Cruz v. Chesapeake Shipping, Inc.: Statutory Interpretation or Nonstatutory Choice of Laws - What Is the Proper Juristic Standard When International Political Objectives and Federal Law Intersect

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Cover Page Footnote
International Law; Commercial Law; Law

This note is available in North Carolina Journal of International Law: https://scholarship.law.unc.edu/ncilj/vol17/iss2/
Cruz v. Chesapeake Shipping, Inc.: Statutory Interpretation or Nonstatutory Choice of Laws - What Is the Proper Juristic Standard When International Political Objectives and Federal Law Intersect?

I. Introduction

On April 29, 1991, the Court of Appeals for the Third Circuit handed down a divided decision holding that the minimum wage provisions of the Fair Labor and Standards Act (FLSA) did not apply to Filipino sailors employed aboard foreign-owned tankers temporarily reflagged under the United States ensign and operating outside of United States waters. While one member of the three judge panel concurred in the judgment only and one member dissented, the holding of the court in Cruz v. Chesapeake Shipping, Inc. may further confine the already restrictive standard governing the extraterritorial application of federal law by refusing to classify a United States flagged vessel as necessarily within the ambit of federal labor legislation by virtue of the flag it flies. Broadly, Cruz repre-

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(a) Every employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed by an enterprise engaged in commerce or in the production of goods for commerce...

(1) not less than [the minimum wage]...

(4) If such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty...


2 Judges Rosenn and Cowen concurred in the judgment, but wrote separate opinions as to the proper method of addressing the legal issues presented. Judge Rosenn analyzed the issue under statutory interpretation standards. Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 219 (3d Cir. 1991). Judge Cowen addressed the issue under a choice of laws approach. Id. at 233 (Cowen, J., concurring).

3 Judge Alito dissented from the judgment analyzing the facts under both choice of law principles and statutory interpretation. Cruz, 932 F.2d at 235 (Alito, J., dissenting).

4 932 F.2d 218 (3d Cir. 1991).

5 The issue of whether application of federal law to a U.S. flagged vessel constitutes extraterritorial application is discussed infra notes 160-73 and accompanying text. While it is arguable that such a vessel is United States territory, Judge Rosenn dismissed such reasoning and Judge Cowen did not address the issue at all. Cruz, 932 F.2d at 227-28. Judge Alito, dissenting from the court’s holding, advocated the stance that a United States
sents a further limitation in the area of extraterritorial application of federal law. The Court has declined to apply federal legislation abroad in a number of cases. See, e.g., EEOC v. Arabian American Oil, 111 S.Ct. 1227 (1991) (holding that Title VII of the Civil Rights Act of 1964 is not applicable to United States citizens employed abroad by U.S. employers).

6 More specifically, Cruz erodes the general maritime principles which regard the law of the flag as paramount in matters of jurisdiction over oceangoing vessels and consider seamen as "wards of admiralty" entitled to particular protection.

Beyond the trend represented by, or the legal effect stemming from, such a holding, the dicta of Cruz functions to highlight compelling questions relating to judicial methodology appropriate to the adjudication of admiralty issues which intersect international relations and domestic regulation. In addition to addressing the specific issue brought to bar by the plaintiffs, Cruz concurrently raises a critical issue concerning the proper method of construing federal legislation regarding extraterritorial application. The division evident within the opinions of the panel members pointedly poses the question of whether statutory interpretation or a non-statutory choice of laws standard should be applied in such circumstances.

After reviewing the facts and the holdings of the courts in Cruz, this Note evaluates the questions of judicial methodology presented by the dicta in the circuit court's analysis and examines aspects of the court's reasoning under these methods. Against the backdrop of admiralty law, the Note posits that: 1) the plaintiffs' claim was properly evaluated under statutory interpretation standards; and 2) a choice of laws analysis is inappropriate in any maritime application of the FLSA. This Note concludes that though the court of appeals properly scrutinized the plaintiffs' claim under statutory interpretation standards, it erroneously held that the plaintiffs fell outside coverage of the FLSA.9 This Note finally suggests that the confusion manifest over the proper standard to be applied, and perhaps even the holding itself, demonstrate that a Supreme Court pronouncement on the

flagged vessel was part of United States territory and not a foreign workplace within the meaning of the FLSA. Id. at 238.

7 E.g., Lauritzen v. Larsen, 345 U.S. 571, 584 (1953) (observing that "[p]erhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag").

8 See, e.g., Harden v. Gordon, F. Cas. 11, No. 6047 (C.C. Me. 1823) ("Seamen... are unprotected and need counsel... and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage.").

9 Not only would a finding for the plaintiffs seem to comport with the language of the statute and the legislative history of the Act, it would also seem just in a broader sense. In light of the political and economic interests of the United States which were served by the reflagging and the federal requirements to which the Kuwaiti ship owners were required to adhere contingent to that reflagging, it seems a nominal concession to require the vessel owners to pay minimum wages to the Filipino sailors.
necessary standard is needed.\(^{10}\)

II. The Facts and Holding of *Cruz v. Chesapeake Shipping, Inc.*

A. Background

The case under scrutiny arose out of incidents stemming from the Iran-Iraq war which began in 1980 and spanned most of the decade.\(^{11}\) As hostilities between the two countries increased in the mid-1980s, Iranian attempts to interrupt the export of Iraqi petroleum threatened to disrupt neutral shipping in the Persian Gulf.\(^{12}\) Kuwaiti tankers, in particular, were targeted for attack by Iran because Kuwait provided Iraq with financial assistance and the use of its ports.\(^{13}\) In order to be secure from the threat to its neutral shipping, Kuwait approached the United States for assistance.\(^{14}\)

B. Reflagging of the Kuwaiti Tankers

Kuwait's overture eventually resulted in the reflagging of eleven Kuwaiti-owned vessels under the United States ensign, thereby affording the vessels protection of United States naval warships.\(^{15}\)

\(^{10}\) Alternately, or perhaps additionally, Congress should amend title 29 to speak to the issue of whether a United States flagged vessel is United States territory for legislative purposes.


\(^{12}\) By 1982, Iran had closed down all Iraqi seaports, forcing Iraq to develop overland routes in order to export its oil. *Cruz*, 738 F. Supp. at 811 (citing *Kuwaiti Tanker Hearings*, supra note 11, at 161-62). Thereafter, Iran began to attack the vessels of non-belligerent countries which supported Iraq. *Id.* (citing *Kuwaiti Tanker Hearings*, supra note 11, at 38, 163).

\(^{13}\) *Cruz*, 932 F.2d at 220 (citing *Kuwaiti Tanker Hearings*, supra note 11, at 40).

\(^{14}\) *Id.*. Kuwait approached the United States for assistance in 1986. *Id.* Kuwait had originally solicited aid from the Soviet Union in a bid to reflag its vessels under the flag of a foreign government or to charter ships flagged by a foreign government. *Cruz*, 738 F. Supp. at 811 (citing *Kuwaiti Tanker Hearings*, supra note 11, at 37-38, 54). The Soviet Union had agreed to either such arrangement, but the United States government, anxious to avoid Soviet involvement in the region, convinced the Kuwaitis to reflag all eleven Kuwaiti tankers under the United States ensign. *Id.* (citing *Kuwaiti Tanker Hearings*, supra note 11, at 38-39, 43).

Contingent to the reflagging, the Kuwaiti government was required to comply with United States federal law relating to United States ownership of American flagged vessels, safety regulations, and manning requirements. In order to expedite the reflagging process, however, waivers were made with regard to certain conditions of the safety regulations and manning requirements. Following the reflagging, the eleven vessels operated with a United States naval escort along their former shipping routes, and carried petroleum from ports in the Persian Gulf, Europe, the Mediterranean, and the Far East.

16 Cruz, 932 F.2d at 220. In order to comport with title 46, requiring American ownership of United States flag vessels, Chesapeake Shipping, Inc. was chartered on May 15, 1987, under the laws of Delaware. Title 46 provides for corporate ownership of an American flagged vessel by:

- a corporation established under the laws of the United States or of a State,
- whose president or other chief executive officer and chairman of its board of directors are citizens of the United States and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum.


17 Cruz, 932 F.2d at 220. The reflagged vessels were obliged to meet safety requirements dictated by U.S. maritime law. To insure the general seaworthiness of the vessels and to evaluate factors ranging from sufficiency of accommodations to adequacy of life-saving and fire fighting equipment, the United States Coast Guard performed an overseas safety inspection on the tankers. Cruz, 738 F. Supp. at 811-12 (citing Kuwaiti Tanker Hearings, supra note 11, at 77).

18 United States Coast Guard inspection indicated that the vessels conformed with international standards, but did not meet more stringent United States standards. Cruz, 738 F. Supp. at 812 (citing Kuwaiti Tanker Hearings, supra note 11, at 78). In order to facilitate reflagging, however, a waiver of inspection requirements was granted for a period of one year and a waiver of drydocking requirements was granted for a period of two years. Id. (citing Kuwaiti Tanker Hearings, supra note 11, at 41, 78, 146-48).

19 During the initial stages of reflagging, title 46 permitted “the use of non-United States citizen crew members while each vessel is engaged on a foreign voyage and does not call at a United States port.” Cruz, 932 F.2d at 220 (quoting 46 U.S.C. § 8103(b)). Congressional concern over this “foreign to foreign” exemption, however, resulted in the drafting of amendment section 8103(b)(1), requiring that every unlicensed seaman be a United States citizen or a lawfully admitted permanent resident alien with a twenty-five percent cap of the total number of aliens. Cruz, 932 F.2d at 221 n.2 (citing Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, Pub.L. 100-239, 101 Stat. 1778 (1988); 46 U.S.C. § 8103(b)(1)). Two days prior to the date the amendment was to become effective, the Secretary of Defense requested Coast Guard waiver of the revised manning requirement with regard to the eleven Kuwaiti tankers. Cruz, 932 F.2d at 221. The Coast Guard granted the waiver, thus allowing the vessels to retain in their employ the Filipino sailors previously hired. Id.

20 Cruz, 932 F.2d at 223. Because the safety and manning requirement waivers would theoretically have given the Kuwaiti vessels operating costs lower than other United States flagged vessels transporting petroleum, the United States government secured from Ku-
C. The Plaintiff's Action

The suit was eventually joined by 228 Filipino seamen who served aboard the eleven reflagged tankers. The plaintiffs sought recovery of minimum wage under the Fair Labor Standards Act, claiming that the reflagging under the United States flag brought them within coverage of the Act. Named as defendants were Chesapeake Shipping, Inc., the corporation chartered contingent to the reflagging, and several related Kuwaiti corporations.

D. The Holding of the District Court

The United States District Court for Delaware granted summary judgment for the defendants. The court observed that as a maritime action, the case at bar presented a choice of laws question which was properly evaluated under the Lauritzen-Romero-Rhoditis.

 wait the concession that the tankers would not enter any U.S. port so as to avoid an "adverse impact on the marketplace." Cruz, 738 F. Supp at 812 (citing Kuwaiti Tanker Hearings, supra note 11, at 83, 87-88).

Cruz, 738 F. Supp. at 814. The suit was originally brought as a class action by eighteen Filipino seamen. Id. Two hundred and ten Filipino seamen later "opted-in" to the class. Id.

See supra note 1.

Cruz, 932 F.2d at 220.

Also named in the suit were Kuwait Petroleum Corporation, Kuwait Oil Tanker Company, Kuwait Petroleum Corporation (U.S. Holdings), Santa Fe International Corporation, and Gleneagle Ship Management Co., an independent contractor. The relationship of the corporate entities was charted by the court as follows:

KUWAIT PETROLEUM CORPORATION (KPC)
[Kuwaiti Corporation Wholly Owned By Kuwaiti Government]

KUWAIT OIL TANKER CO. (KOTC)
[Kuwaiti Corporation Wholly Owned by KPC]

KUWAIT PETROLEUM CORP. (U.S. HOLDINGS) (KPC)
[Wholly Owned by KPC]

CHESAPEAKE SHIPPING, INC.
[Wholly Owned U.S. Subsidiary of KOTC]

SANTA FE INTERNATIONAL CORP.
[U.S. Corporation Wholly Owned By KPC (U.S. Holdings)]

GLENEAGLE SHIP MANAGEMENT CO.
[Wholly Independent U.S. Corporation]

Id. at 232-33.

Cruz, 738 F. Supp. at 825.

Lauritzen v. Larsen, 345 U.S. 571 (1953) (denying application of the Jones Act to Danish seaman who signed aboard Danish ship in United States and was subsequently injured while the vessel was in a Cuban harbor).

Considering the triad’s factors - the place of the wrongful act, the law of the flag, the allegiance or domicile of the injured party, the allegiance of the defendant shipowner, the place of contract, the accessibility of a foreign forum, the law of the forum, and the shipowner’s base of operations - the District Court concluded that only the law of the flag and the law of the forum favored application of United States law. Accordingly, the court held that United States law did not apply to the plaintiffs. Alternatively, the court held that the plaintiffs were neither engaged “in commerce,” nor “employed by an enterprise engaged in commerce” as required under the FLSA, since neither the plaintiffs nor the reflagged vessels had entered the United States or evidenced any continued links with United States commerce. Further, the court declined to regard the vessels as United States territory, referring to the concept as “a mere legal fiction and a metaphor” and noting that even if so viewed, the vessels nevertheless came under the foreign territories exemption clause of the FLSA.

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30 Cruz, 738 F. Supp. at 817. The court observed that “[a]lthough Plaintiffs resist the application of the Lauritzen-Rhoditis test, it is applicable to all maritime actions.” Id.

31 Id. Applying this standard the court reasoned:

In this case the place of the wrongful act is either the Philippines, where the employment contract was entered into, or in Kuwait, Europe and Japan, where the seamen were paid. Either determination indicates the inapplicability of American law. The law of the flag favors applying the law of the United States, as does the law of the forum. The allegiance of the seamen is to the Philippines. Construed most favorably to the Plaintiffs, the allegiance of the shipowner is divided between the United States and Kuwait. The seamen, pursuant to their employment contracts, have access to a forum in the Philippines. Finally, the base of operations of the shipowner is in Kuwait. Id.

32 Id.

33 Id. at 818-22. Referring to the requirements of 29 U.S.C. § 203(b) (1988) that the trade be between a state and a place outside thereof, the court considered that the plaintiffs themselves were not in commerce because no member of the class had been to the United States nor had the tankers entered a United States port. Id. at 819. With respect to the argument that the various corporations related to the reflagged vessels were an enterprise engaged in commerce, the court noted that these corporations exhibited no “routine links to commerce.” Id. at 821.

34 Title 29 provides, in pertinent part:

The provisions of sections 206, 207, 211 and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within a territory under the jurisdiction of the United States other than the following: a State of the United States, the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.


35 Cruz, 738 F. Supp. at 819, 822-23.
E. The Holding of the Third Circuit Court of Appeals

On appeal, the Third Circuit affirmed the holding of the district court. Each member of the panel, however, wrote a separate opinion and one member dissenting from the judgment. Upholding the district court, Judges Rosenn and Cowen concurred in judgment, but differed as to the proper method of addressing the legal issues presented. Writing for the court, Judge Rosenn purported to apply strict statutory interpretation standards, eschewing any application of choice of laws principles. Concurring in the holding only, Judge Cowen advocated that the issue be addressed exclusively by application of choice of laws principles. Dissenting from the judgment, Judge Alito examined the Act's legislative history, and found that strict statutory interpretation or choice of laws principles standing alone were inadequate to resolve the issue.

III. The Opinions of the Circuit Court Panel

A. Judge Rosenn - The Statutory Interpretation Approach

1. Rejecting a Choice of Laws Approach

In delivering the opinion of the court, Judge Rosenn rejected an analysis of the case under choice of laws principles. He noted that the choice of laws standard elucidated by the Supreme Court was an appropriate principle guiding application of the Jones Act due to the potentially all-encompassing language of the statute. He asserted, however, that such a standard was not applicable to cases involving the extraterritorial application of the FLSA since Congress

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36 Cruz, 932 F.2d at 220.
37 Id. at 219.
38 Id. at 233 (Cowen, J., conccurring).
39 Id. at 235 (Alito, J., dissenting).
40 Id. at 223-25.
41 See supra notes 27-29. See also infra note 58.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action 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.

43 Cruz, 932 F.2d at 224. In Lauritzen, the Court noted that the Jones Act, if read literally, "conferred an American right of action which requires nothing more than that the plaintiff be 'any seaman who shall suffer personal injury in the course of his employment' " and "extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation." Lauritzen v. Larsen, 345 U.S. 571, 576-77 (1953). Given this potentially unlimited scope of application, the Court enumerated a seven factor test under the choice of laws principle in order to narrow the breadth of the Act. These factors were: 1) the place of the wrongful act; 2) the law of the vessel's flag; 3) the domicile or allegiance of the injured; 4) the allegiance of the defendant shipowner; 5) the place where the contract was entered into; 6) the inaccessibility of a foreign forum; and 7) the law of the forum. Id. at 583-91.
explicitly limited the scope of the Act by restricting its application to seamen on "American vessels" who were "engaged in commerce" or employed "by an enterprise engaged in commerce." Given the parameters drawn by the language of the FLSA, Judge Rosenn reasoned that the formula was self-defining. Accordingly, if a plaintiff seaman fell within the statutory requirements of the Act and no statutorily prescribed exemption applied, he would be entitled to coverage. To view a FLSA case under any standard other than statutory interpretation, Judge Rosenn contended, would be to hold the power of Congress to legislate subordinate to the court's ability to invoke choice of laws.

2. Finding the Plaintiffs not "In Commerce" within the FLSA

Addressing the issue in terms of statutory interpretation, Judge Rosenn concluded that the while the plaintiffs were "seamen" on an "American vessel," and thus met one of the statutory requirements of the FLSA, they failed to meet the "in commerce" requirement of the Act. Focusing, in part, on the definition of "commerce" provided in title 29, and referring to the legislative history of the Act, Judge Rosenn decided that the FLSA was manifestly designed and structured to be confined in its application to the United States or to

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44 Cruz, 932 F.2d at 224. The court stated that:
Congress, in enacting the FLSA, explicitly considered the reach of the Act. Unlike the Jones Act, whose literal interpretation would apply to seamen injured everywhere in the world, Congress has limited the applicability of the FLSA to seamen and other employees by imposing certain requirements. To be covered by the FLSA seamen must meet a two-part requirement. First, the seamen must be engaged "in commerce" or employed by an "enterprise engaged in commerce." See 29 U.S.C. § 206(a) (1988). Second, the seaman must be employed on an American vessel. See 29 U.S.C. 213(a)(14) (1988). If the plaintiffs in the present case meet the FLSA's two prong requirement and no statutory exemption applies, then they are entitled to the protection of the FLSA.

Id.

45 Cruz, 932 F.2d at 224.

46 Id.

47 Id. To support further the argument that the question sub judice was appropriately addressed in terms of statutory interpretation instead of choice of law, the court referred to the case of Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) (addressing applicability of the FLSA to employees working on United States military base located in Bermuda), and EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (determining whether Title VII of the Civil Rights Act of 1964 is applicable to United States citizens employed abroad by U.S. employers). Id. at 224-25. The court also referred to Windward Shipping (London) Ltd. v. American Radio Ass'n, 415 U.S. 104 (1974) (determining whether the National Labor Relations Act applied to U.S. nationals picketing foreign vessels) and McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)(determining whether the National Labor Relations Act applied to U.S. nationals picketing foreign vessels), as further support for the proposition that the issue should be addressed in statutory interpretation terms. Cruz, 932 F.2d at 225.

48 Cruz, 932 F.2d at 225.

49 As defined in title 29: "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b) (1988).
the territories specifically enumerated in section 213(f). Contingent to this analysis, Judge Rosenn refused to recognize an American flag vessel as United States territory within the meaning of the commerce clause of the FLSA, noting that the concept of a vessel as a piece of national territory was merely a necessary "legal fiction" meant to direct the basic functioning of a vessel and not a true indicator of the vessel's nationality for all purposes. Judge Rosenn maintained that even if the vessel was viewed as United States territory, since it was not among those territories enumerated by section 213(f), it was still excluded from coverage of the seamen under the foreign workplace exemption.

3. Finding the Corporate Defendants not Enterprises Engaged "In Commerce"

Addressing the argument that the plaintiffs were employed by

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50 Cruz, 932 F.2d at 226. The court stated that:

The language of FLSA and its legislative history show that Congress intended the Act to establish minimum wage and maximum hour standards for workers employed in the domestic economy. [footnote omitted]. Congress' express purpose in passing FLSA was to protect a substantial portion of the national workforce from sub-standard wages and excessive hours which endangered the national health and well-being and, as a result 'the free movement of goods in interstate commerce.' Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945). Congress found that the channels and instrumentalities of commerce were being used to spread an perpetuate such labor conditions among the workers of the several states . . . and therefore enacted FLSA in 1938 for the purpose of rectifying labor conditions which were detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.


Thus, the FLSA defines 'in commerce' to include only those economics activities which 'touch' the United States at some point. Section 203(b) of the FLSA defines commerce as 'trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.' 29 U.S.C. § 203(c) defines any State as 'any State of the United States or the District of Columbia or any Territory or possession of the United States.'

Id.

For the territories enumerated within section 213(f) of the FLSA, see supra note 34.

51 Id. at 227-28. The court stated that:

'Flags of convenience' are a comparatively new phenomenon developed after the conclusion of World War II by certain non-traditional maritime countries for economic reasons. The state whose flag was flown exercised 'minimum control over the activities and operations of these vessels.' Ebere Osieke, Flags of Convenience Vessels: Recent Developments 75 AM. J. OF INT'L L. 604 (1979).

It is generally understood among nations engaged in maritime practice that the state whose flag is flown exercises control over matters such as the qualification of masters and officers of the ship, safety of the seas, discipline aboard the vessel, and investigations into instances of navigation causing destruction of life or serious physical damage.

Id. at 227. Presumably, if the vessels were territories regarded as states within the FLSA's definition of "commerce," the sailors could have been viewed as fulfilling that prong of the requirement.

52 Cruz, 932 F.2d at 227.
an enterprise engaged in commerce, due either to their connection to Chesapeake Shipping as a separate entity, or due to their connection to all the defendants collectively, Judge Rosenn opined that the activities carried on by Chesapeake Shipping were not sufficient to constitute "commerce" within the ambit of the FLSA, since they were conducted only to comply with the technical aspects of reflagging. He further noted that the defendants collectively were not acting towards a "common business purpose," as required under the section's definition of "enterprise." Though Judge Rosenn ultimately conceded that Chesapeake Shipping could stand as the enterprise for purposes of the statute, he dismissed this potential alternative by concluding that the uniqueness of the situation precluded Chesapeake Shipping from engaging in commerce within the meaning of the FLSA.

B. Judge Cowen - The Choice of Laws Approach

1. Applying a Choice of Laws Approach

Concurring in the judgment only, Judge Cowen wrote a separate opinion asserting that choice of laws principles governed the dispute before the court and precluded the application of United States law. Applying the criteria delineated in the Lauritzen-Romero-Rhoditis triad of cases, Judge Cowen reasoned that of the eight factors enumerated in those cases, only the law of the flag and the law

53 Id. at 228. Judge Rosenn discounted the chartering of the vessels through the corporation, its purchase of supplies through the U.S. and the telecommunications that it maintained with the vessels as actions secondary to and produced only by compliance with the reflagging requirements. Id. Judge Rosenn noted that since the reflagging was conducted for purely political purposes, it did not alter the entirely foreign character of the shipping operation. Id. He similarly discounted as insufficient to establish contact, the petroleum transhipped from the vessels to the United States via Europe. Id.

54 Id. at 229-30. "Enterprise" is defined within title 29 as:

[T]he related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. . . .


55 Cruz, 932 F.2d at 230. The court conceded that a company such as Chesapeake, chartered under United States laws and purchasing goods within the United States would normally be considered an enterprise engaged in commerce, but stated that the Cruz matter represented "an extraordinarily unique situation" and consequently placed the corporation outside of the section's ambit. Id. at 231.

56 Id. at 233 (Cowen, J., concurring).

57 See supra notes 27-29.

58 Cruz, 932 F.2d at 233. The factors these cases are: "(1) the place of injury; (2) the country of the ship's flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the shipowner; (5) the place of contract; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the defendant's base of operations." Id. (citing Matute v. Procoast Navigation Ltd., 928 F.2d 627, 631-32 (3d Cir. 1991)).
of the forum favored the exercise of American jurisdiction. Dis-
missing the plaintiffs' argument that the law of the flag should domi-
nate the balancing of interests, Judge Cowen concluded that foreign
law controlled the dispute before the court. Thus, by finding insufficient
grounds for jurisdiction, Judge Cowen did not address the
question of whether the Filipino seamen were covered under the
FLSA.

2. Defending Application of the Choice of Laws Principle

In addressing the contention of Judges Rosenn and Alito that a
choice of laws analysis was inapplicable to the present dispute, Judge
Cowen asserted that the FLSA was drafted by Congress in such a
manner as to make a choice of laws evident within its provisions. Citing
to the Supreme Court decision of EEOC v. Arabian American Oil
Co. (ARAMCO), as a guide for determining when Congress dictates
a choice of laws application, Judge Cowen stated that legislation is
"presumed to apply only within the territorial jurisdiction of the
United States," and that absent a strong affirmative showing to the
contrary, any law should be regarded as presumptively domestic in
application. Noting that the Court in ARAMCO observed that if
"Congress intended Title VII to apply overseas, it would have
addressed the subject of conflicts with foreign laws and procedures,"
Judge Cowen reasoned that if, in drafting the FLSA, Congress had
intended to resolve a potential conflict of laws problem in favor of
American law, it was required to state so plainly within the
statute. Since the provisions of the FLSA did not specifically address
the question of whether American law was to prevail in a conflict, Judge
Cowen concluded that a choice of laws analysis was necessary in the
present case to determine whether United States law should be
applied.

59 Cruz, 932 F.2d at 233.
60 Id. In a footnote, Judge Cowen dismissed the plaintiffs' argument that the law of
the flag alone should have dictated application of United States law under the choice of
laws standard, noting that the standard required application of seven other factors. Id. at
n.2. Also by way of footnote, Judge Cowen observed that the plaintiffs' contacts with the
United States were so insignificant as to preclude application of American law, but he
offered that had the plaintiffs been domiciled in the United States, American law would
likely have applied. Id. at 234 n.3. He did not propose which foreign nation's laws would
apply to the dispute. Id. at 233 n.1.
61 Cruz, 932 F.2d at 233.
62 Id. at 234-35.
64 Cruz, 932 F.2d at 234 (quoting ARAMCO, 111 S. Ct. at 1230).
65 Id. (quoting ARAMCO, 111 S. Ct. at 1234).
66 Cruz, 932 F.2d at 234-35.
C. Judge Alito - Legislative Intent

1. Finding the Statutory Language Ambiguous

Dissenting from the court's holding and advancing that neither strict statutory interpretation of the section's language nor choice of laws analysis was adequate to resolve the issues before the court, Judge Alito examined the Act's legislative history and concluded that Congress intended the minimum wage provisions of the FLSA to apply to all seamen on American flag vessels. To determine whether Congress specifically dictated a choice of laws in the language of the FLSA, he argued that the statute could be read either to preclude a choice of laws application or to leave the choice of laws question open. Due to the possibility of such conflicting readings, Judge Alito believed that examination of the legislative history of the Act was the only way to divine congressional intent. Examining the evolution of the statute, he concluded that Congress unambiguously intended for minimum wage provisions to apply to all seamen on American vessels. Given this, Judge Alito averred that application of choice of laws principles would frustrate congressional intent since it could possibly deny coverage to the plaintiff class.

In examining the commerce requirement of the FLSA, Judge Alito advanced that the definition of "commerce" was ambiguous with regard to American vessels engaged in trade among foreign ports. He reasoned that while such trade was not literally trade between the states, or between a state and any place outside thereof, a less literal interpretation of "states" could well place a vessel flying the American flag within the purview of the FLSA as a territory or possession, since vessels flying the flag of a nation have been viewed as "part of the territory of [the] nation." Given the potential for ambiguity, Judge Alito posited that since seamen did not originally have to comport with any commerce requirement, Congress could not have envi-

67 Id. at 235 (Alito, J., dissenting).
68 Id. at 255-36. Judge Alito observed that the language could be read as a "statutory directive to apply American law (the FLSA minimum wage provision), thus precluding application of non-statutory choice-of-law principles." Id. at 236. On the other hand, the language could be regarded as a way to "merely specify the minimum wage rate for seamen on American vessels in those instances in which in which the choice of American law is appropriate." Id.
69 Id. at 236.
71 Cruz, 932 F.2d at 237.
72 Id. For a definition of "commerce" within the FLSA, see supra note 49. "State" is defined within the Act as "any state of the United States or the District of Columbia or any Territory or possession of the United States." 29 U.S.C. § 203(c) (1988).
73 Cruz, 932 F.2d at 237-38 (quoting Patterson v. Eudora, 190 U.S. 169, 176 (1903)).
 tioned that seamen might eventually be denied coverage under the FLSA because of such a requirement.\textsuperscript{74}

2. Considering a United States Flagged Vessel as United States Territory

Judge Alito last addressed the issue of the foreign workplace exemption in the FLSA.\textsuperscript{75} He asserted that a United States flagged vessel was regarded as part of the United States and did not come within the ambit of the foreign workplace exemption.\textsuperscript{76} He similarly rejected a reading which regarded an American vessel as a foreign workplace while it was in a foreign country, since such an interpretation would then prove impracticable since a ship would venture into and out of FLSA coverage as it travelled between ports.\textsuperscript{77} Judge Alito referred to the Act's legislative history to support this contention and concluded by noting that Congress extended coverage to all seamen on American vessels and gave no indication that it only intended the FLSA to apply to such vessels while in American territorial waters.\textsuperscript{78} Therefore, he concluded that an American flagged vessel should not be regarded as coming within the purview of the foreign workplace exemption.\textsuperscript{79}

IV. Background Law: Admiralty Law and the Question of Jurisdiction

It is a fundamental tenet of international law that a country is free to regulate the requirements for registry of vessels under its national flag.\textsuperscript{80} The extent to which the flag imbues exclusive jurisdict-

\textsuperscript{74} Id. at 238. Judge Alito compared excerpted language from the 1961 amended minimum wage provision Pub.L. 87-30, § 5(b), 75 Stat. 65 (1961), with 29 U.S.C. § 206(a) which included the commerce requirement. \textit{Id.} Judge Alito asserted that this requirement arose as a "technical amendment" to the statute in 1966 which was not intended to affect any substantive changes. \textit{Id.}

\textsuperscript{75} Id. at 238-39. For text of the foreign territories exemption clause, 29 U.S.C. 213(f), see supra note 34.

\textsuperscript{76} Cruz, 932 F.2d at 238-39.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} Id. at 239.


The 1958 United Nations Conference on the Law of the Sea, article 5 states in part:

- Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

tion upon the state of registry, however, is an issue of some uncertainty and one which has been periodically addressed by United States courts over the past century. In part, this problem has been compounded by the rise of "Flags of Convenience" vessels, ships owned by nationals of one country, but registered nominally under the flag of another country for various economic reasons. Beyond the Flags of Convenience issue, the very nature of international shipping necessitates that a vessel is often subject to the laws of many nations.

Ostensibly, a vessel is subject to the laws of its country of registry, to international law, and to the laws of countries at which it docks. It may also be subject to the laws of the country of which the ship's owner is a national or where the majority of stockholders reside. Given these vying sovereign authorities, the international

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81 See, e.g., Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) (United States court exercised jurisdiction over Greek flagged vessel). Under the Convention on the High Seas, a vessel on the high seas is subject exclusively to the law of the flag state. See also Elizabeth P. DeVine, Comment, The Long Arm of Federal Courts: Domestic Jurisdiction on the High Seas 37 WASH. & LEE L. REV. 269 (1980) (citing Convention on the High Seas). A warship may board a foreign vessel, however, if that vessel is suspected to be engaged in slave trade or piracy or if the vessel is of the same nationality. Id. at 271 n.20.

82 For a more thorough definition of "Flags of Convenience" vessels, see infra notes 242-45 and accompanying text.

83 There has been considerable disagreement over the type of jurisdiction which a nation exerts over its merchant vessels, but the fact remains that a vessel is subject to the laws of the nation whose flag it flies. Burdick H. Brittin, International Law for Seagoing Officers 132 (1986). One theory holds that a vessel is a floating part of a nation's territory, and that an individual aboard the vessel is bound by the laws of the nation as if within the state itself. Id. The theory countering this asserts that the jurisdiction is not territorial, but rather one born of necessity and exercised over the persons and property of its nationals. Id.

84 See supra note 80. See also Restatement (Third) Foreign Relations Law §§ 501-02 (1987).

85 See, e.g., Convention on the High Seas, supra note 80, art. 1, 13 U.S.T. at 2314, 450 U.N.T.S. at 82. Generally, registration under a nation's flag entitles a vessel to privileges, immunities and international comity accorded under domestic and international law. Meredith L. Hathorn, Note, The Vessel Documentation Act of 1980, 7 MAR. L. REV. 303 (1982). In a broad sense, international law governs the relation between ships. See Brittin, supra note 83, at 131.

86 A vessel docked in a foreign port is typically subject to laws governing matters such as immigration, customs, health, and safety. Boczek, supra note 80, at 160. When a vessel enters a foreign port, the foreign nation obtains jurisdiction that is considered to be concurrent with the flag state. Laura L. Roos, Comment, Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate From International Principles of Jurisdiction, 9 MAR. LAW. 273, 278 (1984).

87 See, e.g., Antypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307 (2d Cir. 1976), cert. denied, 429 U.S. 1098 (1977) (United States law applied to vessel on basis that most of its voyages were to or from United States ports); Hellenic Line Ltd. v. Rhoditis, 398 U.S. 306, 307 (1970) (upholding United States jurisdiction over Greek flagged vessel based on fact that 95% of shipping company's stocks were owned by United States citizens); Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A., 168 F. Supp. 236 (S.D.N.Y. 1958) (holding that majority ownership and control by Americans of Panamanian corporation owning Panamanian vessel sufficient to give court subject matter jurisdiction in Greek seaman's claim under Jones Act). American courts, in particular, have rejected the theory of "vested rights" and have recognized that the fact that one jurisdiction may apply its laws
nature of the trade, and the often multinational nature of the individuals who make up the crews of these vessels, it is apparent that any conflict affecting a vessel may involve the laws and interests of several countries.\textsuperscript{88} The threshold question to any adjudication, therefore, is on what basis may jurisdiction be founded.

Generally, United States courts are disinclined to impose any federal law extraterritorially without direction from the constitutionally mandated authority of Congress to legislate exclusively with regard to commerce with foreign nations\textsuperscript{89} and without full consideration of the potential impact, political as well as legal, of any decision the court might render. There has been a "long standing tradition of restraint in applying United States laws to foreign ships."\textsuperscript{90} With respect to United States labor laws, in particular, there is a general policy against their extraterritorial application.\textsuperscript{91} Yet, where Congress has elected to impose federal labor legislation on foreign vessels,\textsuperscript{92} and where that intent has been manifest, the


\textsuperscript{88} See Watson, supra note 87, at 87. Watson notes:

Maritime litigation is frequently 'transnational' in a number of respects. Foreign law may govern the controversy; evidence may be sought to be obtained in various countries. Moreover, the courts of different nations may take jurisdiction over a single dispute. The courts of one nation may be asked to give effect to proceedings in another country, or to decline jurisdiction so that a particular case may be litigated elsewhere, or even to enjoin the parties from proceeding in another forum.

\textit{Id.}

\textsuperscript{89} See U.S. CONST. art I, § 8, cl. 3.

\textsuperscript{90} International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 221 (1982). Despite the fact that the tradition of restraint may have been long-standing, there has long been precedent upon which the United States could exert jurisdiction over foreign vessels outside of United States territorial waters. In \textit{The Belgenland}, 114 U.S. 355, 368-69 (1885), the Court first pronounced a general rule which gave the United States admiralty jurisdiction over foreign vessels involved in collisions. Patricia A. Krebs, \textit{United States Admiralty Jurisdiction Over Collisions On The High Seas: Forum Non Conveniens And Substantive Law}, 9 MAR. LAW. 43, 46 (1984). The Court, in \textit{The Belgenland}, listed seven factors to be considered in determining whether to exert jurisdiction over cases between the foreign parties. These factors were similar to those enumerated by the \textit{Launitzen-Romero-Rhoditis} triad several decades later. The \textit{Belgenland} factors were: 1) whether the foreign laws govern the matter; 2) whether the parties would experience difficulty in turning to their respective nations' courts; 3) whether the parties to the case had agreed upon a court; 4) the consent of the consul in wage cases; 5) convenience or international comity; and 6) any applicable treaties. The Belgenland, 114 U.S. at 363-64.

\textsuperscript{91} Cleary v. United States Lines, Inc., 728 F.2d 607, 609 (3d Cir. 1984) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); see also Foley Bros. v. Filardo, 336 U.S. 281 (1949)). The case of Benz v. Compania Naviera Hidalgo, S.A., 355 U.S. 158 (1957) (refusing to apply the National Labor Management Act of 1947 to litigation stemming from American Union's picketing of a foreign vessel), is considered the leading authority representing the proposition that express congressional authorization is required for American labor law to apply to the internal regulation of foreign ships. Boczek, supra note 80, at 171.

\textsuperscript{92} See Boczek, supra note 80, at 161 n.21, (citing 23 Stat. 55 (1884); 46 U.S.C. § 599 (barring advance payment of wages to seaman with specific reference to foreign vessels); Rev. Stat. § 4529 (1875), 46 U.S.C. § 596 (1952) (providing for immediate payment of
Supreme Court has upheld the application of American law. Absent a specific statement of intent by Congress that the statute is intended for extraterritorial application, however, the Court has either immediately declined to construe a statute as applicable to a foreign vessel or has attempted to glean congressional intent and evaluated American interests before asserting or declining jurisdiction.

Unlike domestic litigation, where statutory and procedural rules dictate the appropriate forum, international litigation is often uncertain in this regard. Where two forums are available to the plaintiff, a court may dispose of a suit by invoking the doctrine of forum non conveniens to avoid the difficulties inherent in applying foreign law. This procedural expedient allows a court to waive its power to

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93 See Boczek, supra note 80, at 161 (citing Patterson v. The Bark Eudora, 190 U.S. 169 (1903) (upholding application to British vessel of statute prohibiting advance payment of wages to seaman); Strathearn Steamship Co. v. Dillon, 252 U.S. 348 (1920) (British national shipped on British ship in British port allowed to collect one half wages when vessel put in at U.S. port)). The United States has also extended federal law beyond the boundaries of territorial jurisdiction to persons outside those limits when those persons threaten to violate American law or to endanger United States interests. DeVine, supra note 81, at 274. On this general basis, United States courts have extended the reach of United States federal law into international boundaries of the high seas on matters pertaining to the transport of narcotics. Ronald C. Curtis, Note, The Outer Limits of Jurisdiction on the High Seas: United States v. Romero-Galue and United States v. Alvarez-Mena 5 Wts. Int'l. L. J. 222 (1987). See, e.g., United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985) (holding that Congress intended the Marijuana on the High Seas Act to apply to foreign seamen onboard foreign vessels); United States v. Alvarez-Mena, 765 F.2d 1259 (5th Cir. 1985) (upholding United States jurisdiction over a marijuana-carrying, stateless vessel on the high seas); See also United States v. Biermann, 678 F. Supp. 1437 (N.D. Cal. 1988), aff'd sub nom., United States v. Davis, 905 F.2d 245 (9th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991) (holding vessel flying flag of United Kingdom subject to United States jurisdiction under Maritime Drug Law Enforcement Act). On the basis of the Wildenhus's Case, 120 U.S. 1 (1887), the United States can similarly exercise jurisdiction over foreign flag vessels when they are involved in matters which disturb the domestic peace. Marian N. Leich, Contemporary Practice of the United States Relating to International Law, 6 Am. J. Int'l L. 612, 624 (1966).

94 See Boczek, supra note 80, at 161-62 (citing Sandberg v. McDonald, 248 U.S. 185 (1918) (holding that statutes barring advance payment of seamen applied only to payments made in U.S. ports, and not foreign ports).


96 See Watson, supra note 87, at 87.

97 Issues to be considered for forum non conveniens purposes are: 1) accessibility of witnesses; 2) availability evidence; 3) expense of litigation; 4) ease of litigation; 5) enforceability of the court's holding; 6) the burden on local courts; 7) the appropriateness of a local forum; and 8) the law to be applied. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

98 Albert Tate, Jr., Fisher v. Agios Nicolas V and Choice of Law: What Was All the Fuss
exercise jurisdiction at its discretion. When the court is required to establish the applicable law which will determine the rights of the parties, however, a choice of laws analysis is applied.

When a choice of laws evaluation is appropriate in admiralty actions, courts have conducted the evaluation by applying a standard derived from the Lauritzen-Romero-Rhoditis triad of cases. Arising from litigation involving the Jones Act, which provided redress for seamen injured in the course of their employment, these cases fashioned a standard to restrict the overly broad language of the statute. In addition to establishing an eight part test for determining whether United States law is applicable under choice of laws principles, a general doctrine emerged from these cases which can be characterized as favoring a balance of divergent interests and encouraging restraint on the exercise of sovereign authority.

V. Analysis of Cruz v. Chesapeake Shipping, Inc.

The holding of Cruz v. Chesapeake Shipping, Inc. represents an erosion of the doctrine which accords particular primacy to the law of the flag in matters of maritime import and a deterioration of the doctrine which regards seamen as "wards" of the admiralty court. Concurrently, the dicta of the court illustrates the conflict that can arise when there is juristic disagreement as to whether a statute is extra-territorially self-limiting, and thereby proscribing an application of choice of laws principles, or whether it lacks an explicit indication of congressional intent sufficient to trigger application of a choice of

About? And What The Fuss Should Have Been About (Maybe), 7 MAR. LAw. 199, 201-02 (1982); Watson, supra note 87, at 89.

99 See Tate, supra note 98, at 202; Watson, supra note 87, at 89.

100 See Watson, supra note 87, at 88. The doctrine of forum non conveniens and choice of laws principles are interrelated to a degree, but the extent of this relationship has proved a source of confusion in maritime jurisprudence. See Tate, supra note 98, at 201. It has been suggested that there are, in actuality, relatively few maritime conflict of law cases because of the similarity between United States law and the maritime laws of many nations. Symeon Symeonides, Maritime Conflicts of Law From the Perspective of Modern Choice of Law Methodology, 7 MAR. LAw. 223, 224 (1982).

101 See supra notes 27-29.


103 As originally codified, the language of the Jones Act, if read literally, allowed any seaman, even if foreign and of a foreign vessel, recourse through the American courts. An employer's liability under this Act consequently represented a very liberal theory of recovery available to a seaman for personal injury. In general, if the seaman can succeed in bringing suit in an American court, it is likely that he will obtain a more substantial recovery. Paul H. Due, Rights of Foreign Seamen in American Courts - The Law Into the '80's, 7 MAR. LAw. 265 (1982).

104 Those factors are: "1) the place of injury; 2) the country of the ship's flag; 3) the allegiance or domicile of the injured seaman; 4) the allegiance of the shipowner; 5) the place of contract; 6) the inaccessibility of a foreign forum; 7) the law of the forum; and 8) the defendant's base of operations." Matute v. Procoast Navigation Ltd., 928 F.2d 627, 631-32 (3d Cir. 1991)).

105 Boczek, supra note 80, at 165.
laws analysis to assess its applicability abroad. Tangentially, Cruz underscores the uncertainty of the specific relation that a flagged vessel can have with its registering country.

A. The Issues Presented

Cruz presented essentially two questions for the court to consider. First, the court had to address the threshold question of whether the plaintiff seamen were entitled to bring suit in a United States federal court. Second, assuming the court answered the first question in the affirmative, the court then had to determine whether the plaintiffs were entitled to coverage under the FLSA.

B. Are the Plaintiff's Entitled to a United States Forum?

The threshold question of jurisdiction and the division it created within the panel is most clearly illustrated by the different approaches employed by Judges Rosenn and Cowen. Judge Rosenn looked to the language of the statute to determine whether the plaintiffs came within the FLSA's jurisdictional reach and, hence, its provisions. Judge Cowen, however, treated the plaintiffs' case as a maritime matter automatically subject to a choice of laws scrutiny to determine whether the seamen's claim was properly submitted to adjudication in American courts. Judge Cowen looked to the Act's language only to determine whether the statute explicitly dictated the application of American law in a conflict of laws situation. Failing to find such an explicit reference, he applied the balancing test of the Lauritzen-Romero-Rhoditis triad and concluded that American interests were insufficient to justify granting the plaintiffs a forum.

1. The Statutory Analysis Standard

The established canon of statutory construction dictates that the text of a statute is controlling. Where statutory language is unambiguous, without "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." Further, with respect to the extraterritorial application of a statute, the Supreme Court has noted that "it is a matter of statutory interpretation as to whether or not statutes are effective beyond the na-

106 In maritime matters, jurisdiction is granted to federal courts by the U.S. Constitution and the Judiciary Act of 1789. Watson, supra note 87, at 87-88. The Constitution provides that "the judicial power shall extend ... to all cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2, cl. 1. The Judiciary Act of 1789 provides that "the district courts shall ... have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1798, ch. 20, 1 Stat. 77 (1789).


tional sovereignty. It depends upon the purpose of the statute.”

2. Examining the Approach of the Panel Members

On the basis afforded by these long prescribed principles of statutory construction, Judge Rosenn appears to have initially followed a standard most consistent with these directives. As Rosenn contended, the Jones Act, which prompted the development of the Lauritzen-Romero-Rhoditis standard, was overly expansive by virtue of its language. At the time of the triad’s inception, the Jones Act read, in pertinent part:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action 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 . . . .

As the Supreme Court in Lauritzen noted, this Act, if read literally, “conferred an American right of action which requires nothing more than that the plaintiff be 'any seaman who shall suffer personal injury in the course of his employment'” and “extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation.” The standard initiated by the Court in Lauritzen and developed subsequently by the Court in Romero and Rhoditis was designed specifically to limit the expansive scope of this Act. The language of the FLSA, however, is ostensibly self-limiting in that it confines its application to seamen on American vessels engaged in commerce. The FLSA reads, in pertinent part:

(a) Every employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed by an enterprise engaged in commerce or in the production of goods for commerce . . . .

(b) not less than [the minimum wage] . . . .

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112 Cruz, 932 F.2d at 224.
(4) If such employee is employed as a seaman on an American ves-
sel, not less than the rate which will provide to the employee, for the
period covered by the wage payment, wages equal to compensation
at the hourly rate prescribed by paragraph (1) of this subsection for
all hours during such period when he was actually on duty . . . .

Under the FLSA, if the plaintiff is a seaman on an American vessel
and is engaged in commerce or employed by an enterprise engaged
in commerce, he should be entitled to coverage.

Considering this, Judge Cowen's concurring opinion advocating
a choice of laws application is flawed in two respects. First, Judge
Cowen never completely reconciled his application of the choice of
laws standard with the canon of statutory construction which dictates
that the plain language of a statute is controlling absent legislative
intent to the contrary. As Judge Rosenn clearly delineated in his
opinion, the language applying the FLSA to seamen engaged in com-
merce on American vessels is outwardly self-limiting as coverage of
the Act applies only to individuals who fall within these specific pa-
rameters. This language is, therefore, controlling absent legislative
history to the contrary. Judge Cowen, however, merely asserted
that a choice of laws analysis was applicable to the dispute as a mar-
itime matter without any showing of legislative intent to suggest that
the language of the Act should not have controlled. Such reason-
ing is fundamentally inconsistent, for the result of an automatic ap-
plication of the Lauritzen-Romero-Rhoditis triad to all maritime
litigation involving statutory interpretation would make Congress' abil-
ity to legislate subordinate to the court's ability to invoke choice
of laws principles.

Second, as Judge Rosenn declared in his opinion, Judge Cowen
construed ARAMCO to support a proposition incompatible with
its dicta. Specifically, Judge Cowen cited to ARAMCO as controll-
ing the court's disposition of the matter, and asserted that the case
sanctioned application of a choice of laws standard to the issue in
Cruz. In fact, the Supreme Court in ARAMCO stated that it
grant certiorari to resolve an "important issue of statutory interpreta-
tion." The Court in ARAMCO acknowledged that Congress had au-
thority to enforce laws beyond the territorial limits of the United
States, but asserted that it was a matter of statutory interpretation
whether Congress had exercised that prerogative. The Court

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116 Cruz, 932 F.2d at 224.
117 Id. at 233 (Cowen, J., concurring).
118 Cruz, 932 F.2d at 224.
120 Cruz, 932 F.2d at 225 n.6.
121 Id. at 224.
123 Id.
then observed: "It is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Thus, the Court in ARAMCO clearly reasoned that absent a showing that Congress explicitly intended to legislate extraterritorially, the presumption is that it intended to legislate only as to domestic application.

Judge Cowen posited that the absence of a specific declaration by Congress resolving conflicts between the FLSA and the laws of other nations, indicated silence on the choice of laws issue and thus prompted the application of a choice of laws analysis. Despite the fact that Judge Cowen clearly referred to the presumption of territoriality in the preceding paragraph, he failed to give effect to the clearly stated rubric which dictates that the absence of a positive statement of intent to the contrary triggers the presumption that extraterritorial application was not intended. Therefore, in Cruz, the presumption operated against a choice of laws analysis since the very application of such an analysis assumes the possibility of extraterritorial application. With regard to maritime matters, ARAMCO does not stand for the proposition that the absence of a congressional declaration that American law is to prevail over foreign law in a conflict means that a choice of laws evaluation must be applied. Rather, it stands for the proposition that the absence of reference to a possible conflict of laws gives rise to the presumption of territoriality.

While looking to the legislative history of an act is an accepted method of statutory interpretation when the language is ambiguous or is clearly at odds with the congressional intent behind the statute, Judge Alito began his dissenting opinion by attempting to resolve the choice of laws issue. In so doing, he, like Judge Cowen, failed to address specifically the issue of whether the language of the FLSA was self-limiting. Nevertheless, it is implicit in Judge Alito's treatment of the issue that he considered the language of the FLSA not to be self-confining, as he examined the language of the statute for a specific indication of an avowed congressional intent as to choice of laws. He argued that while a choice of laws was not specifically enunciated within the statute, the legislative history of the Act provided adequate indication of congressional intent with respect to the

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124 Id. (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
125 Id.
126 Cruz, 932 F.2d at 234-35.
127 Id. at 234.
128 See also Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (holding that legislation of Congress, unless a contrary intent appears, is meant to apply only within territorial jurisdiction of the United States”).
129 Cruz, 932 F.2d at 235.
130 Id. at 235-36.
extraterritorial application of the statute. While Judge Alito's approach to the issue comports generally with established methods of statutory interpretation, his opinion never addresses the language of the statute in a straightforward manner, but only does so tangentially in his argument concerning the legislative history.

In sum, given the very specific and limiting language of the FLSA and the definitions provided within the Act for its key words, it is clear that the statutory language should control. An automatic application of choice of laws principles through the Lauritzen-Romero-Rhoditis triad not only circumvents compliance with the established canon of statutory interpretation, but, as Judge Rosenn noted, it holds Congress' ability to legislate subordinate to the court's power to invoke choice of laws to govern the application of the law.

C. Are the Plaintiffs within Coverage of FLSA?

Writing for the court, Judge Rosenn clearly pronounced that a choice of laws analysis of the case was inappropriate. Accordingly, he addressed the plaintiffs' case under statutory interpretation standards. Under such an appraisal Judge Rosenn declined to adjudicate the plaintiffs within coverage of the FLSA, finding that they failed to meet the "in commerce" requirement of the FLSA. In so holding, however, Judge Rosenn failed to comply with the standards of statutory interpretation.

1. Straying from Statutory Interpretation Standards - Piercing the Corporate Veil

Judge Rosenn correctly found the plaintiff seamen within the first prong of the FLSA coverage, but his analysis began to stray from methods of strict statutory construction when he analyzed whether the defendants had served in an enterprise engaged in com-

131 Id. at 236-37.
133 Cruz, 992 F.2d at 224.
134 Id. at 225-32.
135 Id. at 232.
136 Id. at 225. The court wrote:

The eleven reflagged tankers squarely meet the definition of an American vessel provided in FLSA. These eleven vessels were documented under the laws of the United States so that they were permitted to fly the American flag. The plaintiffs also meet the definition of seamen: the employees perform 'service which is rendered primarily as an aid in the operation of such vessel as a means of transportation.' 29 C.F.R. § 783.31. Thus, the plaintiffs have met one prong of the two prong requirement for seamen to come under the FLSA.

Id.
merce. Judge Rosenn correctly excluded the Gleneagle Ship Management Company from part of the enterprise argument since it was an independent corporation with no affiliation to the other defendants other than by contract. Looking to the remaining corporate entities, however, Judge Rosenn reasoned that the Kuwaiti-owned Santa Fe International Corporation was not engaged in a business purpose common to that of Chesapeake Shipping. Judge Rosenn's reasoning in this part of his opinion seems labored and fundamentally flawed. Indeed it is quite reasonable to view Chesapeake Shipping and the other defendants as having been engaged in the common business purpose of transporting petroleum products. Though "[t]here must be more than a common goal to make a profit for the business purpose requirement," the fact that the Santa Fe International Corporation was wholly owned by the defendant Kuwait Petroleum Company, and was under a management contract to perform services for the defendant Chesapeake Shipping, seems sufficient evidence that these corporations were pursuing a common business purpose. Within the context of this case, the purpose of Chesapeake Shipping and the Santa Fe International Corporation was to advance the business ventures of the Kuwait Petroleum Company in the carriage of petroleum products from the Persian Gulf. At the least, the existence of Chesapeake Shipping allowed the safe transport of Kuwait Petroleum Company oil since it was only by its charter that the tankers were reflagged under the United States ensign.

Judge Rosenn carefully examined the specific arrangements between the corporate entities in what was ostensibly an attempt to pierce the corporate veil, but his efforts were largely superfluous. A court pierces the corporate veil to determine what entity truly lies behind facades of ownership and layers of corporate structure. In this case, though, the fact remained that no matter how the structure was analyzed, the ultimate owner would always prove to be the Kuwait Petroleum Company, a corporation the United States government recognized. The corporations subsidiary to Kuwait Petroleum Corporation were similarly recognized by the U.S. government. These entities clearly served in capacities common to the business purpose of Kuwait Petroleum Company.

The definition of "enterprise" as provided in title 29 utilizes language to bring all the commonly owned defendants within its scope despite the complexity of the corporate structure. The definition reads:

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137 Id. at 229-30.
138 Id. at 229.
139 Id.
140 Id. at 230 (quoting Donovan v. Easton Land & Development, Inc., 723 F.2d 1549, 1551 (11th Cir. 1984)).
[T]he related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor . . . .

This language is clearly very expansive. Judge Rosenn, contrary to the broad scope of the language and the obvious intent of the section, appeared to use the very complexity of the corporate arrangements made through Kuwait Petroleum Company and Chesapeake Shipping as a means to exclude the commonly owned defendants from enterprise liability.

In United States Tuna Corp. v. United States, a suit brought by a Philippine corporation to recover damages for the sinking of its vessel after a collision with a United States destroyer, the Ninth Circuit declined to look beyond the corporate veil in order to treat the corporation as an American shipowner. Specifically, despite the fact that ninety-nine percent of the corporate stock was owned by American citizens, the court rejected the corporation’s attempts to “pierce its own veil for its own benefit.” The court observed:

The reasons for disallowing such practice are obvious, the corporation could receive the benefits of the corporate structure when it was to its benefit to claim such an existence. On the other hand, the corporation could disregard the commensurate liabilities when such existence was not favorable simply by pointing to its “significant contacts” with the United States.

By analyzing at length the relations of the various Kuwaiti corporations, Judge Rosenn attempted, in effect, to perform a similar service for the defendant corporations. To view Chesapeake Shipping’s creation and incorporation as adequate to comport with United States laws for the reflagging, but inadequate to place the foreign seamen employed aboard the vessels within the purview of federal labor legislation would be to afford the Kuwaiti government the benefits of the Chesapeake corporation (United States naval escort), without the commensurate liabilities (payment of minimum wage to crew) entailed in such an enterprise.

2. Failing to Follow the Trend - The “in Commerce” Requirement

It may be argued that Judge Rosenn failed to construe the “in commerce” requirement of title 29 as broadly as the Supreme Court

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142 550 F.2d 569 (9th Cir. 1977).
143 Id. at 573.
144 Id.
has previously done so and, in this sense, failed to follow the trend of
that the FLSA "has been construed liberally to apply to the furthest
reaches consistent with congressional direction."145 In Mitchell v.
Lublin, McGaughy & Associates,146 the Supreme Court held the activi-
ties of draftsmen, fieldmen, clerks, and stenographers engaged in ar-
chitectural and engineering planning were sufficiently related to the
ultimate functioning of entities such as air bases, roads, and televi-
sion installations so as to constitute engagement in commerce within
the meaning of the FLSA. Observing that the facilities literally
served a role in commerce, the Court noted that "such work is di-
rectly and vitally related to the functioning of these facilities because,
without the preparation of plans for guidance, the construction
could not be effected and the facilities could not function as
planned."147

Drawing a parallel to the facts in Cruz, the seamen aboard the
reflagged tankers served in a role vitally related to the commerce of
the United States. Specifically, the seamen served aboard vessels
whose presence functioned to keep neutral shipping safe in the Per-
sian Gulf and thus kept the West's shipping "pipeline" from the Gulf
open. Given the fact that oil from the Persian Gulf was absolutely
vital to the American economy and American commerce,148 the
seamen, in a very direct sense, kept American commerce functioning
by insuring the continued export of oil.149

Such a view of the seamen is specifically supported in Mitchell v.
C.W. Vollmer & Co.150 The Supreme Court in Mitchell noted:

The test of whether an employee is "engaged in commerce" within
the meaning of the Act is whether the work is so directly and vitally
related to the functioning of an instrumentality or facility of inter-
state commerce as to be, in practical effect, a part of it, rather than
an isolated, local activity.151

The Court considered "engaged in commerce," employees who con-
structed a canal within the United States since the canal itself was
related to commerce. Certainly it is plausible to say that the Filipino
seamen, employed aboard vessels whose presence served to insure
that a significant source of petroleum for the United States remained
accessible to American industry, were engaging in work that was "di-

146 Id.
147 Id. at 212.
148 President Reagan acknowledged that keeping the shipping lanes open served an
interest vital to Western economies since it allowed oil from the Persian Gulf to reach
Western markets. See Mertus, supra note 15, at 208 n.6 (citing N.Y. TIMES, May 30, 1987
at Al, col. 2).
(holding labor union’s refusal to unload vessels engaged in trade with the Soviet Union as
activity "in commerce").
151 Id. at 429.
rectly and vitally related to the functioning or facility of interstate commerce."

3. Straying from Statutory Interpretation - The Enterprise Commerce Requirement

Despite his strong advocacy for statutory interpretation standards, Judge Rosenn ultimately failed to comply fully with the canon of statutory interpretation which dictates that the plain language of a statute is controlling. Though Judge Rosenn offered a compelling argument against application of a choice of laws standard, he employed a distinctly non-statutory juridical method to reject the plaintiffs' argument that Chesapeake Shipping Company was an enterprise engaged in commerce by virtue of the supplies and equipment it purchased on the American marketplace. Judge Rosenn noted:

Under the plaintiff's rationale, a company chartered under an American state law that purchased goods in the United States would be an enterprise engaged in commerce and thus be required to comply with FLSA. Normally this would be true. Here, however, we have an extraordinarily unique situation. In the present case, Chesapeake purchased the supplies solely to bring the eleven vessels into compliance with Coast Guard regulations and not in the production of goods or the performance of services for interstate commerce. Compliance with these safety requirements was necessary for reflagging, a decision entirely motivated by political reasons.

In this manner and by a method which most emulated the weighing of various interests inherent to a choice of laws principle, Judge Rosenn rejected an argument which was statutorily correct. In short, though Chesapeake Shipping was an enterprise engaged in commerce within the terms of the FLSA, Judge Rosenn preempted a viewing of the plaintiffs as employed by an enterprise engaged in commerce on the basis that the activity fulfilling that requirement was "entirely motivated by political reasons." In many respects, and perhaps most reflected by this and by the following commentary, it is arguable that Judge Rosenn either employed a choice of laws analysis, or eschewed both the statutory interpretation standard and the specific-factor Lauritzen-Romero-Rhoditis triad choice of laws standard to adopt a more flexible choice of laws approach in which he gave a less formalized consideration to the interests of sovereigns involved.

152 Id. at 429-30.
153 Cruz, 932 F.2d at 230-31.
154 Id. at 231.
155 Id.
156 Id. at 230-31. Judge Rosenn noted that the "symbolism" of the American flag "is not a valid substitute for involvement in the American economy" and that the court was asked to overthrow the contract of the seamen with the Philippines Overseas Employment Administration "[w]ithout serving any interests or concerns of the United States." Id.
Despite the fact that Judge Rosenn properly viewed the plaintiffs' claim under statutory interpretation standards, he ultimately declined to apply fully its terms. Though done in a very few words and towards the end of his opinion, Judge Rosenn effectively disclaimed the standard whose application he so staunchly advocated throughout most of his opinion. Clearly, under Judge Rosenn's reasoning, the plaintiffs were employed by an enterprise engaged in commerce. As seamen employed on American vessels, it necessarily follows that the plaintiffs were rightfully entitled to the minimum wage provisions of the FLSA. Therefore, despite the fact that the Filipino seamen met both prongs of the FLSA requirements Judge Rosenn denied the plaintiffs coverage because of political considerations. In this manner, *Cruz* represents a singular example of a court declining coverage to the plaintiffs on the very grounds which the authoring judge has spent substantial time repudiating. Beyond such a possible distinction, *Cruz* is also unique in a number of other respects.

**D. Possible Distinctions applied to Cruz**

*Cruz* is atypical in that, in very simplistic terms, it stems partially from United States courts trying to resolve the issue of whether to apply American law to a United States flagged vessel. Viewed in this manner, it is almost perplexing that there should be any question as to whether the seamen employed aboard United States vessels were covered by United States legislation. In this vein, it is curious that the court should consider application of United States legislation to an American vessel as extraterritorial application. Contingent to that distinction, *Cruz* is unique in that Judge Latchum of the district court and Judge Cowen of the circuit court of appeals asserted that the United States flag represented insufficient grounds on which to apply U.S. law to the seamen employed onboard the vessels. *Cruz* may erode the doctrine which dictates that the flagging country is the sovereignty most entitled to adjudicate matters affecting the vessel. Similarly, the holding of *Cruz* might represent an erosion of the doctrine which regards seamen as "wards of admiralty" entitled to protection from the over-reaching of shipowners. Lastly, *Cruz*, in presenting the "unanticipated juxtaposition of foreign policy decision with domestic regulation," is unusual in that it involved a reflagging conducted due to political circumstances.

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157 See *supra* notes 145-52 and accompanying text.

158 This is particularly so when examining cases under the Jones Act in which United States courts have asserted jurisdiction over foreign nationals. See *supra* note 87 and accompanying text. See also *infra* notes 182-84 and accompanying text.

159 *Cruz*, 932 F.2d at 219-20.
1. Is a United States Vessel United States Territory?

In the case of The S.S. Lotus, the Permanent Court of International Justice observed that "a ship on the high seas is assimilated to the territory of the State whose flag it flies... what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies."[160] Despite the fact that a United States vessel may be treated as subject to domestic legislation in certain instances, it is apparent that the vessel is not commonly regarded literally as United States territory. Though federal courts have noted that the "use of the word 'territories' depends on the character and aim of the act,"[161] they have also observed that "[n]ormally the word 'territories' is used as including only the portions of the United States territorial possessions which are organized and exercising governmental functions under act of Congress."[162]

Indeed, in Lam Mow v. Nagle,[163] the Ninth Circuit held that a person born on a United States vessel was not born in the United States for purposes of citizenship under the Fourteenth Amendment. Similarly, in United States v. Eastburn Marine Chem. Co., Inc.,[164] a New York district court held that an accident aboard a United States flagged vessel in a Spanish port was not an accident on United States territory for the purposes of a life insurance policy limiting coverage to such territory. The court stated that "[e]ven though an American flag ship may for some purposes be deemed juridically a part of the United States, it does not follow that it is territorially a part of the United States . . . ."[165]

Nevertheless, the flag of a vessel is a symbol of nationality and if legitimately granted,[166] it evidences to the world the nationality of the vessel flying it.[167] In certain regards, the flag evidences something closer to "pseudo-nationality" since the relationship between a

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162 Id. (citing In re Lane, 135 U.S. 443 (1890)).
163 24 F.2d 516 (9th Cir. 1928).
165 Id. at 885.
166 A state may not grant nationality where it would impinge upon the rights of another state. For example, 1) where the vessel already has, and desires to maintain, a different nationality; 2) where the granting state suspects the vessel will be used to violate international law; and 3) when the vessel will possess the flag of more than one state. Mertus, supra note 15, at 212 (citing Boczek, supra note 80, at 105-06).
167 Id. Technically, under international law the flag of a vessel is considered prima facie evidence of nationality. Id. Under United States and international law, only the registry and documentation of a vessel unequivocally establish its nationality. Roos, supra note 86, at 278. (citing The Merritt, 84 U.S. 582, 586 (1873); The Mohawk, 70 U.S. 566, 571 (1865)). The presence or absence of members of a particular nationality does not determine a vessel's nationality. Id. (citing L'Institut de Droit International, Declarations on the Legal Status of Merchant Vessels, art. 4 (1896)).
ship and the nation granting it registry is unlike other relationships relating to nationality. Despite this distinction and despite the fact that a United States vessel may not be United States territory in the literal sense, it is certainly subject to domestic law and federal legislation. While there is an "assumption that Congress is primarily concerned with domestic conditions," it is a viable contention that Congress views United States flagged vessels as within the domestic arena. Indeed, almost immediately after the reflagging of the Kuwaiti tankers, criticism was levelled at the United States, asserting that the reflagging provided "'temporary' cellophane flags for extension of the use of force.'" The State Department's legal advisor responded to this criticism by asserting that the vessels complied with United States vessel documentation laws, were subject to United States tax an corporate laws, were available to the government for the Military Sealift Command, and were subject to United States laws and jurisdiction. Given this proclamation of the State Department, the opinions of Judge Latchum of the district court and Judge Cowen of the circuit court are unusual in that they are using a choice of laws analysis effectively to exclude particular United States flagged vessels from United States legislation.

2. Is There a Decline of Law of the Flag?

As the Supreme Court stated in Lauritzen, "'[i]t is settled American doctrine that the law of the flag governs all matters of discipline on a ship and all things done on board her which affect only the ship and those belonging to her.'" As the Court further declared, "the

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168 Mertus, supra note 15, at 212 (citing Boczek, supra note 80, at 121).
169 But see 46 U.S.C. § 12104(1) (1987)(dictating that a certificate of documentation issued in accordance with United States laws is conclusive evidence of nationality for international purposes, but is not conclusive evidence of nationality in proceeding conducted under the laws of the United States).
171 Black's Law Dictionary defines "state" as: "Any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States" BLACK'S LAW DICTIONARY 1407 (6th ed. 1991) (emphasis added) (citing UNIFORM PROBATE CODE, § 1-201(40)). This definition would arguably include a United States flagged vessel as a territory or possession subject to United States legislative authority. Also instructive is the Court's language in Filardo where the Court noted that "'[t]he absence of any distinction between citizen and alien labor [in the Federal Eight Hour Law, 40 U.S.C. §§ 321-326] indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress.'" Foley Bros. v. Filardo, 336 U.S. at 286. It seems sound to maintain that seamen on American vessels are "a probable concern of Congress."
172 Wachenfeld, supra note 15, at 183 (quoting Paust, Letters to the Editor, N.Y. TIMES, July 26, 1987, at E26, col. 3.).
174 Lauritzen v. Larsen, 345 U.S. 571, 584-86 (1953). See also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) ("In addition, our attention is called to the well-established rule of international law that the law of the flag state ordina-
weight given to the ensign overbears most other connecting events in determining applicable law." 175 In this vein, one district court noted "[t]he cases which apply the principle that the law of the flag is to govern matters such as the one before us are legion." 176 The district court in Cruz and two panel members of the Third Circuit, however, gave only marginal consideration to the primacy of the reflagged vessels' ensign as a basis for adjudicating the plaintiffs' case. Judge Latchum of the District Court reasoned that a choice of laws balance precluded the application of United States law, finding the presence of the United States flag on the vessels insufficient to overcome the factors weighing against assertion of American law. 177 In the circuit court, Judge Rosenn treated the Kuwaiti vessels as subject to United States jurisdiction, but discounted the notion of the vessels as being American territory and ultimately found the plaintiffs outside of the FLSA coverage because of the uniquely political nature of the reflagging. 178 Judge Cowen nominally recognized the presence of the United States flag, but failed to give it deference under the Lauritzen-Romero-Rhoditis triad sufficient to construe the vessels as within American jurisdiction. Only Judge Alito gave deference to the flag of the tankers, noting that the United States had sovereignty over United States flagged vessels. 179

In many respects, the treatment of the district court and the majority of the Third Circuit represents a shift from the general doctrine of maritime law pronounced by the Supreme Court when it noted that "[p]erhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag." 180 This doctrine has generally yielded the result that when there has been a question over whether foreign law or domestic law

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175 Lauritzen, 345 U.S. at 585:


177 Cruz v. Chesapeake Shipping Inc., 738 F. Supp. 809, 816-18 (D. Del. 1990). For a listing of the eight factors weighed, see supra note 58. Only as an alternate holding did Judge Latchum find the plaintiffs outside the commerce requirement of the FLSA. Cruz, 738 F. Supp. at 818-22.

178 The court found that the plaintiffs were seamen on an American vessel, thus meeting the first prong of the two prong test. However, the court determined that the plaintiffs were neither "in commerce" nor "employed be an enterprise engaged in commerce" as required under the second prong of the test. Cruz, 932 F.2d at 224.

179 Id. at 235 n.1.

180 Lauritzen, 345 U.S. at 584.
prevailed, the law of the flag was given precedence.\textsuperscript{181} Cruz is distinct in that Judge Latchum of the district court and Judge Cowen of the circuit court wanted to decline jurisdiction over a United States vessel. It is perhaps more unusual when compared to a number of cases in which United States courts have extended their reach to exert jurisdiction over foreign vessels,\textsuperscript{182} improperly registered vessels\textsuperscript{183} or stateless vessels.\textsuperscript{184} To advocate declining jurisdiction over an American flagged vessel in this instance seems all the more remarkable. Indeed, under the \textit{Lauritzen-Romero-Rhoditis} triad, the general rule was that the United States would exert jurisdiction if the seaman was a United States citizen or alien resident or if the vessel was under the United States flag or owned by an American whose base of operation was in the United States. Certainly Cowen's opinion, which advocates declining jurisdiction despite the United States flag, represents an example of the erosion of this previously recognized rule.

3. \textit{Are Seamen No Longer "Wards of the Court"?}

United States maritime law has been characterized as "very solicitous" of seamen who are within its jurisdictional reach.\textsuperscript{185} Under United States law a seaman's employment and contractual relations to a vessel is heavily regulated by federal legislation. Statutes governing this area are those which: delineate hours and conditions of employment;\textsuperscript{186} make provisions for living conditions onboard a ves-

\begin{itemize}
\item \textsuperscript{181} Paul S. Edelman, \textit{Suits By Alien Seamen}, 3 MAR. LAW. 27, 32 (1978).
\item \textsuperscript{182} United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985) (holding that Congress intended the Marijuana on the High Seas Act to apply to foreign seamen onboard foreign vessels); United States v. Biermann, 678 F. Supp. 1437 (N.D. Cal. 1988), aff'd sub nom., United States v. Davis, 905 F.2d 245 (9th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991) (holding vessel flying flag of United Kingdom subject to United States jurisdiction under Maritime Drug Law Enforcement Act); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) (upholding application of Jones Act to Greek seaman injured aboard Greek vessel while in United States territorial waters); Anypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307 (2d Cir.1976) (United States law applied to Greek flagged vessel on basis that most of its voyages were to or from United States ports); Bobolakts v. Cia. Panamena Maritima San Gerassimo, 168 F. Supp. 236 (S.D.N.Y. 1958) (holding that majority ownership and control by Americans of Panamanian corporation owning Panamanian vessel sufficient to give court jurisdiction in Greek seaman's claim under Jones Act); The Belgenland, 114 U.S. 355 (1885) (pronouncing general rule which gave the United States admiralty jurisdiction over foreign vessels involved in collisions).
\item \textsuperscript{183} United Sates v. Correa, 750 F.2d 1475 (11th Cir. 1985) (finding jurisdiction over vessel documented under United States laws as a United States vessel despite fact that registration had been rendered invalid).
\item \textsuperscript{184} United States v. Alvarez-Mena, 765 F.2d 1259 (5th Cir. 1985)(upholding United States jurisdiction over a marijuana-carrying, stateless vessel on the high seas). Some circuits have held that a stateless vessel on the high seas is automatically subject to United States jurisdiction regardless of whether the vessel has any contacts to the United States. Curtis, supra note 93, at 230. Other circuits have declined to consider such vessels within United States jurisdiction. Id.
\item \textsuperscript{185} Edelman, supra note 181, at 27.
\item \textsuperscript{186} 46 U.S.C. § 8104 (1988). 
\end{itemize}
exempt seamen from prepayment of court costs in pursuing a claim in federal courts for wages; cover terms for payment of seaman's wages; provide for double wages for certain seaman as penalty for nonpayment; allow seaman to demand wages at specific periods; and provide exemption of seaman's wages from attachments except in specific circumstances.

The abundance of legislation in this area illustrates the maritime principle that seamen are "wards of admiralty" entitled to protection from ship owners. An earlier case explains the reasoning behind this protectionistic principle:

Seamen . . . are unprotected and need counsel . . . they are thoughtless and require indulgence; . . . they are credulous and complying, and are easily overreached . . . they are considered as placed under the dominion and influence of men who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage.

In line with this reasoning, the Ninth Circuit in *Cruz v. Zapata Ocean Resources, Inc.* noted that under international law a state may not present a claim for a foreign nation, but that a possible exception to this rule may apply if an alien seaman serves on a vessel of that nation. The court cited to the case of *In re Ross*, where, in referring to a British seaman serving aboard a United States vessel, the Supreme Court observed:

The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American Ship *Bullion*. By such enlistment he becomes an American seaman . . . although his relations to the British government are not so changed that, after expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service as a seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all power of the United States which could be called into exercise for the protection of seamen who were native born.

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187 *Id.* §§ 11101-11104.
190 *Id.* § 10504.
191 *Id.* § 10313.
192 *Id.* § 11109.
193 Harden v. Gordon, F. Cas. 11, No. 6047 (C.C. Me. 1823).
194 695 F.2d 428 (9th Cir. 1982).
196 140 U.S. 453 (1891).
197 *Zapata*, 695 F.2d at 433-34. (quoting *In re Ross*, 140 U.S. 453, 472 (1891)).
The Ninth Circuit considered this definition of “American seaman,” which included aliens serving as crew onboard a United States vessel, to be supported by language adopted by the Department of State.\(^{198}\) Specifically, Foreign Service Regulations define “American seamen” as: “(a) Seamen who are native born or fully naturalized citizens of the United States” and “(b) aliens who have acquired and maintained the character of American seamen.”\(^{199}\)

While it is arguable that with increased sophistication and the efforts of maritime labor unions, the modern seaman is not as prone to overreaching as the seamen contemplated by the court in *Harden v. Gordon*,\(^{200}\) it is still tenable to assert, as did the court in *Ross*,\(^{201}\) that seamen are entitled to special protection due to the nature of their employment.\(^{202}\) In addition to being subject to the unique demands of employment aboard a vessel at sea, the seamen aboard the reflagged vessels were exposed to the dangers of mines and air attack.\(^{203}\) Indeed, the tanker *Bridgeton* struck a mine on its maiden voyage under the United States flag,\(^{204}\) resulting in fatalities among the ship’s officers.\(^{205}\) The tanker *Sea Isle City* was hit by an Iranian silkworm missile, resulting in numerous injuries among the crew.\(^{206}\) In light of the protectionistic stance which Congress and the courts have adopted towards the rights of seamen as a class, and given the very specific dangers endured by the plaintiff seamen in *Cruz*, it is inappropriate to refuse the seamen the ability to “invoke for [their] protection all power of the United States which could be called into exercise” and unconscionable to deny them the protection of mini-

\(^{198}\) Id. at 434.

\(^{199}\) Id. at n.10 (quoting Foreign Ser. Reg. U.S. XVI-2, nn.1, 23, June 1941 as cited in 4 G. Hackworth, Digest of International Law § 446, at 883-84)

\(^{200}\) F. Cas. 11, No. 6047.

\(^{201}\) 140 U.S. 453 (1891).

\(^{202}\) In maritime legislation regarding seaman’s wages and shipowner liability, Congress has generally specified whether the statute is applicable to situations involving a foreign element. Symeonides, supra note 100, at 225. In this fashion, the choice of laws issue has been resolved a priori. Id. Where Congress has not specified the reach of maritime legislation, it has been suggested that directive established by legislation such as The Seaman’s Act of 1915, 46 U.S.C. § 597 (1976), providing that the Act was specifically applicable “to seamen on foreign vessels while in harbors of the United States,” should provide guidance in cases where Congress has failed to clearly define the transnational reach of maritime legislation. Id. at 230.

\(^{203}\) Wachenfeld, supra note 15, at 174.

\(^{204}\) Id. at 174 n.6 (1988) (citing Convoy to a Minefield, Maclean’s, Aug. 3, 1987, at 20-21).

\(^{205}\) Reuters Library Report, Tugs Battle to Douse Burning Kuwaiti Tanker, February 25, 1990. “The explosion . . . set alight the highly-inflammable naphtha cargo and killed the American captain and first mate.” Id.

4. Is This a Unique Political Situation?

With reference to the opinions of Judge Latchum of the district court and Judge Cowen of the circuit court, *Cruz* is unique in that it is a reversal of the cases normally coming under application of the *Lauritzen-Rhoditis-Romero* triad. In most litigation which has come under the triad’s choice of laws scrutiny, the vessel was registered under the flag of another nation and the United States court was weighing its interests in invading the sanctity of this symbol. Additionally, *Cruz* is unique in that the reflagging was motivated by political reasons as opposed to economic ones; the latter being factors normally perennially involved with flags of convenience vessels. As the Department of State noted, the reflagging was “an unusual measure to meet an extraordinary situation.” For this reason it is arguable that the case does not lend itself well to analysis under the *Lauritzen-Romero-Rhoditis* triad since that standard is more accurately suited to determining issues related to commercial matters. The temporary nature of a political reflagging makes links between a vessel and its registering state tenuous at best. In a commercial endeavor, the links are more definite indicators of the relationship. Consequently, only in an application to a commercial enterprise does a balancing under the *Lauritzen-Romero-Rhoditis* factors accurately reflect the true nature of the business.

E. The Deficiencies of Choice of Laws Analysis

The application of the choice of laws in *Cruz* nevertheless serves the valuable function of pointing up the limitations of the *Lauritzen-Romero-Rhoditis* triad. Analysis under the choice of laws is sufficiently nebulous to allow disparate results. In short, despite the fact that the

207 In re Ross, 140 U.S. at 472.
208 See *Lauritzen*, 345 U.S. at 571 (weighing United States interests in exercising jurisdiction over Danish flagged vessel); *Romero*, 358 U.S. at 354 (weighing United States interests in exercising jurisdiction over Spanish flagged vessel); *Rhoditis*, 398 U.S. at 306 (weighing United States interests in exercising jurisdiction over Greek flagged vessel). See also *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1962) (considering whether provisions of the National Labor Relations Board applied to foreign flagships).
209 Mertus, *supra* note 15, at 211. Though unusual, the practice of reflagging for political reasons does have historical precedent. *Id.* at 211 n.33. American vessels avoided British ships blockading the American coast during the War of 1812 by sailing under the flag of Portugal. *Id.* (citing *Flags of Convenience - The “Offshore” Registration of Ships*, in E. Gold, *New Directions in Maritime Law* 85 (1978)). Similarly, English vessels registered under the ensign of German principalities to avoid French vessels blockading the continent during the Napoleonic wars. *Id.* (citing *Bozzer, Flags of Convenience* 8 (1962)).
211 In a majority of admiralty cases the named defendant is a corporation, partnership, or company. R. D. Kerameus, *Admiralty Jurisdiction in Continental Countries*, 8 MAR. LAW. 329, 331 (1983).
eight factors enumerated by the triad are clearly defined, the flexibility of the standard lends itself too easily to distortion. For example, if Judge Cowen had given the deference to the flag of the vessel as the Supreme Court did in *Lauritzen*, it is likely that he would have favored of applying American law. Likewise, had he elected to place greater weight upon the broader American interests involved in the reflagging, such as maintaining a free flow of oil to the Western world, security in the Persian Gulf, and preventing the Soviets from gaining a foothold in the region, the outcome may have been very different. In a footnote, Judge Cowen noted that if the seamen had greater contacts with the United States, they would have most likely been covered by the FLSA. By making this remark, Judge Cowen intimated that the issue was a close one, with only a slight weight shifting the balance. This provokes the observation that the factors which tip the scale under a *Lauritzen-Romero-Rhoditis* analysis may change to such an extent that they rise to the level of becoming overly subjective.

1. Is There a "New" Political Factor in Choice of Laws Analysis?

It has been proffered that the *Lauritzen* case did not supply a "definitive test" for evaluating choice of laws given the fact that it left "unresolved all the possible combinations of 'contacts' which were not exactly the *Lauritzen* contacts combinations..." Moreover, as the Supreme Court noted in *Rhoditis*, the list of *Lauritzen* factors was not exhaustive. Indeed, the circuit courts have shown division over the exact weight to be accorded to each of the factors and over what additional factors could be considered.

Following the view that the triad's factors are not exhaustive,
Judge Cowen introduced a new “political factor” into the triad and in this application, made it virtually the supreme consideration. This new political factor may merely fit in as an additional element generally considered to be part of the unarticulated triad factors. Or, as Rhoditis authorizes, it may be merely a “governmental interests analysis.” Regardless, during the process of the reflagging, there was certain emphasis on disclaiming the more political aspects of the reflagging, with the U.S. government asserting that the United States was only attempting to keep neutral shipping safe.

2. Were American Interests Sufficient?

Judge Cowen suggested that the outcome of his evaluation under choice of laws principles may have been different had the sailors resided in the United States or had their contacts with the United States been more substantial. From this, he intimated, if not explicitly stated, that the issue was a close one which could have favored the plaintiffs with a few more factors on the side of United States jurisdiction. This raises the question as to why Judge Cowen did not accord greater weight to the broader United States goals served under the reflagging.

The intervention achieved by reflagging the Kuwaiti tankers clearly served United States economic and political interests as it allowed the maintenance of an uninterrupted supply of oil to the West and prevented the Soviet Union from establishing a presence in the Gulf region. The Iranian attacks on merchant shipping during the Iran-Iraq war threatened to destabilize the entire Persian Gulf and with it, to disrupt elements of the American economy and the broader American political agenda pertaining to the Middle East. Following World War II, the United States has been dependent upon the Middle East for a significant supply of its oil and has had substantial political interests in maintaining overall stability in the area. As the Persian Gulf region can weigh heavily in maintaining the balance between the West and the Soviet Union, it is important to the United States that Gulf countries do not fall under the influence of

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219 Cruz v. Chesapeake Shipping Inc., 932 F.2d 218, 234 n.3 (3d Cir. 1991). Judge Cowen failed to acknowledge, however, that the United States government specifically granted certain waivers contingent upon the agreement of the Kuwaitis that these vessels would not enter American ports in order to prevent economic skewing due to the fact that they had not had to comply with all the safety and drydocking requirements.
the Soviet Union. Given the fact that increased United States presence in the area was based on a link to the reflagged vessels, it is reasonable to assert that the United States would have been justified in maintaining absolute control over all matters affecting the reflagged tankers. The district court in Cruz rather blandly stated that the only American interest linked to the reflagging was the goal "to safeguard the United States security and foreign policy objectives in the Persian Gulf." It became disconcertingly clear that the court regarded such an interest as nominal when the court dismissed its significance under the Lauritzen-Romero-Rhoditis triad. This is perhaps more remarkable when it is considered that countries have authorized military actions based on such types of justification.

Indeed, the reflagging of the Kuwaiti tankers caused a significant clash between President Reagan and Congress over the power to send troops abroad into a hostile situation. Congress argued that the buildup of United States troops in the region necessitated invocation of the War Powers Resolution in order to authorize the commitment. There was legitimate and substantial concern that the reflagging and the contingent military buildup needed to protect the reflagged tankers represented "a mission entailing a considerable possibility that the United States would be drawn into one of the century's bloodiest wars." The reflagging also generated criticism that while the purpose in reflagging the tankers was portrayed as one designed to protect "the right to innocent passage on the high seas . . . [i]n fact, Administration policy represented nothing less than a major commitment of American forces on the Iraqi side in the Iran-Iraq War." Regardless of such possible interpretations,

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222 Id. This contention is confirmed by the fact that the U.S. convinced the Kuwaitis approached the Soviet Union first to allow reflagging of the Kuwaiti vessels, the U.S. was anxious to avoid such a situation. Cruz, 738 F. Supp. at 811. In "very high level" discussions, the U.S. stressed that allowing the Soviets to conduct the reflagging would be: against their interests and the interests of other countries in the area as well as the Western interests to give the Soviet Union a major role in protecting oil destined for the West and to allow the Soviet Union to make a strategic foothold in this particular part of the world.

Id. (citing Kuwaiti Tanker Hearings, supra note 11, at 39).

223 738 F. Supp. at 817.

224 Robbins, supra note 206, at 142.


227 Biden & Ritch, supra note 218, at 369.

228 Id. at 368. The authors opined:

In assessing the Administration's decision, it bears emphasis that the Gulf nation crucially dependent on exporting oil by sea is Iran. Iraq and its key Arab allies have enormous pipeline capabilities which enable them to circumvent the Gulf. It was precisely for this reason that Iraq extended its land warfare against Iran into a sea war against Iranian shipping. Had Iraq at
American servicemen fought, were injured, and died in the course of protecting the reflagged vessels. Thirty seven United States Navy sailors were killed aboard the American missile frigate *U.S.S. Stark* when it was hit by two missiles and ten Navy sailors were injured when the American missile frigate *U.S.S. Samuel B. Roberts* struck an Iranian mine.\(^{229}\)

Indeed, the military buildup contingent to the reflagging represented significant United States military action. Though the United States has maintained a presence in the Gulf since the years following World War II, the commitment of United States troops related to the reflagging represented the largest buildup of American troops since the Vietnam War.\(^{230}\) The reflagging by some measures was the biggest and costliest mission of the United States Navy since World War II.\(^{231}\) Between July and September of 1987 alone, the buildup and operating costs contingent to the reflagging totalled approximately $69 million by some estimations.\(^{232}\) The number of United States vessels in the Persian Gulf quadrupled,\(^{233}\) resulting in the presence of more than thirty United States warships in the region at one point,\(^{234}\) and the involvement of approximately 15,000 troops.\(^{235}\) It is very clear that American interests were quite substantial and certainly were more than just a factor to be considered nominally under the *Lauritzen-Romero-Rhoditis* triad.

any point been willing to desists in the sea war, Iran surely would have done likewise.

Thus when the United States committed major naval forces in the Gulf, the principal effect was not to assert the right of passage on the seas - nor to protect the 'vital oil lifeline to the West' from an Iranian threat - but rather to deploy American power on the Iraqi side of that war. Iraq could now intensify its sea attacks on Iranian shipping with the extra incentive that Iranian retaliation might draw United States forces into active conflict with Iran, the United States Navy had thereby become an adjunct of Iraqi policy.\(^{229}\)

*See also* C. Wilbanks, *States News Service*, August 28, 1990 (Rhode Island Senator John Chafee quoted as saying "By flying our flags on Kuwaiti vessels, like it or not we will have effectively chosen sides in the war ... Our lot will have been cast with Iraq"); D. Hoffman, *Delicate Gulf Balance Undone in a Lightning Strike*, *Wash. Post*, August 3, 1990, at A25. ("[T]he U.S. was implicitly helping Iraq in order to prevent Iran from winning a chokehold on the world's oil.").


\(^{231}\) See Pyle, *supra* note 229.


\(^{233}\) See Pyle, *supra* note 229.


3. Would a Ruling for the Plaintiffs Give Rise to Significant International Effects?

While members of the circuit court were disinclined to impose any form of a mandate upon the foreign governments involved in Cruz, the case does not represent a circumstance in which the assertion of American jurisdiction and a ruling for the plaintiffs would have given rise to any untoward international effects. Given Judge Rosenn's description of the protectionistic nature of the Philippines Overseas Employment Administration (POEA), which negotiated the Filipino seamens' labor contract, it appears illogical to assert that any application of United States minimum wage standards would disturb the sovereignty of the Filipino Government, since any such action by the United States would only benefit the concerned Philippine nationals. It is clear, however, that many developing nations depend upon flag of convenience registry as a significant source of revenue and would rebuff any external interference with their ability to set seamen's wages, as the low level of these wages attract shippers. Indeed, relevant to Cruz, providing crews for foreign flag vessels produces the sixth largest source of income for the Philippines, and as wage parity would threaten to limit the appeal of Philippine nationals as low cost crew members, the Philippine Government might be averse to any such development.

Despite this, the court's hesitance to embrace foreign seamen engaged in work upon an American vessel as an impingement upon the sovereignty of another nation is ill-founded. First, it is curious that Judge Latchum of the district court and Judges Cowen and Alito of the circuit court should look to the language of the FLSA for a declaration relating to conflict of law, since the statute was to be applied to seamen on American vessels. Such application is certainly not extraterritorial in the sense that the territory concerned belongs wholly to another government. Second, the application of American labor law to foreign nationals employed onboard United States ships would not likely represent the commencement of a trend. The instant matter involved unique circumstances. Furthermore, Congress adjusted the manning requirements for United States vessels and eliminated the foreign-to-foreign exemption thus obviating the po-

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236 Cruz v. Chesapeake Shipping Inc., 932 F.2d 218, 221 (3d Cir. 1991). The court describes the POEA as, in part, an organization designed "to afford protection to Philippine workers and their families" and one which "approves their wages" and "provides worker assistance and welfare services." Id.


238 Id. (citing T. Lones, ITF Can Win Some Battles, But Will It Lose the War?, Seatrade, April 1979, 59-60; K. Grundey, Flags of Convenience in 1978, Transport Studies Group, Discussion Paper no. 8 (1978)). Given the domestic economy of many countries providing crews for foreign ships, wage parity would in some cases cause a seaman to earn more income than cabinet members, doctors, and many other professionals. Id.
tential for any such future occurrence.\footnote{239} Further, the United States is not a country considered by shipowners to be a favorable flag of convenience registry nation and in fact, the majority of United States owned vessels areflagged under the ensign of another country.\footnote{240} The measures the United States chooses to employ with regard to vessels under its flag is of little concern to the maritime world and flags of convenience vessels in particular. Indeed, the whole application of the term flag of convenience to the vessels concerned in the present dispute is arguably incorrect.

Historically, flags of convenience have been both granted by a country and secured by a shipper largely for economic reasons.\footnote{241} Shipowners have traditionally secured foreign registry to avoid compliance with more stringent or more costly requirements mandated under domestic laws.\footnote{242} The countries granting the flags are typically economically developing countries which rely upon the revenue generated by granting such flags as a substantial source of income for their national economy.\footnote{243} Both parties reap the economic rewards of the relationship, as the fees levied for registration generates funds for the flagging country and the minimal regulation allows a shipper to operate a vessel or fleet of vessels at substantially reduced costs. Given the exclusively political nature of the ref flagging of the Kuwaiti tankers, it is, therefore, somewhat of a misnomer to apply the term “flag of convenience” with its economic connotations to the case under scrutiny.\footnote{244}

\footnote{239} Supra note 20. \footnote{240} BESS & FARRIS, supra note 237, at 150-51. In 1976, of the 985 vessels that were U.S. owned, only 290 were registered under the U.S. flag. Id. According to the 1980 United Nations Conference of Trade and Development (“UNCTAD”), one-third of all tonnage sailing under the ensign of a “flag-of-convenience” country is controlled by United States interests. Mertus, supra note 148, at 216. Crew wages represent a substantial portion of the high operating costs for American flagged vessels. Wells, supra note 80, at 224. \footnote{241} Osieke, supra note 51, at 604. \footnote{242} While the practice became commonplace following World War One, Id., the tradition of flags of convenience has been traced to at least the Sixteenth Century when English merchants used Spanish registry in order to engage in the West Indies trade which was dominated by the Spaniards. BESS & FARRIS, supra note 237, at 150. \footnote{243} Osieke, supra note 51, at 604. \footnote{244} A widely accepted definition for “flag of convenience” contains the following elements:

1. The country of registry allows ownership and/or control of its merchant vessels by non-citizens.
2. Access to registry is easy. A ship may usually be registered at a consul’s office abroad. Equally important, transfer from the register at the owner’s option is not restricted.
3. Taxes on the income from ships are not levied locally or are low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given.
4. The country of registry is a small power with no national requirement under any foreseeable circumstances for all shipping is registered, but re-
VI. Conclusion

Broadly the court in Cruz was hesitant to impose any form of mandate involving foreign governments, fearing an adverse impact. The court failed to note, however, that Kuwait, the only country which would have felt any impact from an adverse decision, was the country primarily seeking to benefit from the status and protection of the United States. The United States government was willing to extract a quid pro quo from Kuwaiti by requiring it to adhere to United States laws regarding ownership, safety, and manning requirements as part of the reflagging. In that instance it did not hesitate to impose a set of federally mandated rules upon a foreign nation. Thus, there is no reason why the United States should see to the safety of the Filipino seamen, but not to their welfare by drawing an artificial distinction at the issue of wages. The contract the Kuwaiti government entered into with the Philippine government regarding employment of the Filipino seamen should have been subsidiary to the fact that the vessels were flagged with the United States flag and that the Kuwaiti government thus voluntarily subjected the vessels to United States law.

It is inconsistent to assert the existence of a paper trail and lack of direct and specific activity in commerce as a grounds for disclaiming jurisdiction or rejecting accountability for matters concerning the vessels. It was this very trail and the United States ensign on the refagged vessels upon which the United States asserted its right to defend the tankers in the eyes of the world. Had it proven necessary, the United States would have utilized these same elements as justification for the right to defend the tankers in any international or domestic tribunal. Such a disclaimer, if done at the time the vessels were operating with United States Navy escort, would have made the...
United States susceptible to a challenge by a foreign state that it was not evidencing a "genuine link" with the flagged vessel, as required under the Law of the Seas. Indeed, one author suggests that the United States specifically took advantage of "the vagueness of the genuine link requirement, using the reflagged vessels to achieve broader political objectives in the Persian Gulf."247

If the court had ruled in favor of the plaintiff seamen, this action would not only comport with federal law, but with international law as well. The vessels were flagged under the United States ensign, thereby imbuing the United States government not only with the right to oversee labor issues, but by some views of international law, the responsibility to administer them.248 The International Court of Justice stated that "[w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them."249 In addition to this standard, there is substantial federal legislation governing the employment of seamen, much of which serves a protectionist function. The abundance of legislation in this area is partially sprung from the notion that seamen are particularly prone to overreaching by a shipowner. Given the generally recognized symbolism of the flag a vessel flies, it seems that the court would be conservative when determining whether to exercise jurisdiction over a vessel flying the flag of another country, but liberal when considering a United States flag vessel.

Aside from the fact that the court in Cruz arrived at a holding which may be questionable, it is significant that the court debated

246 The Restatement (Third) Foreign Relations Law notes that the lack of a genuine link between the vessel and the registering state does not allow another state to refuse to recognize the flag or to interfere with the ship, but does allow the protesting state to reject diplomatic protection by the flag state. Restatement (Third) Foreign Relations Law § 501 cmt. b (1986).

247 Wachenfeld, supra note 15, at 175. Despite this criticism, the reflagging was supported by decisions of the International Court of Justice and the United States Supreme Court. Haimbaugh, supra note 15, at 151.

248 The Restatement (Revised) Foreign Relations Law § 402 notes: "Subject to § 403, a state has jurisdiction to prescribe law with respect to:

(1)(c) conduct outside its territory which has or is intended to have substantial effect within its territory...;

(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a limited class of other state interests.


250 Among the statutes governing this area are: 46 U.S.C. § 8104 (delineates hours and conditions of employment); 46 U.S.C. § 11101-11103 (contains provisions for living conditions onboard vessel); 28 U.S.C § 1916 (exempt seaman from prepayment of court costs in pursuing a claim in federal courts for wages); 46 U.S.C. §§ 10313, 10504, 11105, 11106 (cover payment of seaman's wages); 46 U.S.C. § 10504 (provides for double wages for certain seaman as penalty for nonpayment); 46 U.S.C. § 11109 (provides exemption of seaman's wages from attachments except in specific circumstances).
not only the holding itself, but the legal avenue through which that holding should be determined. While such a task may not be one with which federal courts are entirely unfamiliar, given the significance and potential impact of adjudication which can extend to the international arena, it seems elemental that the judicial approaches in this area should be carefully delineated and defined. The court's debate raises a question of the proper standard, if a single appropriate standard exists, and it additionally serves to highlight the potential shortcomings of either method of interpretation when the issue has such close ties to political concerns.

It is arguable that Judges Rosenn and Cowen, while advocating the distinct applicability of a specific juristic method, indeed failed to apply these methods as strictly as their rationale would dictate. After advocating analysis under strict statutory interpretation methods, Judge Rosenn rejected an otherwise accurate argument on the basis that the situation at hand was unique and hence precluded coverage of the plaintiffs within the statutory language of the FLSA. In this sense, Judge Rosenn abandoned strict statutory interpretation when he failed to serve his argument and instead relied on a form of rebuttal that is reminiscent of a choice of laws factor balancing test. Judge Cowen, on the other hand, inappropriately employed a choice of laws standard, but by placing so little weight on the law of the flag, he applied it in a manner that was almost contrary to the cases which spawned the standard in the first place.

Judge Cowen's argument further serves as a manifest demonstration of the fact that the flexibility of the Lauritzen-Romero-Rhoditis triad appears to delineate somewhat objective standards to determine choice of laws, but is used in a largely subjective manner. In effect this might lead an adjudicative body to evaluate an issue not so much by objectively according weight appropriately to the various factors, but by according weight in a manner so as to support some general, over-arching idea of how the issue should be resolved. In short, the court may use the factors not to decide the dispute, but rather to support a decision made independently of any balancing of these factors. Indeed, both concurring opinions of the circuit court allow the political nature of the reflagging to dominate their reasoning and to dictate the outcome. Judge Rosenn overruled the commerce element because of the uniquely political nature of the reflagging and Judge Cowen seemed hesitant to construe the matter as within United States jurisdiction because of the political nature of the reflagging. Such treatment runs counter to the judicial trend in maritime cases which has reflected a "rational non-result-oriented decisions"\textsuperscript{251} approach since the emphasis seems to be placed on declining coverage of the plaintiffs through varying means.

\textsuperscript{251} Watson, \textit{supra} note 87, at 116.
Given the division evident in the opinions of the circuit court judges, it appears that a congressional declaration or a more explicit Supreme Court guideline is called for in this case and any others like it which may arise in the future. Absent a specific congressional declaration in future maritime legislation, it would be beneficial for Congress to define the exact territorial relationship a vessel has to its registering country with regard to domestic legislation. It is the opinion of this author that Congress has always considered United States flagged vessels within its legislative reach. However, in light of the *Cruz* decision, Congress needs to set forth specific guidelines regarding the United States' relationship with U.S. flagged vessels so that the courts can adjudicate matters with consistency and in a manner that balances American domestic interests against international concerns.

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