sup> When treaty time came, in 1854 through 1856, they retained reservations but ceded away most of their holdings.<sup>3</sup> As for those vast ceded lands, tribal negotiators made it clear that they must be able to have expansive fishing rights on those off-reservation lands or they would not agree to the treaties.<sup>4</sup> The United States understood that. There are many statements in the treaty records that support those understandings.<sup>5</sup> Governor Isaac Stevens of the Washington Territory, for example, assured the tribal leaders that “this paper secures your fish.”<sup>6</sup>

From the beginning, American citizens resisted the treaties. They tormented off-reservation Indian fisherman, often violently.<sup>7</sup> The

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<sup>1</sup> *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). *United States v. Oregon* is the consolidated case and the litigation is often referred to as “*United States v. Oregon*.”

<sup>2</sup> *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (Passenger Vessel)*, 443 U.S. 658, 665 n.6 (1979).

<sup>3</sup> *Id.* at 661–62.

<sup>4</sup> *Id.* at 667–68, 676.

<sup>5</sup> *See, e.g., id.* at 676 (“During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent.”).

<sup>6</sup> *Id.* at 667 n.11 (quoting from minutes of the Point No Point Treaty Council proceedings).

<sup>7</sup> THOMAS P. SCHLOSSER, WASHINGTON'S RESISTANCE TO TREATY INDIAN COMMERCIAL FISHING: THE NEED FOR JUDICIAL APPORTIONMENT 14 (1978), <https://perma.cc/KBW6-UTND>.

territorial governments took no action to protect the tribes, nor did the new states. Instead, both Oregon and Washington developed a heavy-handed argument that the states' "police power," the general right of states to regulate activities within their borders, gave them the right to regulate all hunting and fishing, not acknowledging that general police power does not control over a specific federal treaty right, the supreme law of the land.<sup>8</sup> Coupled with that, the states trumpeted their virtually unlimited right to regulate for "conservation," claiming that the states, and the states alone, must restrict Indian fishing to preserve the runs.<sup>9</sup> Throughout the early twentieth century, the state agencies increased their crackdowns on Indian fishermen, and state officials and state courts refused to intervene. All the while, as Judge Boldt expressly found after careful examination,<sup>10</sup> there was no evidence that tribal fishermen were over-fishing or wasting fish. By the 1950s and '60s the state agencies and popular press increasingly referred to Indian fishermen as "renegades," "poachers," and "outlaws."<sup>11</sup> The rough arrests, confiscations of catches and gear, and prosecutions continued.<sup>12</sup>

In addition to the states' unrelenting harassment over salmon, ever since the mid-1800s all Indian tribes, including those in the Northwest, had faced a barrage of federal laws and policies against their land, cultures, and sovereignty. The General Allotment Act of 1887 dispossessed them of 100-million acres of land<sup>13</sup>—an area larger than the state of Montana. The real government in Indian country was the Bureau of Indian Affairs (BIA), which ruled with oppressive and often manipulative practices. BIA courts, not tribal courts, dispensed justice on sovereign reservation lands. The federal assimilation policy was brutal. Traditional cultural and religious practices were outlawed by federal regulations. Congress funded Christian religions to proselytize and convert Native people. Numerous Indian children were sent off to heavy-duty assimilation in federal boarding schools. Indian hunting and fishing was discouraged—they were forced to take up farming or do other modern kinds of jobs. For generations, federal policy was "kill the Indian and save the man."<sup>14</sup>

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<sup>8</sup> *Id.* at 21.

<sup>9</sup> *Id.* at 15.

<sup>10</sup> *United States v. Washington*, 384 F. Supp. 312, 338, n.26 (W.D. Wash. 1974).

<sup>11</sup> CHARLES WILKINSON, *MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY* 31 (2000).

<sup>12</sup> The best source on citizen and state actions toward tribal fishing in the Pacific Northwest from the 1870s up through the early 1970s is SCHLOSSER, *supra* note 7; *see also, e.g.*, FAY G. COHEN, *TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS* 69–70 (1986).

<sup>13</sup> Ch. 119, 49th Cong. 24 Stat. 388 (1887).

<sup>14</sup> These historical policies have been well covered by many sources. The classic history of federal Indian policy is FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (1984). On the loss of lands through the General Allotment Act of 1887, *see* KIRKE KICKINGBIRD & KAREN DUCHENEVAUX, *ONE HUNDRED MILLION ACRES* (1973). On allotment and assimilation, *see, for example*

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By the end of World War II, tribalism in Oregon, Washington, and all of America reached its lowest point in history. In 1953, the United States Congress—the highest and most powerful trustee—adopted termination as its official policy.<sup>15</sup> Congress, led by the zealous, single-minded Senator Arthur V. Watkins of Utah, meted out a hard-edged elimination of the far-flung Indian legal, policy, and reservation system: sell off the reservations, pay off the Indians, abrogate all of the treaties and laws relating to tribes and tribal members, and move quickly.<sup>16</sup> Watkins and his allies pushed through major termination statutes immediately, among them, laws hitting the timber-rich Klamath and Menominee reservations and the numerous small tribes in Oregon and California.<sup>17</sup>

Watkins, who virtually had no knowledge of Indian country, created an unintended consequence: the moccasin grapevine, passive for so long, heated up with warnings about termination. The National Congress of American Indians, founded in 1944, did the same.<sup>18</sup> Returning veterans from World War II and the Korean War had been respected figures in the military and were willing to stand up to state and local governments and officials. Native activism was blooming. By the early 1960s, several termination bills had been put on hold or rejected.<sup>19</sup> Senators and members of Congress were openly wondering if termination was the right approach.<sup>20</sup> But, make no mistake about it, by 1968, when the cases that led to the Belloni Decision were filed, termination was still moving forward with the lands and people of several large tribes at risk.

Another major event in Indian affairs took place fifty years ago this fall. Vine Deloria, Jr. published *Custer Died for Your Sins (Custer)* in October 1969.<sup>21</sup> He understood Indian law, policy, and politics in a way no one ever had. *Custer* was a national and international best-seller and everybody in Indian country read it or knew about it. Speaking of termination, a sweeping policy that included many proposals to increase state jurisdiction in Indian country, Vine put it bluntly: “If we lose this

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FREDERICK HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS, 1880–1920* (1984).

<sup>15</sup> PRUCHA, *supra* note 14, at 1041.

<sup>16</sup> DONALD LEE FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960*, at 91–94, 96, 99–100, 103–04, 106, 110 (1990).

<sup>17</sup> On the termination policy, see *id.* at 97, and also KENNETH R. PHILP, *TERMINATION REVISITED: AMERICAN INDIANS ON THE TRAIL TO SELF-DETERMINATION, 1933–1953*, at 158, 173 (1999).

<sup>18</sup> FIXICO, *supra* note 16, at 22.

<sup>19</sup> Michael C. Walch, Note, *Terminating the Termination Policy*, 35 *STAN. L. REV.*, 1181, 1190–91 n.50 (1983).

<sup>20</sup> Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 *AM. INDIAN L. REV.* 139, 156–57 (1977).

<sup>21</sup> VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* (Norman, 1988) (1969).

one, there won't be another."<sup>22</sup> He directly identified the importance and opportunity the Northwest fishing cases held: "We had to obtain legal protection for the treaties and the sovereignty. That's why the treaty fishing cases were so important. That was the way to make the breakthrough."<sup>23</sup>

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The breakthrough came down in Oregon first. In the summer of 1968, as part of the extensive crackdowns by Oregon and Washington fish and game officials on Indian fishing, Oregon officers arrested thirteen Yakama fishermen, including David Sohappy, for fishing on the Columbia River with gillnets contrary to state law.<sup>24</sup> The individual Yakama tribal members filed a lawsuit, *Sohappy v. Smith*,<sup>25</sup> against Oregon State Fisheries officials to enjoin the arrests.

In addition, and critically, during the mid-1960s United States Attorney for the District of Oregon Sid Lezak and George Dysart of the Interior Solicitor's Office in Portland had become greatly disturbed over the rapid increase of state arrests of Indian fishermen. Dysart, far more than any lawyer in the country, understood the Northwest Indian fisheries issues in full. He was one of a handful of lawyers in the country who could be called an Indian law expert. Several months before the *Sohappy* filing, Dysart and Lezak began putting together a comprehensive and unprecedented litigation package to establish the fishing rights of the four tribes with treaties covering the mid-Columbia River. Their approach called for a court-ordered tribal "fair and equitable share" of all fish harvested by tribal members at their "usual and accustomed" off-reservation fishing places.<sup>26</sup> And in September 1968, after working with Owen Panner and other tribal attorneys, the United States brought the case, *United States v. Oregon*, as plaintiff and, as trustee, on behalf of the Warm Springs, Yakama, Umatilla, and Nez Perce tribes.<sup>27</sup> The four tribes then filed to intervene on their own behalf and were recognized as parties in the litigation.<sup>28</sup> *United States v. Oregon* was soon consolidated with *Sohappy v. Smith* because the issues in both cases were so similar.<sup>29</sup> Not incidentally, the tribes and fishermen now had the prestige and resources of the United States of

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<sup>22</sup> STAN STEINER, *THE NEW INDIANS* 270 (1968); CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF THE MODERN INDIAN NATIONS* xiii (2005).

<sup>23</sup> Interview by the author with Vine Deloria, Jr. in Golden, Colo. (Aug. 4, 2000) as quoted in WILKINSON, *supra* note 22, at 149.

<sup>24</sup> Donald W. Meyers, *It Happened Here: Federal Suit Affirms Yakama Treaty Rights to Fish*, YAKIMAHerald.com (July 29, 2019), <https://perma.cc/CHC6-VG7M>.

<sup>25</sup> 302 F. Supp. 899, 903–04 (D. Or. 1969).

<sup>26</sup> Michael Blumm & Cari Baermann, *The Belloni Decision and Its Legacy: United States v. Oregon and its Far-Reaching Effects After a Half-Century*, 50 ENVTL. L. 347, 367 (2020).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

America in this case where the plaintiffs were asking for unprecedented relief, including the central idea of a tribal share of the world-renowned Columbia River salmon runs.<sup>30</sup>

It might seem that the tribes had come up with an unfortunate judge in this Oregon case—and, as well, up in western Washington, where *United States v. Washington*<sup>31</sup> would soon be filed in Judge Boldt's court on essentially identical treaty law.

Judge Robert Belloni was raised in small towns in Coos County on the southern Oregon Coast. “I grew up with commercial fishermen—they're my best friends—and sportsfishermen.”<sup>32</sup> He kept contact with them all of his life. He belonged “to a little golf club in Newport, about a quarter of the members are commercial fishermen.”<sup>33</sup> Could he be biased, even if unconsciously, in favor of the commercial and sportsfishermen who were so loudly and effectively urging the state to crack down on Indian fishing?

The Washington tribes had similar concerns. Judge Boldt, an Eisenhower appointee, was a conservative jurist, a law and order judge who handed out tough sentences to criminals. Most notable, in 1970, the Vietnam protesters called “the Seattle Seven” were charged with inciting to riot.<sup>34</sup> When they disrupted the trial, Judge Boldt declared a mistrial—and then charged them with contempt of court and sentenced them to six months in jail, with no time off for the upcoming Christmas vacation.<sup>35</sup> The Washington tribes wondered, “We are protesting government action—will he be fair with us?”<sup>36</sup>

The answer was that the tribes had definitely not been assigned to judges who would be influenced by their personal relationships or general views about the law. They had been assigned to the kind of judges who we admire so and who are at the very heart of American justice at its best: judges who, hard though it sometimes would be, could put aside all personal concerns and general professional views and look specifically and only at the particular cases in front of them, judges who open-mindedly examined the facts of those cases and worked earnestly to determine the laws that governed these cases. You will never find that classic idealism and professionalism carried out more vividly than by Judges Robert Belloni and George Boldt.

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<sup>30</sup> On the trail-blazing work of Lezak and Dysart in conceiving of, and bringing to court, *United States v. Oregon*, see *id.* at 365–66.

<sup>31</sup> 384 F. Supp. 312 (W.D. Wash. 1974).

<sup>32</sup> Interview by Laura Berg with Judge Robert C. Belloni, United States District Court Judge for the District of Oregon: The *U.S. v. Oregon* story, in Portland, Or. (Dec. 1, 1989).

<sup>33</sup> *Id.* at 19.

<sup>34</sup> See, e.g., Kit Bakke, *The Chaos, and Surprising Conclusion, of the 1970 Trial of the Seattle 7*, SEATTLE TIMES-PAC. N.W. MAG. (May 3, 2018), <https://perma.cc/LAY9-HH2U>.

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Rob Carson, *Boldt Decision Has Rippling Effects 40 Years Later*, NATIVE TIMES (Feb. 15, 2014), <https://perma.cc/TN4U-PPJB>.

The moments that Judge Belloni and Judge Boldt were assigned to the cases turned out to be the most decisive moments in all of this historic litigation.

I mean it this way. There is no denying the stature of Supreme Court opinions. But a number of years ago, I realized that I was short-changing my Indian Law students when I, and my casebook, taught the fishing cases through 1979 Supreme Court opinion, a fine, firm, and important statement of law but written in faraway Washington, D.C.<sup>37</sup> My students were not getting the depth, the essence, the feel, the soul, of historic legal and societal events. As a result, I became convinced that the Belloni and Boldt decisions created the best way to understand the whole broad controversy. Further, these luminous documents of law, history, society, and morality represent the very best of American law. Rarely do judges dig so hard, so deep, as Belloni and Boldt did, to get past the conventional but misguided assumptions of the time. Yes, these were treaties, but they are a kind of document, carrying words such as “[t]he right to fish in common with the citizens of the territory” that at first glance seem so indefinite and vague.<sup>38</sup> Can they support rulings of this magnitude? Can a court properly use words like that to rearrange significant parts of a state’s economy? To overturn state conservation laws that have always been considered core elements of state sovereignty? Without the courage, independence, fairness, diligence, and plain obedience to the rule of law that shout out from these two remarkable and eternally valuable judicial statements, the Supreme Court might well have never ruled for the tribes and the governing rule of law.

So while I personally will celebrate with my whole being today, and in 2024 when a sister fifty-year celebration will be held up north near the Salish Sea, in 2029 I will be warmed by, and will give proper respect to, what the Supreme Court put down a half century earlier. But I will be sure to remind myself that the most authentic celebrations should be held elsewhere because the result was determined *out here*.

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When Judge Robert Belloni sat down to decide *United States v. Oregon*, the existing decisions gave him little help. The main exception was the 1905 *United States v. Winans*<sup>39</sup> case, written by Justice Joseph McKenna, which blocked attempts by local citizens to deny fishing rights to Yakama fisherman. *Winans*, still foundational to Indian and natural resources law, offered a powerful explanation of the reserved

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<sup>37</sup> See *Passenger Vessel*, 443 U.S. 658 (1979).

<sup>38</sup> Treaty of Medicine Creek, art. III, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, art. V., Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, Art. IV, Jan. 26, 1855, 12 Stat. 933; Treaty of Neah Bay, Art. IV, Jan. 31, 1855, 12 Stat. 939; Treaty with the Yakamas, Art. III, Jun. 9, 1855, 12 Stat. 951; Treaty of Olympia, Art. III, Jan. 6 1856, 12 Stat. 971.

<sup>39</sup> *United States v. Winans*, 198 U.S. 371, 380 (1905).

rights doctrine, explaining how tribes possessed fishing and water rights before the treaties and kept—or “reserved”—them in the treaties.<sup>40</sup> To explain why tribes would have pressed so hard for their fishing rights at treaty time, Justice McKenna issued a much-quoted assessment of the centrality of Indian fishing to Native cultures, writing that salmon were “not much less necessary to the existence of Indians than the atmosphere they breathed.”<sup>41</sup> Three years later he wrote the equally seminal *Winters v. United States*<sup>42</sup> opinion, establishing reserved tribal water rights.

It is understandable that previous judges had given Judge Belloni only limited help in *United States v. Oregon* because the tribes and United States raised overriding issues in wildlife and Indian law at a time when both fields had long lain dormant and were right on the front edge of comprehensive reevaluation and reform. Modern fisheries law was just beginning to evolve. Tribal governmental authority, the sovereignty announced by Chief Justice John Marshall in *Worcester v. Georgia*,<sup>43</sup> had been largely ignored by the courts and Congress; when Judge Belloni ruled, the word “sovereignty” hadn’t been used with respect to tribes by the Supreme Court in the twentieth century, although that was about to change.<sup>44</sup>

Today, we know that regulation of complex public fisheries regimes are evaluated in terms of rights to fish; group shares of fisheries; government regulation of harvests; and management of water and land habitat to assure sustainability. Pre-Belloni cases dealt almost exclusively with rights. As for a tribal share, no case had explored, either way, whether the courts should declare such a share and, if so, how large. On state regulation, the courts had addressed the issue only rarely and unhelpfully. Even *Winans* came up short, offering a two-sentence suggestion, which did not survive, of a broad state authority.<sup>45</sup> State regulation of tribal fishing did come up in the Supreme Court’s ruling in *Puyallup Tribe v. Department of Game of Washington*<sup>46</sup> (*Puyallup I*) in 1968, just as Judge Belloni was entering the judiciary. The shallow, confusing opinion by Justice William O. Douglas was formidable only because it was recent. But it contained new language—suggesting that states might include authority to regulate tribes when “reasonable and necessary”—that was far broader than previously believed.<sup>47</sup> Judge Belloni narrowly construed the reference<sup>48</sup> and, in the 1973 case *Department of Game of Washington v. Puyallup Tribe*,<sup>49</sup>

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<sup>40</sup> *Id.* at 381.

<sup>41</sup> *Id.*

<sup>42</sup> 207 U.S. 564 (1908).

<sup>43</sup> 31 U.S. (6 Pet.) 515, 580 (1832).

<sup>44</sup> See *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973).

<sup>45</sup> *Winans*, 198 U.S. at 384.

<sup>46</sup> 391 U.S. 392, 398 (1968).

<sup>47</sup> *Id.* at 401–03.

<sup>48</sup> *Sohappy*, 302 F. Supp. 899, 907 (D. Or. 1969).

<sup>49</sup> 414 U.S. 44 (1973).

(*Puyallup Tribe II*) Justice Douglas did not apply the “reasonable and necessary” standard, which effectively removed the inappropriate language in *Puyallup I* from Supreme Court jurisprudence.

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Judge Belloni responded with the opinion we celebrate today by cutting through the existing confusion and presenting the case in the context of traditional Indian law and the demands of an emerging new era in public natural resource and wildlife law. He recognized that the treaties must be read to reflect the intent of the tribes and required strong protection of tribal off-reservation fishing rights.<sup>50</sup> He ruled, which had never been done before, that tribes must have a specific share of the resource. He did not put a number on it, but called it a “fair share.”<sup>51</sup> As for the case as a whole, he knew that his decision would have to be employed in a real and complex world on real rivers, on specific runs in particular areas at designated times, and declared that the court would keep continuing jurisdiction to resolve continuing conflicts,<sup>52</sup> a judicial remedy rarely used at the time. That jurisdiction remains in force today.

Judge Belloni also clarified and defined, as had never been done before, the truth about the state’s absolutist arguments to regulate tribal fishing based on state police power and the right of the state to regulate for “conservation.”<sup>53</sup> He recognized that the state could regulate when “necessary” for “conservation.” He emphasized, however, that legal “necessity” and “conservation” had very different definitions than the state claimed. As for necessity, this regulatory authority is narrow: the state “*may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource.*”<sup>54</sup>

Judge Belloni then thoroughly, and with great clarity, debunked the state’s assertion that the current state policy was solely aimed at conserving the fishery resource.<sup>55</sup> Instead, he wrote, a key object of state policy was to allocate the resource to satisfy two powerful user groups—the commercial fishing industry and the sportsfishing community.<sup>56</sup> He explained in real-world terms how the Oregon system worked:

[Oregon has] divided the regulatory and promotional control between two agencies—one [the Game Commission] concerned with the protection and promotion of fisheries for sportsmen and the other [the Fish Commission] concerned with protection and promotion of commercial fisheries. The regulations of these agencies, as well as their extensive propagation

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<sup>50</sup> *Sohappy*, 302 F. Supp. at 905–06.

<sup>51</sup> *Id.* at 907–08, 910–11.

<sup>52</sup> *Id.* at 911.

<sup>53</sup> *Id.* at 906–08.

<sup>54</sup> *Id.* at 908 (emphasis added).

<sup>55</sup> *Id.* at 909–10.

<sup>56</sup> *Id.* at 910–11.

efforts, [were] designed not just to preserve the fish but to perpetuate and enhance the supply for their respective user interests.<sup>57</sup>

This determination to meet the interests of these user groups, and promote them, without any concern about a tribal share, he held, amounted to discrimination against tribal treaty rights and violated overriding federal law.<sup>58</sup>

This piercing observation, which explained in human terms the true basis of asserted state regulation, underlay his entire opinion. Each of Judge Belloni's holdings in *United States v. Oregon* was adopted by Judge Boldt, who added a definition of "fair share" to mean 50%.<sup>59</sup> Judge Belloni's reasoning and rulings were also central to the Ninth Circuit, the Supreme Court, and many decisions in other states.

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There definitely was an aftermath. I imagine that Laura Berg, when she conducted her valuable oral history of Owen Panner<sup>60</sup> years ago, had the same reaction I did when I interviewed Judge Panner in his chambers in 2002. I asked him about the criticism that Judge Belloni received after rendering his opinion. The media reported extensive and angry public opposition to it. The commercial fishing interests fueled the fire. The sportfishermen were probably even more effective. The Northwest Steelheaders had articulate and hard-hitting representatives and wide influence with the media. Judge Panner was emotional about that onslaught in general. But he teared up, and took a long pause, when he explained how hard it was on his friend:

[T]he case took a toll on Belloni. I know how much he worried about it. He lost a lot of friends, commercial fishermen down on the coast. He took a lot of abuse. That decision couldn't have happened without a federal judge who could put up with that kind of static and not have to worry about being reelected.<sup>61</sup>

The public outrage was even greater in western Washington after the Boldt decision. Oregon never did go overboard nearly as much as Washington did, although numerous bumper stickers with a "Screw Boldt and Slice Belloni" message were popular in both states.<sup>62</sup> To be sure, some of the public concern was understandable. The 50% share ordered by Judge Boldt required a heavy fundamental reworking of the economy of northwest Washington, which was commonly described at

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<sup>57</sup> *Id.* at 909.

<sup>58</sup> *Id.* at 910.

<sup>59</sup> *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

<sup>60</sup> Interview by Laura Berg, with Judge Owen M. Panner, United States District Judge of the United States District Court for the District of Oregon, in Portland, Or. (Dec. 14, 1989).

<sup>61</sup> WILKINSON, *supra* note 22, at 166.

<sup>62</sup> WILKINSON, *supra* note 11, at 58.

that time as “Timber, Salmon, and Boeing.”<sup>63</sup> Before the Court decision, commercial fishermen took by far the greatest amount of the harvest, about 85%; sportsfishers took about 8%; while the tribes took about 6%.<sup>64</sup> This meant that for the decision to be enforced, there would be a truly fundamental realignment, with many commercial boats being retired and tight-knit commercial fishing villages along the coast having to find new sources of revenue. These were sad, unfortunate consequences, justifiable only as necessary to honor the compelling and legally superior tribal treaty rights.

Still, western Washington protesters went way too far.<sup>65</sup> They hung Judge Boldt in effigy on the courthouse steps.<sup>66</sup> They held disruptive demonstrations and, worse yet, conducted continuing illegal fish-ins over a five-year period that took tons of salmon in direct violation of Judge Boldt’s ruling.<sup>67</sup> State fisheries officials almost uniformly refused to comply with, and state court judges often refused to enforce, federal orders that should have been routinely carried out. Parallels have often been made between the courage and wisdom of Judges Boldt and Belloni and of the Southern judges such as federal District Judge Frank Johnson in Alabama and others who enforced desegregation rulings tenaciously opposed by Southern states.<sup>68</sup> In the 1979 Supreme Court *Washington v. Wash. State Commercial Passenger Fishing Vessel Association*<sup>69</sup> (*Passenger Vessel*) decision, the Court made the statement, a kind so rare for the Court to hand down, that:

[t]he state’s extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state’s fishery in order to enforce its decrees. Except for some desegregation cases [in the South], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in the century.<sup>70</sup>

Thus, my first assessment is that the fishing rights decisions, most notably from the two district court opinions, are in the very forefront of all American court rulings for the rights of dispossessed peoples, along

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<sup>63</sup> See Ashley Ahearn, *How Boeing’s ‘Flying Fortress’ Warplane Changed Seattle’s Environment, Economy, and Demographics*, OPB.ORG, <https://perma.cc/7477-9VKV> (last visited Apr. 18, 2020).

<sup>64</sup> See, e.g., AM. FRIENDS SERV. COMM., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 126 (1970); SCHLOSSER, *supra* note 7; WILKINSON, *supra* note 11.

<sup>65</sup> See, e.g., AM. FRIENDS SERV. COMM., *supra* note 64, at 107–17.

<sup>66</sup> *Backlash to Boldt Decision Case Study*, SMITHSONIAN, <https://perma.cc/NH6X-64AQ> (last visited Apr. 18, 2020).

<sup>67</sup> See, e.g., AM. FRIENDS SERV. COMM., *supra* note 64, at 108, 110, 110 n.5.

<sup>68</sup> Howell Raines, *American Indians Struggling for Power and Identity*, N.Y. TIMES (Feb. 11, 1979), <https://perma.cc/FEX6-PDNB>.

<sup>69</sup> 443 U.S. 658 (1979).

<sup>70</sup> *Id.* at 696 n.36 (quoting Puget Sound Gillnetters Ass’n v. U.S. Dist. Court, 573 F.2d 1123, 1126 (9th Cir. 1978)).

with *Brown v. Board of Education*,<sup>71</sup> the decisions of the Southern District Court Judges, and a few others.

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My second conclusion is that the Belloni decision, and what tribes have made of it, mark the exact moment when the burgeoning modern tribal sovereignty movement accomplished its first significant achievement.

The tribes and Indian people needed lawyers so badly. As Vine Deloria and a growing number of tribal leaders emphasized, creating legal empowerment was a top priority for building the tribal sovereignty they craved.<sup>72</sup> Historically, most important Indian law cases were carried by courageous U.S. attorneys. Often, tribes weren't even parties. The private lawyers they did have were often of poor quality—tribes didn't have any funding for lawyers. Most tribal grievances, large and small, were not given any legal attention at all.

But from the beginning, the tribes in *Sohappy* and *United States v. Oregon* were lawyered up in a way that had never happened before. Owen Panner for Warm Springs and Jim Hovis for Yakama were dedicated, first-rate lawyers. Notable national legal figures participated.<sup>73</sup> Importantly, the tribal attorneys built an alliance with the federal government and could count George Dysart and Sid Lezak on their side. Owen Panner and Jim Hovis worked closely with the two federal attorneys in developing a litigation request to the Justice Department in Washington, D.C. and the White House and received support to proceed with the litigation.

The procedural process that the federal and tribal lawyers developed was itself a model for the sovereignty movement. Having the case brought by the United States on behalf of the tribes was a great asset for the tribes. The Justice Department would bring prestige, good lawyers, and funding for the litigation in a variety of areas, with expert witnesses being especially important. The tribes also intervened and participated on their own as full parties and, if necessary, could present their own views on particular issues if disagreements with the federal lawyers arose. That rarely happened. Today, this process is often followed with important tribal cases being brought by the United States as trustee with the tribes intervening.

The formative impact of the Belloni decision on sovereignty went well beyond court decisions and lawyering. Once the Belloni decision came down, federal interest in providing the tribes with funding for

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<sup>71</sup> 347 U.S. 483 (1954).

<sup>72</sup> WILKINSON, *supra* note 22, at 241–68.

<sup>73</sup> Among several others, Arthur Lazarus, one of the few prestigious large-firm lawyers who represented tribes; Jack Greenburg, Director-Counsel of the NAACP Legal Defense Fund; and widely respected Professor Ralph Johnson of the University of Washington Law School, were brought in as co-counsel for individual tribes. *See United States v. Oregon*, 302 F. Supp. 899, 903 (D. Or. 1969).

implementation was sparked and that increased when the Boldt decision was announced. The tribes jumped on the opportunity. If they were going to co-manage fisheries resources, they needed tribal courts, tribal enforcement officers, and, perhaps most of all, scientific expertise. With federal financial support as part of the trust relationship, individual tribes set up administrative agencies dedicated to fisheries for those purposes.<sup>74</sup> They promptly established two premier intertribal commissions, the Northwest Indian Fisheries Commission and the Columbia River Intertribal Fish Commission.<sup>75</sup> Organized around a major substantive area, they were very different in concept from the National Congress of American Indians. Today, there are scores of intertribals and they are valuable sources of national tribal decision-making. The two blue-ribbon Northwest fisheries organizations initiated that.

With the tribal fisheries agencies maturing and furthering sovereign tribal interests, the Northwest Tribes saw benefits of establishing agencies for other tribal concerns such as housing, health, economic development, education, and cultural resources. The word spread across Indian country and the substantial tribal governments that we see today were born and expanded. Today, most tribes have 300 or more governmental employees, not including tribal enterprises.<sup>76</sup> Remember that, in the late 1960s, tribes were likely to have literally two, one, one-half, or no staff members. Today, tribal offices are usually found in substantial tribal office buildings that bespeak governmental authority. Back then, tribal councils typically operated out of a room or two in the local BIA building. Modern sovereign Indian tribes make and implement most of the laws within their reservations. They, not the BIA, are the real governments. Each tribe achieved its own system of sovereign tribal governance through its own determined work over decades. But the Northwest fishing cases provided a vivid starting point.

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My third conviction is directed at the crisis over the rule of law we Americans face today. The rule of law is assumed to be one of the nation's core values. But is that really true? Can the rule of law hold?

The rule of law is easy to state and often hard to apply. All Americans, and all the entities they create, must take only actions that are allowed by law, including the Constitution, treaties, federal statutes and regulations, state statutes and regulations, and right down to the most minor local ordinances.

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<sup>74</sup> Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 406 (1991).

<sup>75</sup> Jennifer Ott, *Northwest Indian Fisheries Commission*, HISTORYLINK.ORG (Mar. 28, 2011), <https://perma.cc/8AZ4-HD3X>; *The Founding of CRITFC*, COLUMBIA RIVER INTERTRIBAL FISH COMM'N, <https://perma.cc/NAF4-YN4H> (last visited Apr. 18, 2020).

<sup>76</sup> WILKINSON, *supra* note 22, at 294.

We believe that we—all people and all institutions—are bound by the rule of law. This is not a harsh notion, but a compassionate one that builds safe, stable, and trusting relationships among governments and smoothly-working communities. Needless to say, individuals and organizations often stray, out of pique, exasperation, bad judgment, or a conscious decision to break the law. Nonetheless, the rule of law has remained a sacred aspiration, an eternal part of the ideals that make us proud to be Americans. Overall, the rule of law has to hold, recognizing that sensitive, difficult circumstances may produce heartrending conflicts that require long, strenuous efforts by many parties if the rule of law is to hold.

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From the moment Judge Belloni handed down his opinion, it was unclear whether it could hold. Of course, this was rarely articulated in terms of the rule of law, but that is what it was. What kind of law is an Indian treaty? It's vague. Nobody knew about it. It's outmoded, never designed to deal with modern commercial and sportfishing. Doesn't the law protect good, honest, and valued businesses? There is no way to articulate the joy of steelhead fishing. Will the steelheading take be reduced, or seasons shortened or shut down entirely for non-Indians? And doesn't the law prohibit discrimination by race? And besides, how can one judge just tear society apart like this?

These weren't racists. These were normal, fair-minded Oregonians who just did not comprehend how this made sense. The outrage in Washington over the Boldt decision took the anger to a new level and reinforced objectors in Oregon, especially when Judge Belloni adopted the Boldt 50% share in *United States v. Oregon*.<sup>77</sup> As mentioned earlier, for years, refusal to obey federal law was supercharged in Washington and evident to a lesser degree in Oregon as well. Could the Belloni and Boldt decisions hold?

Part of the answer came from the Supreme Court in 1979.<sup>78</sup> The Court upheld the rule of law. The overt illegal fishing mostly ceased.

But that didn't end the matter. Everyone knew that Congress could adjust or abrogate the treaty rights entirely. It could be done fairly and legally by paying off the tribes. In Washington, Senator Slade Gorton and Congressman Jack Cunningham did exactly that, trying to find some mechanism that would be acceptable to the public and Congress.<sup>79</sup> But in the end—about 1990 in Oregon and later in Washington—the rule of law held, not just in the courts, but in Congress and the general public as well. The idea of abrogation dissipated. Hard though it often

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<sup>77</sup> See *Sohappy*, 529 F.2d 570, 572 (9th Cir. 1976) (citing Judge Belloni's order applying Judge Boldt's 50% allocation to the fisheries covered by the Belloni decision).

<sup>78</sup> *Passenger Vessel*, 443 U.S. 658, 695–96 (1979).

<sup>79</sup> See, e.g., *To Provide for Additional Protection of Steelhead Trout as a Game Fish, and for Other Purposes, Hearing on S. 954 Before the S. Comm. on Indian Affairs*, 99th Cong. 1 (1985) (proposing legislation to abrogate tribal treaty rights to harvest steelhead).

was, people on all sides came together to create systems that all could live with. Today, the treaty rights are embedded in widely accepted co-management systems.

The story of why the rule of law, as embodied in what *United States v. Oregon* held, is complex and can't be addressed in detail here, but we can note a few points.

The leadership in the 1970s and '80s was extraordinary at all levels and the Republicans came forth at least as well as the Democrats. Tom McCall. Mark Hatfield. Bob Packwood. Vic Atiyah, the most accepting of tribal sovereignty of any governor in the nation. Dave Frohnmayer. James Burns. Jim Redden. Owen Panner believed to his depths that both sides could settle the allocation questions and he kept at it and finally succeeded. Somehow, in ways not fully understood, the general public of Oregon was willing to accept the new system by the mid-1980s. Again, there was no announcement that the rule of law held, and the public discourse didn't put it that way. But that is what happened.

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May Americans hope, and work toward it, to reinforce the value of the rule of law. It will take time. It took time in Oregon too, but looking to what Oregon did might afford some guidance and inspirations. And the people of Oregon should be everlastingly proud of what your judges, political leaders, tribal leaders, and citizenry did.