

Lost At Sea: An Argument for Seaman Status for Fisheries Observers

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*Observers, while stationed aboard [commercial] fishing vessels, shall carry out such scientific, compliance monitoring, and other functions . . . necessary or appropriate to carry out the purposes of [the Magnuson Act]; and shall cooperate in carrying out such other scientific programs relating to the conservation and management of living resources*¹

I. INTRODUCTION

The commercial fishing industry has historically been subject to a host of conservation-based regulations.² Enforcement of these regulations, however, has proven problematic. Once the commercial fishing fleet was out to sea, there was no reliable way to verify that the regulations were followed.

As commercial fishing took an increasing toll on the marine ecosystem, conservationists and fishermen alike began pressuring lawmakers to provide a reliable check on the fishing industry.³ In response, Congress created a new class of maritime employee: the observer.⁴ An observer aboard a commercial fishing vessel would

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1. 16 U.S.C. § 1821(i)(3) (1988). This section is part of the Magnuson Fishery Conservation and Management "Magnuson (Act)," codified at 16 U.S.C. §§ 1801-1882 (1988 & Supp. IV 1992).

2. *Lovgren v. Byrne*, 787 F.2d 857, 865 (3d Cir. 1986).

3. Karen Franklin, *Alaskan Fisheries: The Battle Between Conservation and Resource Allocation*, PAC. NORTHWEST EXECUTIVE, Apr. 1990, at 3.

4. An observer is a researcher/technician aboard a commercial fishing vessel or at a shoreside facility who collects data in accordance with one of the federally mandated observer programs. Although observers are hired by certified contractors, observers must be certified by the National Marine Fisheries Service (NMFS). To be certified, an observer should have a bachelor's degree in fisheries, wildlife biology, or a related field of biology or natural resource management. Observers must also successfully complete a three week training course conducted by NMFS. The training includes instruction in sampling duties and methods, species identification, fishery regulations, life at sea, and cold water safety and survival. Heather Weikart & Russell Nelson, *The Domestic Observer Program*, ALASKA'S MARINE RESOURCES, Dec. 1991, at 5.

gather scientific data, monitor the fishing catch and bycatch⁵ rate, and ensure that the vessel complied with the conservation regulations.

However, creation of this new class of maritime employee created a new problem. As observers were placed aboard commercial fishing vessels, they were exposed to the same perils and hazards of the sea which plagued traditional seamen.⁶ Predictably, observers were injured and turned to the courts for a remedy. Courts, however, were not equipped to deal with this new class of maritime employee because Congress had not defined the observer's legal status.⁷ Observers did not clearly fit into any of the existing maritime classifications,⁸ and there were questions as to whether observers were entitled to the special protections traditionally afforded to certain maritime employees.⁹

This Comment addresses the question of how observers should be classified within the structures of maritime law. Part II discusses the importance of the fisheries observer program, as well as the federal authority that created it. Part III discusses the risks and remedies afforded to those who work upon the high seas and presents the policy reasons for granting observers seaman status. Part IV discusses the judicial debate surrounding this issue and presents the legal reasons for granting observers seaman status. Part V discusses how the reauthorization of the Magnuson Act provides an opportunity to clearly define the observer's legal status. Finally, Part VI concludes that because observers are exposed to the same high rate of injury which plagues traditional seamen, and because observers satisfy the Supreme Court's test for seaman status,¹⁰ observers should be provided the full panoply of remedies available to these traditional maritime employees.

5. Bycatch, or incidental take, is the catch of fish species, seabirds, or marine mammals other than the intended target catch.

6. See *infra* notes 85-101 and accompanying text.

7. See 16 U.S.C. §§ 1801-1882, 1862(e). The Magnuson Act does not define the observer's legal status, nor does it address or make provisions for the redress of personal injury by observers. See *infra* Part II.B.2.c.

8. Traditional maritime classifications include seamen, fishermen, longshoremen, harbor workers, and processing workers aboard processing vessels. CHARLES M. DAVIS, MARITIME LAW DESKBOOK 97-101 (1994).

9. Arctic Alaska Fisheries Corp. v. Feldman, No. C93-42R (W.D. Wash. filed Mar. 5, 1993).

10. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991). See also *infra* Part IV.A.

II. EMERGENCE OF THE FISHERIES OBSERVER PROGRAM

A. *More Fish in the Sea? The Importance of the Observer's Role*

*This is a conservation emergency of global dimensions What is happening in oceans and seas all around the world is already a full-blown environmental disaster, potentially one of the worst in history.*¹¹

Although the fluctuation of fishstocks is not a new phenomenon, never before have so many commonplace species been fished so perilously close to oblivion.¹² Since 1989, when the world's marine fish catch peaked at eighty-six million metric tons, stocks of fish have rapidly plummeted.¹³ Four of the world's seventeen major fisheries are commercially depleted, and nine more are in serious decline.¹⁴ Currently, most commercial fish species are classified as "depleted," "fully exploited," or "overexploited" which, according to the United Nations, could lead to potentially "disastrous social and economic consequences."¹⁵

Accurate estimates of the fishing mortality rate are essential to managing populations of desirable species.¹⁶ In the past, fishery managers were forced to rely on vessel operators for these estimates.¹⁷ This data was notoriously poor.¹⁸ Because certain species of fish were not typically harvested for consumption, they were not brought to port to be counted.¹⁹ Without a reliable check on the commercial fishing industry, there was little incentive for vessel owners to accurately monitor and report their catch rates. Consequently, large numbers of undesirable catch were routinely dumped overboard.²⁰ Even today, an alarming twenty-five percent of all fish caught in the world's oceans is wasted.²¹ This translates into an estimated average of twenty-seven

11. Colin Nickerson, *Troubled Waters*, GAZETTE (Montreal), May 21, 1994, at H12.

12. *Id.*

13. *The Catch About Fish*, ECONOMIST, Mar. 19, 1994, at 13.

14. Nickerson, *supra* note 11, at H12.

15. *Id.*

16. *Cf.* Weikart & Nelson, *supra* note 4, at 5.

17. Interview with Janet Wall, Task Leader for the Foreign Fisheries Observer Program, National Oceanic and Atmospheric Administration (NOAA)/National Marine Fisheries Service (NMFS), in Seattle, Wash. (Nov. 21, 1993).

18. *Id.*

19. *Id.*

20. Solveig Torvik, *All 17 of the World's Fisheries Are in Decline, Fish Going . . . Going . . . Gone*, SEATTLE POST-INTELLIGENCER, Dec. 11, 1994, at I1.

21. *Id.*

million metric tons of fish thrown overboard by commercial fishermen per year.²²

Though the problems of self-monitoring are obvious, the resulting environmental impact is not so obvious. Because ocean fish are not declared extinct as are other species,²³ the rapid depletion of fisheries may not be noticed until irreversible damage has occurred. This is why the creation of the fisheries observer program was so crucial. Observers aboard commercial fishing vessels now provide the consistent monitoring and reliable data essential to the proper management of fisheries resources.

The data collected by observers is used by the National Marine Fisheries Service (NMFS) to ensure that conservation goals are being met.²⁴ Primary uses of the data include: (1) estimating the bycatch rates of prohibited species; (2) monitoring individual vessel performance and compliance with bycatch rate standards; (3) assessing the status and health of groundfish stocks; (4) investigating predator-prey relationships; (5) determining incidental takes of marine mammals and analyzing fishery-marine mammal interactions; (6) appraising impacts on fisheries and stocks of proposed actions by other federal or state agencies; and (7) assisting fishery development activities.²⁵

Environmentalists, commercial fishermen, and regional fishery council members agree that scientific observers are desperately needed to monitor bycatch problems and to improve the quality of data provided to NMFS.²⁶ Without observers, such monitoring would not be possible.

B. Federal Authority for the Fisheries Observer Program: The Magnuson Act

*Do not blame fishermen for overfishing. They are behaving rationally as they have always done Blame instead those who have power over the fleets, and who have taken the sea into their custody: governments.*²⁷

22. *Id.* See also the correction run in the SEATTLE POST-INTELLIGENCER, Dec. 19, 1994, at 11.

23. Jon Margolis, *Is This Fish Story, Like All of Them, a Bit Exaggerated?*, CHI. TRIB., Jun. 27, 1994, at 13.

24. Weikart & Nelson, *supra* note 4, at 5.

25. *Id.*

26. Franklin, *supra* note 3, at 3.

27. *The Catch About Fish*, *supra* note 13, at 13.

As a consequence of increased fishing pressure and the inadequacy of the fishery conservation schemes promulgated by Congress, certain stocks of fish were overfished to the point where their survival was threatened.²⁸ In 1973, foreign fishing alone took seventy percent of the commercial catch within domestic waters and overharvested sixteen species.²⁹ To remedy this situation, Congress passed the Magnuson Fishery Conservation and Management Act³⁰ (the "Magnuson Act") to end foreign domination and energize the U.S. fishing industry.³¹ In enacting the legislation, Congress declared, "[a] national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources."³²

A primary goal of the Magnuson Act was to immediately begin conserving and managing the fishery resources found off the coasts of the United States by establishing a 200 mile fishery conservation zone (the Exclusive Economic Zone ("EEZ"))³³ within which the United States would assume exclusive fishery management authority.³⁴ The federal government delegated to each coastal state the right to determine the allowable catch and exploitation of fisheries within its EEZ and the duty to ensure proper conservation and management of living resources.³⁵ A general requirement, however, was that populations of harvestable fisheries be maintained and restored at levels to produce the "maximum sustainable yield" (the level of fishing at which the maximum tonnage of the stock can be harvested without stock depletion).³⁶

A concurrent goal of the Magnuson Act was to provide special protection to particular domestic fisheries.³⁷ The Act established

28. 16 U.S.C. § 1801(a)(2)(A) (1988 & Supp. II 1990).

29. Franklin, *supra* note 3, at 3.

30. 16 U.S.C. §§ 1801-1882 (1988 & Supp. IV 1992).

31. Franklin, *supra* note 3, at 3.

32. 16 U.S.C. § 1801(a)(6).

33. The fishery conservation zone became known as the "Exclusive Economic Zone" (EEZ) following a 1983 proclamation by President Ronald Reagan. *Legislation to Authorize the Appropriation of Funds for Implementation of the Magnuson Fishery Conservation and Management Act: Hearings on H.R. 780 Before the Subcomm. on Fisheries Management, 103d. Cong., 1st Sess. 2 (1993)* (memorandum to members of the subcommittee on Fisheries Management). The EEZ begins at the outerlimit of the territorial sea and extends 200 miles from the baseline of the coastal state. 19 U.S.C. § 1401(j) (1988).

34. 16 U.S.C. § 1801(b)(1)(A).

35. THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 33 (1994).

36. *Id.*

37. 16 U.S.C. § 1801(b)(6).

eight Regional Fishery Management Councils ("Councils") to prepare, monitor and revise fishery management plans to maintain the optimum yield from each domestic fishery.³⁸ The Councils were required to "prepare and submit to the Secretary [of Commerce] a fishery management plan with respect to each fishery within its geographical area of authority that requires conservation and management."³⁹

The Magnuson Act thus mandated observer monitoring in two areas: (1) foreign fishing within the EEZ⁴⁰ and (2) certain fishing within the North Pacific Fisheries.⁴¹ The Secretary of Commerce, acting through NMFS, implements observer coverage of foreign vessels within the EEZ, while the North Pacific Fisheries Management Council⁴² implements observer coverage of vessels within the North Pacific Fisheries.

1. Foreign Fishing Within the Exclusive Economic Zone

Under the Magnuson Act, no foreign fishing vessel is permitted within the United States' EEZ unless specifically authorized.⁴³ Foreign fishing within the EEZ may, however, be conducted pursuant to an international fishery agreement that meets the requirements of Section 1821 of the Magnuson Act.⁴⁴ Each agreement must include a binding commitment on the part of the foreign nation and its fishing vessels to comply with the various terms and conditions of the Magnuson Act.⁴⁵ One such condition provides:

The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such agreement, will abide by the requirement that . . . United States' observers . . . be permitted to be stationed

38. *Id.* §§ 1801(b)(5), 1852(a) (1988 & Supp. II 1990).

39. *Id.* § 1852(h)(1) (1988 & Supp. II 1990).

40. In addition to observer coverage on foreign vessels within the EEZ, the Magnuson Act instructs the Secretary of Commerce to establish a program under which a United States' observer will be stationed aboard each foreign fishing vessel while that vessel is within "the Convention area as defined in Article I of the International Convention for the Conservation of Atlantic Tunas; and is taking or attempting to take any species of fish if such taking or attempting to take may result in the incidental taking of billfish." 16 U.S.C. § 1827(b). The term "billfish" means any species of marlin, spearfish, sailfish or swordfish. 16 U.S.C. § 1827(a)(2).

41. The North Pacific Fisheries are the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. See 16 U.S.C. § 1852(a)(7).

42. The North Pacific Fishery Management Council consists of the States of Alaska, Washington, and Oregon, and has authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The North Pacific Council has eleven voting members, including seven appointed by the Secretary of Commerce. *Id.*

43. 16 U.S.C. § 1821(a).

44. *Id.* § (c).

45. *Id.*

aboard any such vessel and that all of the costs incurred incident to such stationing, including the costs of data editing and entry and observer monitoring, be paid for . . . by the owner or operator of the vessel⁴⁶

Thus, observers must be stationed on *any* foreign fishing vessel fishing within the EEZ. This requirement may be waived only if: (1) "the time during which the [foreign] vessel engages in such fishing will be of such short duration that the placing of a United States' observer aboard the vessel would be impractical;"⁴⁷ (2) "the facilities of the vessel for the quartering of a United States observer, or for the carrying out of observer functions, are so inadequate or unsafe that the health or safety of an observer would be jeopardized;"⁴⁸ or (3) "for reasons beyond the control of the Secretary [of Commerce], an observer is not available."⁴⁹

Observers stationed aboard the foreign vessels carry out scientific compliance monitoring, and other functions as the Secretary of Commerce deems necessary to carry out the purposes of the Magnuson Act.⁵⁰ Observers also cooperate in carrying out other scientific programs relating to the conservation and management of living resources.⁵¹

Although fishery observer programs have existed since 1973, until recently American observers only worked on foreign vessels within the EEZ.⁵² As foreign fishing within the EEZ declined to negligible amounts,⁵³ the National Marine Fisheries Service turned its attention to the domestic fishing fleet.

2. Fishing Within the North Pacific Fisheries

a. Observer Coverage

In 1990, in accordance with amendments to the Magnuson Act, American observers began collecting data on American vessels fishing in the North Pacific.⁵⁴ These amendments mandated observer

46. *Id.* § (c)(2)(D).

47. *Id.* § (i)(2)(B).

48. *Id.*

49. *Id.* § (i)(2)(c).

50. *Id.* § (i)(3).

51. *Id.*

52. *Fisheries Observer Programs, ALASKA'S MARINE RESOURCES*, Dec. 1991, at 2.

53. *See infra* Part II.C. and notes 72-74.

54. *Fisheries Observer Programs, supra* note 52, at 2.

coverage of certain vessels fishing within the North Pacific Fisheries.⁵⁵ The fisheries affected by these provisions are the groundfish fisheries of the Bering Sea and the Gulf of Alaska.⁵⁶

The North Pacific Fisheries Management Council (the "Council") had the authority to prepare a "fisheries research plan" for the regulation of these fisheries.⁵⁷ The plan required that,

[o]bservers be stationed on fishing vessels engaged in the catching, taking or harvesting of fish, and on United States fish processors fishing or processing species under the jurisdiction of the Council . . . for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction.⁵⁸

Although the design and implementation of the research plan was largely controlled by the Council, the Magnuson Act set some basic standards. For example, the Magnuson Act required the research plan to be reasonably calculated to,

gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan; [and to] take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.⁵⁹

55. 16 U.S.C. § 1862(a). "A mothership processor vessel of any length that processes 1,000 [metric tons] or more . . . of groundfish during a calendar month is required to have a NMFS certified observer on board the vessel each day it receives or processes groundfish during that month." 50 C.F.R. § 672.27(c)(iii)(A); 50 C.F.R. § 675.25(c)(iii)(A). "A mothership processor vessel of any length that processes 500 [metric tons] to 1,000 [metric tons] . . . of groundfish during a calendar month is required to have a NMFS certified observer on board the vessel at least thirty percent of the days it receives or processes groundfish during that month." *Id.* §§ 672.27(c)(iii)(B); 675.25(c)(1)(iii)(B). Catcher/processors or catcher vessels 125 feet length overall or longer must carry a NMFS certified observer at all times while fishing for groundfish. *Id.* §§ 672.27(c)(1)(ii)(C); § 675.25(c)(1)(iii)(C). Catcher/processors or catcher vessels from 60 to 125 feet length overall must carry a NMFS certified observer during thirty percent of their days during fishing trips in each calendar quarter of the year in which they fish more than 10 days in the groundfish fishery all times while fishing for groundfish. *Id.* §§ 672.27(c)(iii)(D); 675.25(c)(1)(iii)(D).

56. *Fisheries Observer Programs*, *supra* note 52, at 2.

57. 16 U.S.C. § 1862(a) (Supp. IV 1992).

58. *Id.* § (a)(1).

59. *Id.* § (b)(1)(A),(D).

b. *Observer Funding*

The Council also established a system of fees to pay for the costs of observer coverage.⁶⁰ Funding for the observer program is a shared responsibility of NMFS and the commercial fishing industry. The Magnuson Act required that all fees collected from the commercial fishing industry "be assessed against all fishing vessels and United States fish processors including those not required to carry an observer under the plan, participating in fisheries under the jurisdiction of the Council"⁶¹ The fees⁶² collected from vessel owners are deposited in the North Pacific Fishery Observer Fund.⁶³ The fees are based on a percentage, not to exceed two percent, of the unprocessed ex-vessel value of fish harvested under the jurisdiction of the Council.⁶⁴ In 1991, the estimated cost of the observer program was \$87,600 paid by commercial fishermen fishing in the North Pacific, and \$12 million paid by NMFS.⁶⁵

c. *Legal Remedies Available to Observers*

The Magnuson Act provides little guidance in the area of legal remedies available to observers who are injured in the course of their employment. However, within Section 1862(e) of the Act, Congress anticipated the possibility of observers bringing suit against vessel owners for personal injury. Under a section entitled "Special provisions regarding observers," the Magnuson Act authorizes the Secretary of Commerce "to review the feasibility of establishing a risk sharing pool through a reasonable fee . . . to provide coverage for vessels and owners against liability from civil suits by observers,"⁶⁶ as well as to provide for "the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers."⁶⁷ Thus,

60. *Id.* § (a)(2).

61. *Id.* § (b)(2)(F).

62. *Id.* § (b)(2).

63. *Id.* § (d).

64. *Id.* § (b)(2)(E).

65. *Fisheries Observer Programs*, *supra* note 52, at 2.

66. 16 U.S.C. § 1862(e)(1)(A). Although the Secretary called hearings to review the feasibility of establishing such a risk sharing pool, 55 Fed. Reg. 49,559-02 (1990), no decision was ever made or published in the Code of Federal Regulations.

67. 16 U.S.C. § 1862(e)(1)(B). The Insurance Technical Committee (ITC) of the North Pacific Management Council met on November 4, 1994 at the Alaska Fisheries Science Center (AFSC) in Seattle, Washington to address insurance issues surrounding the observer programs. Observer contractors are currently required to procure insurance to protect their observers in the case of on-board accidents. Because the observer's legal status has not been defined, observer contractors are forced to carry a wide array of overlapping policies to cover any possible

while Section 1862(e) does not specifically authorize personal injury actions by Magnuson Act observers against vessel owners, it does contemplate that such actions will be brought.

The importance of Section 1862(e) as a means of recovery to the injured observer is emphasized when compared to a section within the Marine Mammal Protection Act (MMPA).⁶⁸ The MMPA governs its own observer program which focuses primarily on a moratorium on the taking of Marine Mammals.⁶⁹ Within Section 1383a(e)(7) of the MMPA, Congress declared, "[a]n observer . . . may not bring an action under any law of the United States for . . . illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought against the vessel owner for the owner's willful misconduct . . . [or if] the observer is engaged by the owner . . . to perform any duties in service to the vessel."⁷⁰

Although the Magnuson Act was enacted four years after the MMPA, no similar provision barring suits by Magnuson Act observers against vessel owners was included. In fact, both Acts have been amended several times, but in none of these amendments has Congress implemented such an exclusion of remedies to Magnuson Act observers.⁷¹

C. *Did the Magnuson Act Succeed?*

As a result of the Magnuson Act, the United States' fishing industry reclaimed the harvest from foreign domination and created a multi-billion dollar enterprise.⁷² The statistics were impressive: The percentage of fish harvested by foreign nations declined from seventy-

classification. Thus, the coverage varies across contractors creating uncertainty and inequities for all involved. A recent proposal from the Insurance Technical Committee (ITC) of the North Pacific Fishery Management Council recommended that a package of coverage should be carried by observer contractors which would cover all possible classifications and would protect the three parties involved: observers, observer contractors and vessel owners. Such a package would include: (1) Maritime Liability (to cover seaman's claims under the Jones Act and General Maritime Law); (2) United States Longshoreman & Harborworkers (U.S.L. & H.); (3) State's Worker's Compensation; (4) Contractual General Liability; and (5) Employee Related Practices. Preferred additional coverage would include: (1) Personal property; (2) Waiver of subrogation in favor of vessel owner, and Additional Insured status for vessel owners on liability coverage; and (3) Hold Harmless wording in favor of vessel owner included in contractual liability coverage. The ITC will meet again in June of 1995 to attempt to make a formal recommendation to NMFS on this issue.

68. 16 U.S.C. § 1361 (1988).

69. *Id.*

70. 16 U.S.C. § 1383a(e)(7). Unlike the observer programs under the Magnuson Act, the observer program under the MMPA is funded solely by the United States' government.

71. See 16 U.S.C. §§ 1801-1882 (1988 & Supp. IV 1992).

72. Franklin, *supra* note 3, at 3.

one percent of the total catch in 1977 to a mere 0.2% in 1991.⁷³ Fifteen years after its enactment, the Magnuson Act was declared a triumph.⁷⁴

However, though the Magnuson Act had achieved the goal of re-Americanizing domestic fisheries by eliminating foreign fishing within the EEZ, the Act was less successful in two respects. First, once international agreements had confined foreign fishing to waters 200 miles off the United States' coast, the federal government became more willing to grant low interest loans to fishermen to build up the domestic fishing fleet.⁷⁵ Since 1976, the U.S. fleet has almost doubled, leading to far worse overfishing than occurred under the foreign fleet.⁷⁶ The result of the generous government funding has been too many vessels fishing for too few fish. In order to protect rapidly dwindling stocks, the government drastically cut back the number of days open for fishing.⁷⁷ However, shorter fishing seasons have meant forced fishing in whatever hazardous weather conditions might exist.⁷⁸ During 24-hour marathons, commercial fishermen employ the quickest, most hazardous, and most wasteful methods of securing their catch.⁷⁹ As one commentator noted,

[S]hort seasons . . . have created a circus of pounding boats and fishing crews working [twenty-four]-hour stretches to maximize their catch. It is hoped a short season diminishes the pressure on the catch and limits the impact on a species. But species on the surface—crews who are under the gun to catch within the time limits—also become endangered by the rules.⁸⁰

73. *Legislation to Authorize the Appropriation of Funds for Implementation of the Magnuson Fishery Conservation and Management Act: Hearings on H.R. 780 Before the Subcomm. On Fisheries Management, 103d Cong., 1st Sess. 2 (1993)* (memorandum to members of the Subcommittee on Fisheries Management).

74. Franklin, *supra* note 3 at 3.

75. The United States' government dispersed \$90 million in loan guarantees in the 1980s to help domestic fishing companies build state of the art vessels that used hydraulic cranes to pull in the heavy nets and could process the fish on board. Leah Harrison, *Seattle's Trawler Fleet May Be on Verge of Shakeout—Too Many Fishermen in the Sea, Not Enough Fish*, SEATTLE TIMES, Aug. 31, 1993, at D1.

76. Torvik, *supra* note 20, at I1.

77. Harrison, *supra* note 75, at D1.

78. Torvik, *supra* note 20, at I1.

79. Carl Safina, *Where Have All the Fishes Gone? Overfishing*, ISSUES SCI. & TECH., Mar. 22, 1994, at 37, 39.

80. *Short Season, High Toll in Bering Fishing Derby*, SEATTLE TIMES, Jan. 20, 1995, at B6.

These short, frantic seasons have meant more vessels working longer hours in worse conditions.⁸¹ The results are more injuries, more sinkings, and more fatalities at sea.⁸²

Second, the Magnuson Act failed to afford adequate legal remedies to the very persons entrusted with carrying out the goals of the legislation. Although the Act contemplates the likelihood of suits by observers against vessel owners,⁸³ the Act failed to legally define or protect the observer. When an observer is injured by a defective condition of the vessel or by the negligence of the captain or crew, the observer is forced to present his claim to a judicial system that has proven unwilling to provide adequate and predictable remedies.⁸⁴

Thus, an unfortunate result of the Magnuson Act is that observers are working in more dangerous conditions than ever and are not provided adequate legal remedies to compensate for this risk.

III. ROUGH WATERS: THE RISKS AND REMEDIES TO THOSE WHO WORK UPON THE HIGH SEAS

A. *The Most Dangerous Profession*

*[It's] just insane. You don't take breaks, you don't sleep . . . you find yourself falling asleep when you're still on your feet, and it's terribly dangerous because there are a number of ways you can be injured or killed if you're not alert.*⁸⁵

According to the United States Department of Labor, commercial fishing is one of the most dangerous professions in the United States.⁸⁶ Nearly 100 fishermen die and 250 fishing vessels are total losses each year.⁸⁷ This death rate is seven times the national average for all industrial groups.⁸⁸ The statistics for commercial fishing in

81. Torvik, *supra* note 20, at 11.

82. Safina, *supra* note 79, at 39.

83. 16 U.S.C. § 1862(e)(1).

84. *See infra* Part IV.B.

85. Dick Tracy, *Sea Change*, SACRAMENTO BEE, Nov. 3, 1993, at SC1 (statement of Reinette Senum, describing work on a commercial fishing vessel in Alaska during halibut season).

86. Commercial fishermen aboard documented vessels perish at extraordinarily high rates, and are more likely to die on the job than workers in most other industries. *Hearings Before the Subcomm. on Investigations and Oversight of the Public Works and Transportation Comm., U.S. House of Representatives*, 103rd Cong., 2nd Sess. 10 (1994) (testimony of Rear Admiral Arthur E. Henn, Chief, Office of Marine Safety, Security and Environmental Protection, U.S. Coast Guard) [hereinafter *Testimony of Rear Admiral Henn*].

87. *Id.*

88. Jeffrey H. Birnbaum, *The Limits of Constituent Service: How Far Should Agencies go in Accommodating Congressional Pleas to Aid Constituents? A High-Seas Tragedy Raises Some Tough*

Alaska are even more grim: commercial fishing in the Bering Sea is rated thirty times more hazardous than the average job in the United States.⁸⁹

The United States Coast Guard has historically recognized the existence of significant safety problems within the commercial fishing industry.⁹⁰ The Coast Guard investigates 1,100 marine casualties involving fishing vessels and responds to approximately 3,000 offshore Search and Rescue cases involving commercial fishing vessels each year.⁹¹ According to one Coast Guard Fishing Vessel Safety Coordinator, "[w]e are losing 250 fishing vessels and 150 fishermen a year in the U.S. . . . That's more (loss of life) than any other industry in the United States. It's the most dangerous [profession] . . . in the U.S., including law enforcement and coal mining."⁹²

The reasons for these alarming rates of injury are not surprising. A commercial fishing vessel is a complex industrial enterprise operating in a hostile marine environment.⁹³ This combination of industrial hazards and ocean perils presents unique and unpredictable dangers to all those on board. Obvious hazards include complex machinery and gear, extreme weather, unpredictable tides and currents, deep waters, relative isolation, great distances from shore, and inaccessibility of medical facilities.⁹⁴

Because of these extreme conditions, emergencies on commercial fishing vessels develop rapidly. A vessel can go from a state of relative calm to complete chaos in a matter of minutes. One such incident occurred when, without any warning or indication of danger, a seventy-foot commercial fishing vessel refused to recover from a roll, continued to list, and started to sink.⁹⁵ In no more than seven minutes the crew was left to fend for themselves in the forty-five degree water of the Bering Sea.⁹⁶ These were experienced fishermen on a routine trip in ordinary weather.⁹⁷ Another tragedy occurred as a crew was bringing

Questions for the Coast Guard, GOV'T EXECUTIVE, Jun. 1991, at 29.

89. *Alaska Fishing Vessels Hazardous According to NIOSH Warning*, OCCUPATIONAL & HEALTH DAILY (BNA), Jun. 23, 1993.

90. Testimony of Rear Admiral Henn, *supra* note 86.

91. Commercial Fishing Industry Vessel Regulations, 53 Fed. Reg. 52,735 (1988) (codified at 46 C.F.R. Ch. I).

92. Matthew Mosk, *New Coast Guard Rules, Boardings Anger Fishermen*, L.A. TIMES, June 18, 1993, at B1.

93. David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79, 80 (1985).

94. *Id.*

95. Testimony of Rear Admiral Henn, *supra* note 86, at 10.

96. *Id.*

97. *Id.*

a haul of fish aboard a 162-foot vessel.⁹⁸ Suddenly, the net broke spewing tons of fish onto the deck and causing the vessel to list.⁹⁹ Water burst through several uncovered openings in the hull and in minutes the ship capsized and sank.¹⁰⁰ Nine crew members died in the frigid waters of the Bering Sea.¹⁰¹ Fishing lore is replete with similar tragedies—tragedies which are unique to those who work upon the high seas.

In recognition of the seaman's exposure to the hazards of their high risk environment, Congress and the Courts have afforded special protections to seamen under United States maritime law.¹⁰²

B. Remedies Afforded to Traditional Seamen

*[S]eamen are wards of the courts. The sailor's life is usually neither exhilarating nor salutary; frequently it is grim and dangerous.*¹⁰³

Because of the dangers that the marine environment poses, seamen have been the beneficiaries of extraordinary legislation.¹⁰⁴ The statutes of the United States have historically contained elaborate requirements with respect to such matters as the seaman's wages, hours, medicines, clothing, heat, watches and return transportation to this country if destitute abroad.¹⁰⁵ Although current law is less formal and paternalistic, there is still judicial and Congressional recognition of the hazards within the commercial fishing industry. This recognition translates into extensive regulation of the seaman's working conditions and general welfare.

Though Congress has not adopted a worker's compensation statute applicable to seamen, the courts and Congress have developed three remedies available to seamen for maritime personal injuries.¹⁰⁶ These are (1) the doctrine of maintenance and cure in the event of disability in service of the vessel, (2) the doctrine of seaworthiness of the vessel on which the seaman is engaged, and (3) the Jones Act,¹⁰⁷

98. Birnbaum, *supra* note 88, at 33.

99. *Id.*

100. *Id.*

101. *Id.*

102. Robertson, *supra* note 93, at 81.

103. Litherland v. Petrolane Offshore Constr. Servs., Inc., 546 F.2d 129, 130 (5th Cir. 1977).

104. Robertson, *supra* note 93, at 81.

105. Southern Steamship v. NLRB, 316 U.S. 31, 39 (1942).

106. This Comment does not discuss the rights and remedies available for maritime deaths. For a thorough discussion of maritime death actions, see SCHOENBAUM, *supra* note 35, at 465-80.

107. 46 U.S.C. § 688 (1988).

with the right to claim damages for injury or death resulting from the negligence of the seaman's employer.¹⁰⁸

These three remedies are unique to the seaman and have proven to be an extremely effective means of recovery for work-related injuries. A brief description of each of the remedies demonstrates, as one commentator noted, "no other worker in our society can invoke such powerful relief in the event of an industrial accident."¹⁰⁹

1. Maintenance and Cure

The first claim that an injured seaman may bring is a claim for maintenance and cure.¹¹⁰ Every seaman who becomes sick or injured during his employment is entitled to maintenance, cure, and unearned wages¹¹¹ as a matter of right, regardless of any fault of the owner or operator of the vessel. A claim for maintenance and cure is independent of the claims based upon the unseaworthiness of the vessel or Jones Act negligence, although nearly all of the benefits payable under maintenance and cure may be recovered under those claims. Thus, a major role of maintenance and cure today is to provide a seaman with medical treatment from his employer or the vessel on which he is a seaman when his illness or injury was not caused by the vessel's unseaworthiness or the negligence of the shipowner.¹¹²

2. The Doctrine of Seaworthiness

The second claim that an injured seaman may bring is a claim for unseaworthiness.¹¹³ "Seaworthiness," in the context of a seaman's claim, means that the vessel must be a reasonably fit place to live and work.¹¹⁴ A vessel owner and its operator owe a seaman the duty to furnish a seaworthy vessel, and are liable for an injury to a seaman resulting from a breach of that duty.¹¹⁵

108. DAVIS, *supra* note 8, at 97.

109. SCHOENBAUM, *supra* note 35, at 254.

110. For a thorough discussion of the maintenance and cure remedy, *see* SCHOENBAUM, *supra* note 35, at 348-70.

111. "Maintenance" is the seaman's reasonable expenses of room and board while ashore, until the seaman is fit for duty or until maximum benefit of treatment is reached. "Cure" is the reasonable medical expenses incurred by the seaman for curative treatment. "Unearned wages" are wages that the seaman would have received had he not become sick or injured, to the end of the voyage. DAVIS, *supra* note 8, at 85.

112. SCHOENBAUM, *supra* note 35, at 348-53.

113. For a thorough discussion of the unseaworthiness remedy, *see* SCHOENBAUM, *supra* note 35, at 333-47.

114. The seaworthiness duty applies to all parts of the vessel, including its appurtenances, gear, equipment, and personnel. *Id.* at 130.

115. DAVIS, *supra* note 8, at 85.

The duty of seaworthiness is imposed by maritime law as an incident to the relationship of the seaman to the vessel. Unlike maintenance and cure and Jones Act remedies, the vessel owner's duty to provide a seaworthy vessel applies to *all* seamen aboard the vessel, regardless of whether the vessel owner is the seaman's employer.¹¹⁶ Thus, the duty owed to a seaman is greater than the seaworthiness duty owed to others. To the seaman, the shipowner's duty is absolute; it does not require shipowner fault and it extends to conditions created by the acts of third persons without any negligence or knowledge on the part of the shipowner or his employees.¹¹⁷ The unseaworthiness cause of action can relate to any defective condition of the vessel, even one that is temporary or arises after the ship commences its voyage.¹¹⁸

If a court finds that a seaman's injury was caused by the unseaworthiness of the vessel, the seaman can recover loss of income, medical expenses, pain and suffering, and compensation for disability.¹¹⁹ Because many injuries that a seaman will suffer are caused by the condition of the vessel, as opposed to the negligence of an individual, the remedy of unseaworthiness is an indispensable means of recovery to the injured seaman.

3. The Jones Act

The third and final remedy available to an injured seaman is a claim for negligence under the Jones Act.¹²⁰ Maritime common law did not provide a seaman with a cause of action against his employer for damages caused by the negligence of co-employees.¹²¹ To mitigate the harsh results of the traditional rule, Congress enacted the Jones Act in 1920.¹²² The Jones Act grants seamen who are injured

116. *Pope v. Talbot, Inc. v. Hawn*, 346 U.S. 406, 412-13 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 99-100 (1946); *Baker v. Raymond Intern., Inc.*, 656 F.2d 173 (5th Cir. 1981) (reiterating that the owner's obligation to provide a seaworthy vessel does not depend upon the master/servant relationship), *cert. denied*, 456 U.S. 983 (1982).

117. DAVIS, *supra* note 8, at 85.

118. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). Unseaworthy conditions include, but are not limited to, a defective hull, equipment or appliances, slippery decks, an insufficient or incompetent crew, inadequate supplies or provisions, an improper or dangerous method of work or operation, defective tools, failure to provide adequate safety equipment, failure to provide a safe means of boarding and leaving the vessel, and assaults by fellow crew members. SCHOENBAUM, *supra* note 35, at 344.

119. DAVIS, *supra* note 8, at 85-86.

120. 46 U.S.C. app. § 688. For a thorough discussion of the Jones Act, see SCHOENBAUM, *supra* note 35, at 307-33.

121. *The Osceola*, 189 U.S. 158 (1903).

122. DAVIS, *supra* note 8, at 117-18.

in the course of their employment the right to seek damages against their employer in the same manner as the Federal Employers' Liability Act (FELA)¹²³ allows claims by railroad employees. The Jones Act provides in pertinent part:

Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply

124

Because the Jones Act is remedial legislation, it has been liberally construed to accomplish its beneficent purposes.¹²⁵ Jones Act precedents relax the general maritime law standards of proximate cause between the wrongful act and the injury.¹²⁶ As the Supreme Court has emphasized, the relaxed standard of proximate cause is a special feature of this statutory negligence action that makes it significantly different from an ordinary common-law negligence action.¹²⁷

The burden of proving causation under the Jones Act has been described as "very light" or "featherweight."¹²⁸ This "slight negligence"¹²⁹ standard allows a seaman to recover if the negligence of the vessel owner or crew played any part, *even the slightest*, in producing the injury or death for which damages are sought.¹³⁰ In practice, this means that a "jury is entitled to make permissible inferences from unexplained events."¹³¹

The most common Jones Act claim is one in which the employer is charged with the negligence of an employee that causes injury to another employee. The Jones Act makes the employer liable for the negligence of any of its officers, agents or employees, but the negligence must be within the course and scope of the offending employee's

123. 45 U.S.C. § 51 (1988).

124. 46 U.S.C. app. § 688(a).

125. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932).

126. DAVIS, *supra* note 8, at 119.

127. *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 509 (1957); *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 771 (9th Cir. 1981).

128. *Cella v. United States*, 998 F.2d 418, 427 (7th Cir. 1993) (quoting *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287, 289 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993)).

129. SCHOENBAUM, *supra* note 35, at 319; *see also Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993).

130. Proof of proximate causation in the traditional sense is not required under the Jones Act. *See Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

131. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987).

employment.¹³² If a seaman's injury was caused by either the negligence of the seaman's employer or by a fellow employee, then under the Jones Act, a seaman can recover damages including compensation for all past and future loss of income, expenses of medical care (exceeding cure paid by the employer), pain and suffering, and disability.¹³³

An important aspect of the Jones Act is the availability of a trial by jury. Under general maritime law, a seaman has no right to a jury trial on his claims for maintenance and cure or unseaworthiness, unless the claims are brought in state court or in federal court at law in diversity cases.¹³⁴ However, a seaman is entitled to a jury trial on his Jones Act claims if he elects to bring them in federal court at law.¹³⁵ When a Jones Act cause of action is joined with causes of action for unseaworthiness and maintenance and cure, all three causes of action may be tried to a jury.¹³⁶

Thus, the relaxed standard of causation, the right to maintenance and cure, unearned wages, and the right to jury trial, have made the Jones Act an extremely effective means to compensate the seamen for the negligent acts of the vessel owner and crew.

C. Remedies Afforded to Observers

Unlike commercial fishermen, injured observers will not be afforded the general maritime law remedies of maintenance and cure, the doctrine of seaworthiness, or the Jones Act if they are not granted seaman status. The status of the observer would be that of a mere visitor. In the maritime context, a "visitor" is a person other than a passenger¹³⁷ or a seaman who is on board with the express or implied consent of the vessel owner or operator.¹³⁸

Visitors who are injured on board a vessel by the negligence of the vessel operator or crew have a cause of action in admiralty.¹³⁹ As between the vessel owner and the visitor, however, there is no insurer relationship and no warranty of seaworthiness.¹⁴⁰ A shipowner owes

132. DAVIS, *supra* note 8, at 119.

133. *Id.* at 85.

134. *Id.* at 126.

135. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963).

136. DAVIS, *supra* note 8, at 127.

137. A "passenger" is a person who travels in a public conveyance by virtue of a contract, express or implied, which involves paying a fare or some other consideration to the carrier. SCHOENBAUM, *supra* note 35, at 169.

138. *Id.*

139. *Id.*

140. DAVIS, *supra* note 8, at 92-93.

only the limited duty of exercising "reasonable care under the circumstances" toward visitors aboard the vessel.¹⁴¹ "Reasonable care" is the duty (1) to warn visitors of any dangers which the vessel operator knows or should know, as well as the duty (2) not to negligently injure them.¹⁴² This lower standard of care would leave the observer uncompensated in at least two situations.

First, if the observer is injured by a defective condition of the vessel, but is unable to prove that the vessel owner or operator *knew or should have known* of the defective condition, the observer will not recover. This may be the result in many cases. A vessel is a complex industrial workplace that contains a myriad of concealed hazards, from dangerous equipment to defective safety devices. Precisely because these dangers are concealed, an injured observer will often be unable to prove that the vessel owner actually knew or should have known of the hazardous condition. The availability of the doctrine of seaworthiness, which does not require the vessel owner's awareness of the risk-creating condition, would ensure that observers would be adequately compensated in these situations.

Second, if the observer is injured by the negligence of the vessel operator or crew, but is unable to prove that the vessel owner or operator *proximately caused* that injury, the observer will again be unable to recover. This too may be the likely result in many cases. Consider a situation where an observer is injured by the negligence of a crew member. If the observer is not afforded Jones Act seaman status, he may not be able to bring an action against the vessel owner for that negligence. The observer would only be able to bring the suit against the offending crew member, who will often times be impecunious. Even if an action is brought against the vessel owner or crew member, because of the observer's "outsider" status, there may not be anyone aboard the vessel who would be willing to testify on the observer's behalf. Without corroborating witnesses, the observer may be unable to prove strict proximate cause. The availability of the Jones Act, with its "slight negligence" standard, would ensure that observers would be adequately compensated in such situations.

Thus, if observers are not granted seaman status, vessel owners will owe them a lower standard of care even though observers perform duties in service to the vessel which are as important as those of the commercial fishermen, and even though many of the risks observers confront are as dangerous as those of the commercial fishermen.

141. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

142. *Id.*

D. Sound Policy: Observers and Traditional Seamen Confront the Same Perils of the Commercial Fishing Industry

*[An observer's] work is conducted aboard commercial fishing vessels at sea and is, therefore, conducted in a difficult and hazardous environment. Commercial fishing has been rated as one of the most hazardous occupations in the United States. The work requires strenuous physical activity which includes lifting heavy baskets of fish . . . and long working hours. The nature of the job is also mentally stressful due to the confined living and working space and the differing objectives of the observer and crew aboard the vessel.*¹⁴³

Although the job title of "observer" sounds passive, the majority of an observer's work day involves actively collecting data alongside the commercial fishermen.¹⁴⁴ A typical observer spends eight to twelve hours a day on deck gathering and recording scientific information.¹⁴⁵ An observer also works on all parts of the vessel including the vessel's bridge, trawl or working deck, holding bins, processing areas, cargo holds and any other area that is used to catch, hold or process fish. An observer likewise uses the vessel's navigation and communication equipment, uses pilot ladders to board vessels, and transfers among vessels at sea in small boats or rafts.

An observer spends up to four months at a time living and working aboard a commercial fishing vessel. An observer eats, sleeps, and works alongside the crew of the vessel.¹⁴⁶ During that time, an observer confronts treacherous weather, slippery decks, defective equipment and appliances, inadequate safety equipment and supplies, and dangerous methods of work. And if the vessel sinks, is set afire, or comes into a collision, an observer has the same chance of going down with the ship as do all others aboard. Observer injuries, which have included hooks in the face, broken sacrum, torn ligaments, fractured ribs, and even amoebic infections,¹⁴⁷ confirm that the risks

143. National Marine Fisheries Service, *Observer Plan*, Jul. 2, 1991 at 16-17 (on file with the *Seattle University Law Review*).

144. Tyson Vogeler, *The Shellfish Observer Program*, ALASKA'S MARINE RESOURCES, Dec. 1991, at 7.

145. *Id.*

146. The Code of Federal Regulations requires that an operator of a vessel must "[p]rovide, at no cost to the observer of the United States, accommodations on a participating vessel for the observer which are equivalent to those provided for crew members of the participating vessel." 50 C.F.R. § 672.27(d)(1)(i); 50 C.F.R. § 675.25(d)(1)(i) (emphasis added).

147. Interview with Michael Lake, President, Alaskan Observers, Inc., in Seattle, Wash. (Mar. 9, 1995) (interview notes on file with the *Seattle University Law Review*).

aboard a commercial fishing vessel are as threatening to the observer sampling the catch as they are to the fishermen making the catch.

Like a traditional seaman, an observer suffers the rigors and risks of working in a commercial fishing environment, the psychological stress of confined living and working space, and a strenuous workload. Unlike a traditional seaman, however, the observer will not be adequately compensated in the event of injury or death if he is not granted seaman status.

The reason observers are not currently granted traditional seaman's remedies is that Congress neglected to clarify the observer's legal status within the Magnuson Act. In light of the paucity of legislative authority, determination of the observer's legal status was left adrift in a sea of conflicting judicial standards.

IV. THE JUDICIAL QUANDARY AND THE LEGAL DEBATE

A. *Who is a Seaman?*

Diderot may very well have had the previous Supreme Court cases [which discuss the elements of seaman status] in mind when he wrote, "We have made a labyrinth and got lost in it. We must find our way out."¹⁴⁸

Under maritime law, individuals who satisfy the test for seaman status have access to special rights and remedies not afforded to other workers.¹⁴⁹ In order to receive the benefits of maintenance and cure, the doctrine of seaworthiness, and the Jones Act, however, the individual must meet the definition of a seaman. Given that the Jones Act does not define "seaman," Congress has charged federal courts with the duty of ascertaining who is eligible for seaman's remedies.¹⁵⁰ Courts have therefore endured an ongoing struggle to determine just who is entitled to recover as a seaman.¹⁵¹

Over time, a three-prong test for determining seaman status emerged.¹⁵² In order for a claimant to be a seaman, (1) the vessel must be in navigation; (2) the claimant must have a more or less permanent connection with the vessel; and (3) the claimant must be

148. *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 353 (1991).

149. SCHOENBAUM, *supra* note 35, at 254.

150. J.P. Kavanagh, Jr. & D.T. Plunkett, *McDermott International, Inc. v. Wilander: Robison Revisited—The 'Aid in Navigation' Test Walks the Plank*, 65 TUL. L. REV. 1747, 1748-49 (1991).

151. *Id.* at 1748.

152. DAVIS, *supra* note 8, at 97.

aboard primarily to aid in navigation, or to contribute to the accomplishment of the mission of the vessel.¹⁵³

Although the federal courts were in agreement on the meaning of the first two prongs, the third and pivotal prong, "aid in navigation", caused much confusion. The Supreme Court itself acknowledged that "[o]ur wayward case law has led the lower courts to a myriad of standards and lack of uniformity in administering the elements of seaman status."¹⁵⁴

Early cases required that an individual directly contribute to the vessel's navigation in order to meet the "aid in navigation" requirement: "The word 'seaman' undoubtedly once meant a person who could 'hand, reef, and steer,' a mariner in the true sense of the word. But as the necessities of ships increased, so the word 'seaman' enlarged its meaning."¹⁵⁵ Modern cases broadened the definition to include individuals assigned to the vessel whose employment contributed to the function of the vessel.¹⁵⁶ Maritime cases are replete with examples of unusual occupations, which, when performed at sea, constitute the work of a seaman.¹⁵⁷ These cases resulted in miscellaneous workers being considered seamen, including engineers, firemen, barbers, cooks, bartenders, coal passers, dipper tenders, pilots, divers, horsemen, sealers, stewards, pursers, watchmen, porters, wreckers, laundry workers, musicians, and telephone operators.¹⁵⁸ And, according to the Ninth Circuit, "[i]t is not inconceivable that an actor, under certain circumstances, might be a seaman in the same manner as a musician or a bartender might qualify."¹⁵⁹

Although courts began to recognize new classes of employees as seamen, there was still much confusion as to what the "aid in navigation" requirement really meant. In the pivotal case of *McDermott International, Inc. v. Wilander*,¹⁶⁰ the Supreme Court attempted to settle the issue when it "jettisoned" the highly restrictive "aid in navigation" requirement and held that an individual will satisfy the third prong for seaman status if the individual contributes to the

153. *Id.*; see also *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986); *Estate of Wenzel v. Seaward Marine Serv., Inc.*, 709 F.2d 1326 (9th Cir. 1983).

154. *Wilander*, 498 U.S. at 353.

155. *Id.* at 349.

156. DAVIS, *supra* note 8, at 98.

157. 1 MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 2.3, at 38-46 (4th ed. 1985).

158. *Id.*

159. *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 394 (9th Cir. 1973).

160. 498 U.S. 337 (1991).

"function of the vessel in navigation."¹⁶¹ The Court rejected the argument that the underlying policy basis for granting special remedies was because the individual "aids in navigation."¹⁶² Rather, the Court emphasized that

[t]raditional seaman's remedies . . . have been "universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected."¹⁶³

The Court concluded that all who work at sea in the service of a ship face those perils to which the protection of maritime law, statutory as well as decisional, is directed.¹⁶⁴ Thus, the key to seaman status is "employment-related connection to a vessel in navigation."¹⁶⁵

However, the question of whether Magnuson Act fisheries observers have the requisite employment-related connection to a vessel in navigation to qualify as seamen has yet to be resolved. Although no Circuit Court has reached a definitive conclusion,¹⁶⁶ District Courts within the Ninth Circuit have addressed the issue.

161. *Id.* at 353.

162. *Id.* at 353-54.

163. *Id.* at 354 (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946)) (emphasis added).

164. In reciting the history of the Jones Act, the Court highlighted an expanded definition of seaman. The Court noted that, "federal courts throughout the last century have consistently awarded seaman's benefits to those whose work on board ship did not direct the vessel." *Id.* at 343. Thus, it was not the employee's job that the Court found determinative, but the *employee's relationship with the vessel*. A seaman was not required to "aid in navigation" or contribute to the transportation of the vessel, but a seaman must "be doing the ship's work" in order to recover. *Id.* at 355.

165. *Id.*

166. In 1993, the Eleventh Circuit held that an observer on a Japanese driftnet vessel plying international waters was not a seaman. *O'Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993). The observer's duties were governed by the Driftnet Impact, Monitoring, Assessment and Control Act of 1987 and the Shima-Asselin Treaty, which provide for the placement of American observers on Japanese driftnet vessels fishing international waters. The *O'Boyle* court held that the observer did not meet the third requirement for seaman status, because he was not "performing the ship's work." *Id.* at 213. In a concurring opinion, one judge found "some merit" in *O'Boyle's* argument that the vessel could not legally perform its function without carrying him aboard and conceded that, "it cannot be said the *O'Boyle's* position is incorrect in light of the paucity of relevant authority." *Id.* at 214 (Anderson, J., concurring).

B. District Courts Chart a Rocky Course

The Ninth Circuit has mirrored the Supreme Court's three-prong test for determining seaman status.¹⁶⁷ The Circuit has also adopted a broad interpretation of the phrase "aid in navigation" to include tasks which contribute to the function of the vessel, or to the accomplishment of its mission.¹⁶⁸ However, District Courts within the Ninth Circuit have reached different results in applying the third prong to observers.

In January of 1992, in *Key Bank of Puget Sound v. F/V Aleutian Mist*,¹⁶⁹ Judge Thomas Zilly considered whether an observer was a seaman for purposes of asserting a maritime lien¹⁷⁰ for crew wages. There, Key Bank brought an *in rem* proceeding against the F/V Aleutian Mist to establish its priority lien status.¹⁷¹ The observer contractor whose observers had been employed on the vessel intervened to establish its lien priority, claiming that the observers were seamen. Because wages due a seaman are entitled to a preferred maritime lien of the highest order,¹⁷² if the observers were considered seamen, their liens would have taken priority over Key Bank's lien for the preferred ship mortgage.¹⁷³

The test for determining whether an individual is a seaman is the same regardless if the individual's claim arises in the maritime lien or personal injury context.¹⁷⁴ In applying that test, Judge Zilly held:

The fisheries observers employed by Data Contractors, Inc. do not meet the test for "seamen" status, as applied by the Ninth Circuit

167. *Wells v. Arctic Alaska Fisheries Corp.*, 1991 A.M.C. 448 (W.D. Wash. 1990) (quoting *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983)).

168. The Ninth Circuit has adopted the test promulgated by the Fifth Circuit in *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), to determine whether a claimant was aboard to aid in navigation. Under this test, the third prong is satisfied if the capacity in which the claimant was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission.

169. No. C91-107z (W.D. Wash. Jan. 10, 1992) (order).

170. A "maritime lien" is a non-possessory property right of a non-owner in a vessel, its earned freight, cargo or other maritime property giving the lienholder the right in admiralty courts to have the property sold and the proceeds distributed to the lienholder to satisfy an *in rem* debt of the property. *DAVIS*, *supra* note 8 at 303; *Pierside Terminal Operators, Inc. v. M/V Floridian*, 389 F. Supp. 25 (E.D. Va. 1974).

171. *F/V Aleutian Mist*, No. C91-107z at 2.

172. *DAVIS*, *supra* note 8, at 308.

173. Under 46 U.S.C. § 31301 (1988), a preferred maritime lien includes a lien, "for wages for the crew of the vessel." A preferred maritime lien has priority over a preferred ship mortgage. 46 U.S.C. § 31326 (1988).

174. *Seattle Trust & Sav. Bank v. M/V Yukon*, 1987 A.M.C. 1751, 1752 (W.D. Wash. 1986); *see also White v. Valley Line Co.*, 1985 A.M.C. 1172, 1174 (5th Cir. 1984).

. . . and as modified by *McDermott International, Inc. v. Wilander* The observers were independent scientific personnel who did not perform crew functions [T]he observers hired by Data Contractors were not employed to perform the duties of the crew.¹⁷⁵

However, less than a year later, in *Key Bank of Washington v. Dona Karen Marie*,¹⁷⁶ then Chief Judge Barbara Rothstein found that an observer *was* a seaman for purposes of asserting a preferred maritime lien for crew wages. In recognizing the lack of authority on the issue, Judge Rothstein began by stating, “[t]his is apparently a matter of first impression. The parties have provided neither case law nor statutory authority which directly addresses the question of whether an observer is a crew member, or whether a contracting agent may assert an observer’s lien for crew wages.”¹⁷⁷

Judge Rothstein therefore applied the three-prong test to determine whether the observers were seamen.¹⁷⁸ In analyzing the requirements for satisfying the third prong, Judge Rothstein reasoned,

[T]he third requirement is broadly construed in the Ninth Circuit: to aid in navigation means simply to perform duties which contribute to the function of a vessel or to the accomplishment of its mission Clearly, observers also qualify under this test: [S]ince vessels are required by law to have observers on board, a fishing venture, at least legally speaking, would be impossible without them.¹⁷⁹

Because the vessel on which the observers were employed was engaged in navigation, the observers had a more or less permanent connection with the vessel, and the observers performed duties which contributed to the function of the vessel or to the accomplishment of its mission, Judge Rothstein found that the observers were seamen.¹⁸⁰

In a subsequent ruling, however, Judge Rothstein seemed to reverse her previous course. Five months later, in *Arctic Alaska Fisheries Corp. v. Feldman*,¹⁸¹ Judge Rothstein applied the three-prong test for seaman status in the context of an observer’s action for

175. *F/V Aleutian Mist*, No. C91-1077z, at 4.

176. No. C92-1137R (W.D. Wash. Oct. 26, 1992) (order granting in part and denying in part plaintiff’s motion for summary judgment with respect to intervenors).

177. *Id.* at 5.

178. *Id.* at 8.

179. *Id.* at 9.

180. *Id.*

181. No. C93-42R (W.D. Wash. Mar. 5, 1993) (order denying defendant’s motion for summary judgment).

personal injuries, but this time found that the observer did *not* satisfy the third prong.

Judge Rothstein began by acknowledging the difficulty in assessing the observer's legal status:

The question of how observers fit into existing structures of maritime law can be a difficult one, and the question of whether they are entitled to the special protections traditionally afforded to certain maritime employees is particularly troublesome. Congress has provided only partial guidance in this area, and no Circuit Court has yet addressed the matter [E]ven courts with this district have not always reached consistent results when the question of an observer's status has arisen in the context of the observer's right to assert a maritime lien for crew wages.¹⁸²

"Fortunately," according to Judge Rothstein, "Congress has spoken more clearly in the context presently before the court: the context of an observer's right to traditional seaman's remedies for personal injuries."¹⁸³ Therefore, her prior ruling that an observer was a seaman in the context of a preferred maritime lien for crew wages,¹⁸⁴ did not control the issue of whether an observer was a seaman in the context of a claim for personal injuries.

The "partial guidance" provided by Congress to which Judge Rothstein referred is found within the Marine Mammal Protection Act (MMPA)¹⁸⁵ which governs its own observer program. Within Section 1383a(e)(7) of the MMPA Congress declared that, "[a]n observer . . . may not bring a civil action under any law of the United States for . . . illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought against the vessel owner for the owner's willful misconduct . . . [or if] the observer is engaged by the owner . . . to perform any duties in service to the vessel."¹⁸⁶ Relying on this authority, Judge Rothstein reasoned that,

. . . it is clear that an observer is not entitled to bring suit under the Jones Act, or for unseaworthiness, or maintenance and cure, *simply* because she is an observer. She must go further and show that she belongs to that special sub-category of observers who have been "engaged to perform duties in service to the vessel."¹⁸⁷

182. *Id.* at 3.

183. *Id.*

184. *Dona Karen Marie*, No. C92-1137R.

185. 16 U.S.C. § 1361 (1988).

186. *Id.* § 1383a(e)(7) (1988).

187. *Feldman*, No. C93-42R, at 4.

Because Judge Rothstein found that this particular observer was not "engaged to perform duties in service to the vessel," the observer did not satisfy the third prong for seaman status.

However, although Section 1383a(e)(7) of the MMPA bars certain civil suits by marine mammal observers, the observer before Judge Rothstein was a fisheries observer. Accordingly, the observer's employment was governed by the Magnuson Act, and any provision of the MMPA would therefore be inapplicable to her. In acknowledging this dilemma, Judge Rothstein stated:

Section 1383a(e)(7) pertains by its own terms only to observers under the Marine Mammal Protection Act; Ms. Feldman, by contrast, was an observer in the National Marine Fisheries Service, which was established under the Magnuson Act The court is not aware of any reason, however, that observers under the two statutes should be treated differently.¹⁸⁸

One reason worthy of consideration is that while Section 1383a(e)(7) of the MMPA bars certain suits by observers against vessel owners, Section 1862(e)(1) of the Magnuson Act contemplates suits by observers against vessel owners. Section 1862(e)(1) of the Magnuson Act directs the Secretary of Commerce to review the feasibility of establishing a risk sharing pool "to provide coverage for vessels and owners against liability from civil suits by observers."¹⁸⁹ This provision only makes sense if suits by observers against vessel owners are available to observers. If Congress had intended to preclude certain suits by fisheries observers, it could have done so either when the Magnuson Act was initially enacted (four years after the MMPA), or in any of the numerous amendments added throughout the last two decades.

Nine months after Judge Rothstein's last ruling, however, Judge John Coughenour held that observers were seamen for purposes of a preferred maritime lien in *State Street Bank and Trust v. F/V Yukon Princess*.¹⁹⁰ Relying on *Key Bank of Washington v. Dona Karen Marie*, Judge Coughenour reasoned that because the vessel on which the observer worked was engaged in navigation, the observer had a more or less permanent connection with the vessel, and the observer was aboard primarily to contribute to the function of the vessel, the

188. *Id.*

189. 16 U.S.C. § 1362(e)(1) (1988).

190. No. C93-5465C (W.D. Wash. Dec. 22, 1993) (order on conferring preferred maritime lien).

observer qualified as a seaman under maritime law.¹⁹¹ Judge Coughenour clarified that,

observers have the requisite employment connection to the vessel even if they are paid by an independent contractor to attain seaman status . . . whether an observer is a seaman under maritime law is not a factual question. The court's determination that an observer is a seaman is based on the observer's theoretical job description. Whether the observer performed such duties aboard the vessel is a question of fact that is not in dispute.¹⁹²

A month later, in *West One Bank v. Continuity*,¹⁹³ Judge Coughenour affirmed his previous ruling by holding that, "an observer falls within the definition of seaman under 46 U.S.C. § 10101(3)."¹⁹⁴

In February of 1994, in *Key Bank of Washington v. Yukon Challenger*,¹⁹⁵ Judge Carolyn Dimmick also had the opportunity to address whether an observer was a seaman for purposes of asserting a maritime lien for crew wages. Like Judges Rothstein and Coughenour before her, Judge Dimmick found the observer to be a seaman because the observer had an "employment-related connection to a vessel in navigation."¹⁹⁶

Two months later, in *Coyne v. Seacatcher Fisheries, Inc.*,¹⁹⁷ Judge Zilly had the opportunity to revisit the issue. However, this time the observer's claim did not arise in the context of a maritime lien for crew wages. The observer before Judge Zilly brought a claim under the Jones Act for verbal and sexual harassment by the vessel's fishmaster.¹⁹⁸ Judge Zilly, relying on Judge Rothstein's holding in *Arctic Alaska Fisheries Corp. v. Feldman*, held that the observer was *not* a seaman.¹⁹⁹ In doing so, he agreed with Judge Rothstein: The provision barring certain suits by observers against vessel owners under the MMPA applied to this Magnuson Act observer.

On February 1, 1995, the last ruling on this issue to date was handed down by a District Court within the Ninth Circuit. In *Key Bank of Washington v. F/T Pacific Orion*, Judge Zilly relied on his prior decision in *Key Bank of Puget Sound v. F/V Aleutian Mist* in

191. *Id.*

192. *Id.* at 5.

193. No. C93-1218C (W.D. Wash. Jan. 19, 1994) (minute order).

194. *Id.*

195. No. C93-1157D (W.D. Wash. Feb. 22, 1994) (order).

196. *Id.* at 7.

197. No. C93-510Z (W.D. Wash. Feb. 1, 1994) (minute order).

198. *Id.*

199. *Id.*

holding that, "the employees of Arctic Observers serving on the F/T Pacific Orion as fisheries observers were not 'seamen' and thus wages advanced to them cannot serve as the basis for a maritime wage lien."²⁰⁰

Until there is Congressional or judicial resolution to this issue, these cases will continue to beleaguer the District Courts. Future court decisions will likely lead to further course changes regarding the observer's proper legal status. And, as long as there are contradictory rulings, future observers cannot be assured of adequate and predictable remedies.

C. Sound Jurisprudence: How Observers Satisfy the Test for Seaman Status

Although the question of whether an observer qualifies as a seaman has engendered much debate, the three-prong test for seaman status as applied to the observer is relatively straightforward.

First, the vessel on which the observer is aboard will be engaged in navigation. The observer's job is to collect scientific data from the catch of commercial fisherman while the crew is actively fishing. This cannot take place unless the vessel is in navigation. Thus, the first prong of the test will seldom pose a problem to the observer.

Second, the observer has a "more or less" permanent connection with the vessel. This second prong of the test only requires that an individual have more than a transitory relationship with the vessel.²⁰¹ Observers have extensive contact with the same vessel, sometimes stationed there for months at a time. This contact goes far beyond a mere transitory relationship. Thus, the second prong of the test will likewise rarely pose a problem to the observer.

Third, the observer performs duties which contribute to the function of a vessel or to the accomplishment of its mission. Although this prong could have potentially posed a problem before *McDermott International, Inc. v. Wilander*,²⁰² the Supreme Court has clarified that to "aid in navigation" means simply to perform duties which contribute to the function of the vessel or the accomplishment of its mission.²⁰³ Because vessels are required by federal law to have an observer on board, a fishing venture, at least legally speaking, would

200. No. C93-806Z (W.D. Wash. Feb. 1., 1995) (minute order).

201. See *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 394 (9th Cir. 1973) (holding that movie extras who spent two hours on board do not have a "more or less permanent" relationship with the vessel).

202. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).

203. *Id.*

be impossible without them.²⁰⁴ By keeping vessels in compliance with federal law, and allowing them to fish lawfully, observers contribute to the function of the vessel and the accomplishment of its mission.

Though the vessel cannot legally fish without an observer, an observer is more than a license to fish. Observers are an invaluable component of the fishing industry's mission. Not only do observers allow current vessels to accomplish their missions, but they also guarantee that *future* vessels will accomplish their missions by ensuring that fishery resources are available in years to come. The purpose of the observer program under the Magnuson Act is to observe and manage fishery resources so that there will be continued resources for the commercial vessels to harvest.²⁰⁵ The information gathered by Magnuson Act observers is essential to protect coastal fish, the national fishing industry, and dependent coastal economies from stresses caused by overfishing waters adjacent to the territorial waters.²⁰⁶ In this respect, observers are as important to the overall mission of the commercial fishing industry as any other individual on board the vessel. Thus, on both a short-term and long-term basis, fisheries observers are vital to the accomplishment of the mission of the vessel.

Because observers meet the three-prong test for seaman status they should be afforded legal remedies equal to those of traditional seamen. Given the Supreme Court's liberal interpretation of the third requirement for seaman status, to hold otherwise would run afoul of the Court's underlying policy rationale and demonstrate a swing back to earlier, more rigid definitions of a seaman. The Supreme Court has emphasized that the underlying policy basis for granting special maritime remedies to certain groups of employees is to compensate or offset "the special hazards and disadvantages to which they who go down to sea are subjected."²⁰⁷ Because Magnuson Act fisheries observers are subjected to the special hazards and disadvantages of the North Pacific, they should be afforded the same basic protections that are afforded to traditional seamen.

204. See *supra* note 179 and accompanying text.

205. 16 U.S.C. § 1801(b) (1988).

206. *Lovgren v. Byrne*, 787 F.2d 857, 861 (3d Cir. 1986).

207. *Wilander*, 498 U.S. at 354. See *supra* Part IV.A. & note 163.

D. *The Final Obstacle: The "Employee" Requirement*

If observers are granted seaman status, vessel owners will owe them the duty of seaworthiness.²⁰⁸ However, an employer-employee relationship is essential to recover under the remedies of maintenance and cure and the Jones Act.²⁰⁹ Because the National Marine Fisheries Service Research Plan requires observers to be employed by independent contracting agents, observers are not direct employees of the vessel.²¹⁰

The drafters of the Research Plan intended the contractual separation of vessel owner from observer as a protection both for the observer and for the integrity of the observer program. The purpose in establishing this structure was to circumvent collusion between the vessel owner and the observer, and to encourage accurate reporting and observation by taking the observer out of the subordinate employer-employee relationship with the vessel owner. Observers are therefore forbidden to have any financial interest in the vessels to which they are assigned, and are prohibited from being paid directly by vessel owners.²¹¹

However, even though observers are not direct employees of the vessel owner, observers should not be precluded from bringing a cause of action under the Jones Act or for maintenance and cure for two reasons.

First, observers satisfy three of the four factors considered in determining the existence of an employment relationship under the Jones Act. These factors are (1) the selection of engagement of the putative employee; (2) the situation vis a vis payment of wages; (3) the situs of the power of dismissal; and (4) the situs of control over on the job conduct.²¹² Of these factors, the right of control, including the right to direct the manner in which the work shall be done, is the most crucial.²¹³ Although the vessel owner does not select the particular observer for the vessel, he does pay for the observer, he does have the power to dismiss the observer if he is willing to forego his legal right

208. See *supra* notes 113-19 and accompanying text.

209. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir.), *cert. denied*, 115 S. Ct. 203 (1994); *Heath v. American Sail Training Association*, 644 F. Supp. 1459, 1468 (D.R.I. 1986).

210. National Marine Fisheries Service, *Observer Plan*, Jul. 2, 1991 (on file with the *Seattle University Law Review*).

211. The actual cost of maintaining the observer is nonetheless borne by both the vessel owners and NMFS. See *supra* Part II.B.2.b. and notes 60-65.

212. *Heath*, 644 F. Supp. at 1468.

213. *Id.*

to fish in certain areas, and he does satisfy the most crucial factor by maintaining significant control over the observer.

The structure of the observer program gives NMFS little control over observer personnel once the observer is assigned to a vessel.²¹⁴ For all practical purposes, once aboard the observer becomes an "employee" of the vessel operator and is subject to many of his orders. Although a vessel operator cannot lawfully interfere with an observer doing his job,²¹⁵ the vessel operator still controls the observer in many situations. For example, the vessel operator has direct control over the observer's actions when he feels such actions jeopardize the vessel's performance or where he deems conditions to be unsafe for the observer's presence. As a general rule, an observer is subject to the orders of the vessel operator on all matters of safety and accommodations.

Second, the policy reasons for including the "employee" requirement within the Jones Act do not apply to the observer. Congress intended that employees of the vessel should be allowed to recover against their employer for negligence, but did not want to extend this remedy to passengers aboard such vessels who merely had a transitory connection with the vessel. Because crew members were subject to the possibly negligent orders of the vessel operator, Congress wanted to ensure that vessel operators owed a higher duty of care to crew members than passengers. The "employee" requirement was merely added to distinguish crew members from passengers.²¹⁶ Observers, like crew members, are also subject to the possibly negligent orders of the vessel owner, and are therefore owed a higher duty of care.

Thus, because observers satisfy three of the four factors in determining an employment relationship, including the key factor of control, and because observers are subject to the negligent orders of the vessel owner, observers should be afforded both maintenance and cure and Jones Act remedies.

V. THE REAUTHORIZATION OF THE MAGNUSON ACT

The Magnuson Act provides an opportunity to clearly define the observer's legal status and to grant observers the legal protection they deserve. The Act was in the process of reauthorization during the

214. Mandy Merklein, *Observers Observed*, ALASKA'S MARINE RESOURCES, Dec. 1991, at 3.

215. The Magnuson Act provides that it is unlawful for any person, "to forcibly assault, resist, oppose, impede, intimidate, or interfere with any observer on a vessel under [the] Act." 16 U.S.C. § 1857(1)(L) (Supp. II 1990).

216. See SCHOENBAUM, *supra* note 35 at 167-76.

104th Congress when this Comment was written.²¹⁷ Senate Bill 39 and House Resolution 39 to amend the Magnuson Act were introduced into Congress on January 4, 1995.²¹⁸ However, as originally proposed, neither piece of legislation extended the necessary legal protections to observers.

B. Senate Bill 39: When is a Seaman Not a Seaman?

Senate Bill 39, Section 403(c), Wages as Maritime Liens, states “[c]laims for observers’ wages shall be considered maritime liens against the vessel and be accorded the same priority as seaman’s liens under admiralty and general maritime law.”²¹⁹ Although this section would grant observers seaman status for purposes of their wage claims, it could create further uncertainty regarding the observers’ status in the context of personal injury claims.

As this Comment has discussed, District Courts within the Ninth Circuit have granted observers seaman status in the context of maritime liens for crew wages, but have not extended this status to claims for personal injury.²²⁰ Thus, whether an observer is granted seaman status depends on whether the observer brings a claim for personal injuries or a claim for a preferred maritime lien for crew wages, *although the test for seaman status is the same in both contexts.*²²¹ Because an observer’s legal status varies according to the context in which the claim is brought, these rulings create uncertainty. Senate Bill 39 would simply codify this uncertainty.

To illustrate the contradictory results of Section 403(c), consider the situation where a vessel catches fire due to the negligence of the vessel owner, both injuring an observer and causing the owner to later default on the vessel’s preferred ship mortgage. An *in rem* proceeding and sale of the vessel ensues. The observer brings an action for personal injuries under the Jones Act, and an action to establish his priority lien status for crew wages. The courts would apply the three-prong test for seaman status to the observer and could likely find the observer is a seaman and is not a seaman: The observer is a seaman for the purpose of the lien status, but the observer is *not* a seaman for the purpose of the personal injury claim. Congress could eliminate this uncertainty, and the litigation that invariably accompanies legal

217. See S. 39, 104th Cong., 1st Sess. (1995); H.R. 39, 104th Cong., 1st Sess. (1995).

218. *Id.*

219. S. 39 § 403(c).

220. See *supra* Part IV.B.

221. See *supra* note 174.

uncertainty, by simply acknowledging that an observer is a seaman in all contexts.

*B. House Resolution 39: Civil Suits By Fisheries
Observers Walk the Plank*

House Resolution 39, Section 15(a), Civil Action, states, "[a]n observer . . . may not bring an action under any law of the United States for . . . illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought against the vessel owner for the owner's willful misconduct . . . [or if] the observer is engaged by the owner . . . to perform any duties in service to the vessel."²²²

This section would prohibit observers from bringing suit against vessel owners, except in two limited circumstances (1) when the owner's misconduct is willful, or (2) when the owner engages the observer to perform duties in service to the vessel. Section 15(a) is manifestly unfair for three reasons.

First, an observer would be the only individual on a commercial fishing vessel with no legal recourse against the vessel owner in the case of owner negligence. Even though observers share the same work space and are exposed to many of the same negligent acts of the vessel operator and crew, observers would be barred from bringing any form of negligence action against the vessel owner. In essence, the federal government asks observers to incur the risks of working on the high seas without securing for them the same rights and protections it has secured for the commercial fishermen they work alongside.

Second, if Section 15(a) is enacted, there would be no real prospect of penalty against the vessel owner or operator where his action or inaction, intentional or negligent, causes injury to an observer. Compensating for injuries is an effective way to ensure vessel operators are concerned for the observers' health and safety. This is especially true where the risk of injury aboard a commercial fishing vessel is largely uncontrolled by the observer.

Finally, observers are neither a potent political force nor a cohesive group. As one observer contractor noted,

As a group [observers] tend to be young They have no union; there seems to be no one who will function as their advocate. Their position is not unlike that of the seamen of old who were easily

222. H.R. 39 § 15(a).

taken advantage of by men of affairs. Their work is hardly without risk.²²³

The federal government should not require observers to take such risks without the rights and remedies equal to others who work on the high seas.

VI. CONCLUSION

*Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.*²²⁴

Observers are crucial to the survival of our marine resources. Congress has emphasized that the federal interests at stake in the effective enforcement of Fisheries Management programs are vital to our nation.²²⁵ Circuit Courts have agreed that there is a strong federal interest in protecting the natural resources within our domestic waters.²²⁶ Observers are the individuals responsible for the protection of these vital natural resources. Observers, in turn, deserve protection under the law commensurate with the task they perform.

An observer's work is conducted on the high seas where perilous conditions can result in injuries of every description. Other workers of the sea have historically been compensated for these risks. As Justice Story stated over 170 years ago:

Seamen are by the peculiarity of their lives liable to sudden sickness . . . exposure to perils, and exhausting labour If some provision is not made for them in sickness at the expense of the ship, they must often . . . suffer the accumulated evils of disease Every act of legislation which secures their health, increases their comforts, and administers to their infirmities . . . encourages seamen to engage in perilous voyages [I]t urges the seamen to encounter hazards in the ship's service from which they might otherwise be disposed to withdraw.²²⁷

223. Letter from David Edick, General Manager, Alaskan Observers, Inc., to Barbara J. Rothstein, Chief United States District Judge, Western District of Washington at Seattle (May 28, 1993) (on file with the Seattle University Law Review).

224. 16 U.S.C. § 1801(a)(5).

225. *Lovgren v. Byrne*, 787 F.2d 857, 866 (3rd Cir. 1986); *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 995 (9th Cir. 1983) ("Congress was aware that an important national asset was at stake and that strong measures were necessary.").

226. *Id.*; *Lovgren*, 787 F.2d at 866; *Kaiyo Maru*, 699 F.2d at 995.

227. *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6047).

Currently, half of all observers choose not to repeat a trip.²²⁸ Retention of qualified and competent observers may be accomplished by affording adequate compensation should an observer become injured in his uniquely treacherous workplace. The traditional seaman's remedies, especially the Jones Act, are necessary to achieve this end. If adequate protection is not provided soon, observers could become as endangered as the fishery resources they monitor.

228. Merklein, *supra* note 214, at 3.