

9-1-1980

Age Discrimination in Employment Act Amendments of 1978: Tension Between Congress and the Courts

John A. Adams

Jay D. Pimentel

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Civil Rights and Discrimination Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

John A. Adams and Jay D. Pimentel, *Age Discrimination in Employment Act Amendments of 1978: Tension Between Congress and the Courts*, 1980 BYU L. Rev. 569 (1980).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1980/iss3/4>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

COMMENTS

Age Discrimination in Employment Act Amendments of 1978: Tension Between Congress and the Courts.

I. INTRODUCTION

During the fourteen years since the enactment of the Age Discrimination in Employment Act of 1967 (ADEA),¹ tension has developed between Congress and the federal judiciary regarding implementation of the Act. This tension is manifested by the differences between what Congress intended to promote and the narrower construction given the law by the federal courts. Congress enacted the Age Discrimination in Employment Act Amendments of 1978 to clarify its intentions in several troublesome areas. But despite the Amendments' impact of setting forth decisive answers with respect to some issues, the scope of the Amendments was not so pervasive as to settle all controversies. Differences in breadth of interpretation continue to exist between Congress and the federal judiciary on a few significant issues concerning age discrimination protection.

A. *Age Discrimination in Employment Act*

The efforts of Congress to combat age discrimination date back to the early 1960's when it enacted laws to aid the elderly in employment.² These acts did not expressly forbid age discrimination, however, and an Executive order issued by President Johnson in 1964 only prohibited federal contractors and subcontractors from discriminating on the basis of age.³ Congress con-

1. 29 U.S.C. §§ 621-634 (1976).

2. See Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 218 (codified at 42 U.S.C. §§ 3001-3056f (1976)); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified at 42 U.S.C. §§ 2701-2996l (1976)); Manpower Development & Training Act of 1962, Pub. L. No. 87-415, 76 Stat. 23 (codified at 42 U.S.C. §§ 2571-2628 (1976)).

3. Exec. Order No. 11,141, 3 C.F.R. 179 (1964-1965 Compilation), reprinted in 5 U.S.C. § 3301 app., at 379 (1976).

sidered including age as a prohibited basis for discrimination in the Civil Rights Act of 1964⁴ but decided to wait until the Secretary of Labor could investigate and propose recommendations for specific age discrimination legislation.⁵ The Secretary's subsequent report led to the passage of the ADEA in 1967.⁶

The ADEA's express purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁷ The Act originally prohibited private employers with more than twenty-five employees from discriminating on the basis of age against prospective or current employees between forty and sixty-five years of age. In 1974 the Act was extended to encompass the federal civil service, state and local governments, and private employers with more than twenty employees.⁸ The trend toward greater protection of the elderly continued when Congress enacted the Older Americans Amendments of 1975⁹ to prohibit unreasonable discrimination on the basis of age in programs or activities receiving federal financial assistance.

B. Court Enforcement

Paradoxically, Congress' deliberate movement toward greater protection of the elderly against employment discrimination has met noticeable opposition from segments of the federal judiciary, including the Supreme Court. The Court to date has decided two mandatory government retirement cases outside ADEA coverage,¹⁰ has ruled on four ADEA cases,¹¹ and has denied certiorari in at least seven other ADEA actions.¹² Of these

4. 42 U.S.C. §§ 2000e to 2000e-15 (1976).

5. Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1328 (1974) [hereinafter cited as *Age Discrimination*].

6. *Id.*

7. 29 U.S.C. § 621(b) (1976).

8. *Id.* §§ 630(b), 633a.

9. Pub. L. No. 94-135, 89 Stat. 713 (amending the Older Americans Act of 1965, 42 U.S.C. §§ 3001-3056f (1976)).

10. *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

11. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979); *Lorillard v. Pons*, 434 U.S. 575 (1978); *United Air Lines v. McMann*, 434 U.S. 192 (1977); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977), *aff'g*, 539 F.2d 1256 (10th Cir. 1976).

12. *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006

thirteen cases, two decisions do not lend themselves to being labeled either pro- or anti-elderly,¹³ one granted relief to the plaintiff employee in a four-to-four decision without opinion,¹⁴ one protected the plaintiff employee,¹⁵ and the other nine cases furthered the interests of the defendant employers.¹⁶ The conclusion arguably to be derived from the holdings in these cases is that the Court has construed the ADEA and its amendments so narrowly that the broad age discrimination protection Congress intended for the elderly has not been fully realized.

The divergent views taken by Congress and the Supreme Court have understandably provoked confusion and dissension

(1978); *Dean v. American Security Ins. Co.*, 559 F.2d 1036 (5th Cir.), *cert. denied*, 434 U.S. 1066 (1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Rogers v. Exxon Research & Eng'r Co.*, 550 F.2d 834 (3d Cir.), *cert. denied*, 434 U.S. 1022 (1977); *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir.), *cert. denied*, 434 U.S. 1008 (1977); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir.), *cert. denied*, 419 U.S. 1122 (1974); *De Loraine v. MEBA Pension Trust*, 355 F. Supp. 89 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

13. *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Lorillard v. Pons*, 434 U.S. 575 (1978) (discussed in text accompanying notes 102-04 *infra*).

14. *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977), *aff'g* 539 F.2d 1256 (10th Cir. 1976) (discussed in text accompanying notes 136-37 *infra*).

15. *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977). See note 96 *infra*.

16. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) (resort to state remedies is mandatory); *Vance v. Bradley*, 440 U.S. 93 (1979) (provision of Foreign Service Act of 1946 requiring persons covered by Foreign Service retirement system to retire at age 60 is not violative of equal protection concerns of due process clause of fifth amendment); *United Air Lines v. McMann*, 434 U.S. 192 (1977) (mandatory retirement of pre-age 65 workers pursuant to terms of bona fide retirement plan came within exception to ADEA and was thus not a "subterfuge"); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (state statute mandating retirement of uniformed state police officers at age 50 does not violate equal protection clause of fourteenth amendment); *Dean v. American Security Ins. Co.*, 559 F.2d 1036 (5th Cir.), *cert. denied*, 434 U.S. 1066 (1977) (punitive damages and general damages for pain and suffering not allowed in private ADEA actions); *Rogers v. Exxon Research & Eng'r Co.*, 550 F.2d 834 (3d Cir.), *cert. denied*, 434 U.S. 1022 (1977) (damages for pain and suffering or emotional or psychic distress not allowed in ADEA suits); *Zinger v. Blanchette*, 549 F.2d 903 (3d Cir.), *cert. denied*, 434 U.S. 1008 (1977) (forced early retirement pursuant to bona fide pension plan not violative of ADEA); *Hodgson v. Greyhound Lines, Inc.*, 449 F.2d 859 (7th Cir.), *cert. denied*, 419 U.S. 1122 (1974) (defendant employer which raised bona fide occupational qualification defense successfully carried its burden in showing that it had a rational basis in fact to believe that elimination of its maximum hiring-age policy would increase the likelihood of risk of harm to passengers); *De Loraine v. MEBA Pension Trust*, 355 F. Supp. 89 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974) (even if pension trust in question was covered under ADEA, the pension trust's conduct with respect to plaintiff was within the exemption to Act that permits labor organizations to observe terms of a bona fide employee benefit plan).

among the lower federal courts. In over one hundred ADEA cases brought in the lower federal courts, splits among the circuits have developed—and in some cases continue to exist—on almost every major issue.¹⁷ The splits among the circuits have not arisen solely because of Congress' and the Supreme Court's conflicting views; rather, the confusion also stems from the fact that the ADEA is a hybrid of the Civil Rights Act, the Fair Labor Standards Act, and, to a lesser extent, the National Labor

17.

Table I. Congress and the Courts

ISSUES	CONGRESS	SUPREME COURT	CIR- CUITS
1. Mandatory Government Retirement	NO: with some exceptions: 1974 Amendment, 1978 Amendment	YES: if rational basis: 1976 <i>Murgia</i> , 1979 <i>Bradley</i>	YES: 0 NO: 2
2. Pension Plan Forced Retirement	NO: 1978 Amendment	YES: 1977 <i>McMann</i>	YES: 7 NO: 1
3. Lenient BFOQ Standard	YES: 1978 Comment	YES: 1974 <i>cert. denied in Hodgson</i> , <i>cert. denied in Houghton</i>	YES: 2 NO: 1
4. Jury Trial Available	YES: 1978 Amendment	YES: 1978 <i>Lorillard</i>	YES: 4 NO: 3
5. Punitive Damages Available	NO: 1978 Comment	NO: 1978 <i>cert. denied in Dean</i>	YES: 0 NO: 6
6. Damages for Pain and Suffering		NO: 1978 <i>cert. denied in Dean</i> , 1977 <i>cert. denied in Rogers</i>	YES: 0 NO: 8
7. 180 Days Jurisdictional	NO: 1978 Comment	NO: 1977 <i>Dartt</i>	YES: 3 NO: 4
8. Federal Conciliation Jurisdictional	NO: 1978 Comment		YES: 4 NO: 2
9. State Remedy Exhaustion Jurisdictional	NO: 1978 Comment	YES: 1979 <i>Evans</i>	YES: 1 NO: 6

Relations Act.¹⁸ Inconsistent results are inevitable when the varying legal standards of these three acts are grafted into the ADEA setting without the benefit of a principled, uniform approach. Thus, some circuits appear to be more inclined toward Congress' pro-elderly approach, and others appear to subscribe to the Supreme Court's less accommodating view toward the elderly.¹⁹ However, the correlation is far from perfect and the relative mix of causal factors may be difficult to pinpoint.

C. *The Age Discrimination in Employment Act Amendments of 1978*

The adoption of the Age Discrimination in Employment Act Amendments of 1978 (1978 Amendments)²⁰ can be traced to at least two driving forces. First, numerous hearings conducted by the House Select Committee on Aging revealed mounting public opposition to mandatory retirement based solely on age.²¹ Sec-

18. *Lorillard v. Pons*, 434 U.S. 575, 578 (1978) (discussing roots and hybrid nature of ADEA—including reference to National Labor Relations Act). The prohibitions in § 4(a)(1)-(2) of the ADEA are taken "in haec verba" from § 703(a)(1)-(2) of title VII of the Civil Rights Act of 1964, *Lorillard v. Pons*, 434 U.S. at 584; compare 29 U.S.C. § 623(a)(1)-(2) (1976) with 42 U.S.C. § 2000e-2(a) (1976), but § 7(b) of the ADEA expressly provides that the Act is to be enforced in accordance with the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 626(b) (1976) (incorporating 29 U.S.C. §§ 211(b), 216(b)-(d), 217 (1976)). In addition to legal relief analogous to the FLSA, see *Rogers v. Exxon Research & Eng'r Co.*, 550 F.2d 834, 840 n.10 (3d Cir.), cert. denied, 434 U.S. 1022 (1977), § 7(b) of the ADEA provides for equitable relief with language similar to § 706(g) of title VII. Compare 29 U.S.C. § 626(b) (1976) with 42 U.S.C. § 2000e-5(g) (1976).

Judges have not been able to agree on the appropriate analogy in many cases. The analogy between § 7(d) of the ADEA and § 706(d) of title VII was the basis of a decision which was affirmed by an evenly divided court. See *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977), aff'g, 539 F.2d 1256 (10th Cir. 1976). Compare 29 U.S.C. § 626(d) (1976) with 42 U.S.C. § 2000e-5(e) (1976). Section 14(b) of the ADEA has been found to be virtually the same as § 706(b) of title VII, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979); compare 29 U.S.C. § 633(b) (1976) with 42 U.S.C. § 2000e-5(c) (1976), yet some judges believe that enforcement proceedings under the FLSA are the more appropriate analogy, *Oscar Mayer & Co. v. Evans*, 441 U.S. at 766 (Blackmun, J., concurring). In another case, the majority opinion stated that § 706(b) of title VII was the basis for § 14(b) of the ADEA, *Goger v. H. K. Porter Co.*, 492 F.2d 13, 15 (3d Cir. 1974); compare 42 U.S.C. § 2000e-5(c) (1976) with 29 U.S.C. § 633(b) (1976), while the concurring opinion stated that § 706(b) of title VII should instead be compared with § 7(b) of the ADEA, 492 F.2d at 17 (Garth, J., concurring); compare 42 U.S.C. § 2000e-5(c) (1976) with 29 U.S.C. § 626(b) (1976)).

19. See note 17 *supra*.

20. Pub. L. No. 95-256, 92 Stat. 189 (amending 29 U.S.C. §§ 623, 624, 626, 631, 633a, 634; 5 U.S.C. §§ 8335, 8339 (1976)).

21. See, e.g., *Avocational and Employment Needs of Retired Persons: Hearings Before the House Select Comm. on Aging*, 95th Cong., 2d Sess. (1978); *Active Americans*

only, Congress seemed displeased with the federal judiciary for several ADEA interpretations that created large loopholes in the protection Congress intended to provide for the elderly.²²

In response to both public sentiment and judicial interpretations, Congress enacted the 1978 Amendments, which raised the protected age limit for private sector employees from sixty-five to seventy years of age as of January 1, 1979.²³ In addition, mandatory retirement for most federal employees was abolished as of September 30, 1978.²⁴

Under the Amendments, colleges and universities retain the right to require the retirement of tenured faculty members at age sixty-five until July 1, 1982.²⁵ Top-level executives or high policy-making employees in the private sector who have served in those positions for two years prior to retirement are exempted from the Act's additional five-year protection, provided they are entitled to an immediate, annual, unforfeitable retirement benefit equivalent to a straight-life annuity of \$27,000.²⁶

The Equal Employment Opportunity Commission (EEOC) was assigned to conduct a study on the effects of the 1978 Amendments on federal employees, and submit its report to the President and Congress no later than January 1, 1980.²⁷ The

Over 65: A Case Against Mandatory Retirement: Hearings Before the House Select Comm. on Aging, 95th Cong., 1st Sess. (1977); Active Americans Over 65 Speak on Retirement Age Policies: Hearings Before the House Select Comm. on Aging, 95th Cong., 1st Sess. (1977); Alternatives to Retirement: Hearings Before the House Select Comm. on Aging, 95th Cong., 1st Sess. (1977); Retirement Age Policies: Hearings Before the House Select Comm. on Aging (pts. I & II), 95th Cong., 1st Sess. (1977) [hereinafter cited as Retirement Age Policies]; Impact of the Age Discrimination in Employment Act of 1967: Hearings Before the House Select Comm. on Aging, 94th Cong., 2d Sess. (1976); Age & Sex Discrimination in Employment & Review of Federal Response to Employment Needs of the Elderly: Hearings Before the House Select Comm. on Aging, 94th Cong., 1st Sess. (1975).

22. See generally STAFF OF HOUSE SELECT COMM. ON AGING, 95TH CONG., 1ST SESS., REPORT ON MANDATORY RETIREMENT: THE SOCIAL AND HUMAN COST OF ENFORCED IDLENESS (Comm. Print 1977) [hereinafter cited as MANDATORY RETIREMENT].

23. 29 U.S.C. § 631(a) (Supp. III 1979).

24. *Id.* § 633a(a).

25. *Id.* § 631(d).

26. *Id.* § 631(c).

27. *Id.* § 633a(g). The responsibility of undertaking a study and submitting a report to the President and Congress was originally assigned to the Civil Service Commission. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 5(g), 92 Stat. 192. This responsibility was later assigned to the Equal Employment Opportunity Commission pursuant to Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978 Compilation), reprinted in 5 U.S.C. app., at 354 (Supp. III 1979) and in 92 Stat. 3781 (1979), effective Jan. 1, 1979, as provided by Exec. Order No. 12,106, 3 C.F.R. 263 (1978 Compilation).

Secretary of Labor was directed to conduct a similar study focusing on the feasibility of raising the age protection above seventy years of age for private sector employees. Special attention was to be directed to the bona fide executive and tenured faculty exemptions. An interim report from the Secretary of Labor was due January 1, 1981, and the final report is to be submitted to the President and Congress by January 1, 1982.²⁸

The amended ADEA prohibits pension plans or seniority systems from requiring the mandatory retirement of employees protected under the Act. However, the effective date of the prohibition was delayed with respect to employee benefit plans or seniority systems included in collective bargaining agreements. The effective date in such cases was January 1, 1980, or the expiration of the contract, whichever occurred first.²⁹

The 1978 Amendments dealt with certain procedural issues as well. Age discrimination claimants were given a right to a jury trial on any issue of fact in actions seeking recovery of back pay, liquidated damages, or other amounts owing as a result of a violation of the ADEA.³⁰

The 1978 Amendments replaced the earlier "notice of intent to sue" with a "charge" requirement. The charge is to be filed with the EEOC and sets forth the identity of the potential defendant as well as describes the alleged discriminatory action. However, the charge requirement is not a jurisdictional prerequisite for bringing an action under the ADEA.³¹

The statute of limitations may be tolled for one year during conciliation conducted by the EEOC. The conciliation requirement is not a jurisdictional prerequisite for bringing a cause of action under ADEA, but the courts may stay pending lawsuits in order to permit conciliation to be completed.³²

II. MANDATORY RETIREMENT

A. *Public Opinion*

According to testimony presented in congressional hearings,

28. 29 U.S.C. § 624.

29. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189.

30. 29 U.S.C. § 626(c) (Supp. III 1979).

31. *Id.* § 626(d).

32. *Id.* § 626(e).

the vast majority of Americans oppose mandatory retirement.³³ A 1974 Harris Poll asked people over eighteen years of age whether they agreed with the statement: "Nobody should be forced to retire because of age if he wants to continue working and is still able to do a good job." The results were overwhelming—eighty-six percent agreed, including seventy-nine percent of those age eighteen to sixty-four who are responsible for hiring and firing.³⁴

This strong public sentiment against mandatory retirement appears quite justified in view of several commentators' conclusions that the traditional bases for mandatory retirement are proving to be myths.³⁵ One in-depth study analyzed "the nine most frequently cited reasons justifying mandatory retirement" and concluded that the traditional justifications must be dismissed for a lack of substantiation.³⁶ Five of the cited reasons are disability related and allege that the elderly: (1) work less efficiently—and therefore are unable to maintain production standards; (2) experience an intellectual decline in old age; (3) show a decrease in stamina and strength which causes an inability to comply with employer safety requirements; (4) cannot adjust to new work situations and new company policies and practices due to inflexibility; and, (5) contract frequent illnesses resulting in absences from work.³⁷ The remaining four grounds involve administrative difficulties that would supposedly arise if mandatory retirement was banned: (6) increased corporate insurance costs; (7) the difficulty and costliness of administering "a selective retirement system on an individual basis;" (8) discouragement of new blood in the company; and, (9) fear that promotion openings would be diminished without mandatory retirement.³⁸ The grounds enumerated that are capable of quantifiable verification not only lack substantiation but face statisti-

33. H.R. REP. NO. 95-527 (pt. 1), 95th Cong., 1st Sess. 5 (1977).

34. *Id.*

35. See Note, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHL-KENT L. REV. 116, 118-20 (1974) (section entitled "Myths That Support Mandatory Retirement") [hereinafter cited as *Mandatory Retirement Myths*]; *Age Discrimination*, *supra* note 5, at 1315-18 (section entitled "The Infirm Basis of Age Discrimination"); Note, *Mandatory Retirement: The Law, the Courts, and the Broader Social Context*, 11 WILLAMETTE L.J. 398, 401-04 (1975) (section entitled "Mandatory Retirement: Fact and Fiction") [hereinafter cited as *Broader Social Context*].

36. *Mandatory Retirement Myths*, *supra* note 35, at 118-20.

37. *Id.* at 118.

38. *Id.*

cal evidence to the contrary.³⁹ The more subjective grounds are considered by some to barely support a rational basis for mandatory retirement;⁴⁰ others think them to be unfounded.⁴¹

B. Government Employees

Although not arising under the ADEA, the leading case dealing with mandatory retirement of government employees is *Massachusetts Board of Retirement v. Murgia*.⁴² In *Murgia* the Supreme Court rejected an equal protection attack against a state law requiring uniformed police officers to retire at age fifty.⁴³ The Court applied a rational basis rather than a strict scrutiny standard since it determined that neither is government employment a fundamental right nor is age a suspect classification.⁴⁴ The Court again applied the rationality standard in the non-ADEA case of *Vance v. Bradley*⁴⁵ to defeat an equal protection challenge to the federal law requiring Foreign Service personnel to retire at age sixty.⁴⁶

39. MANDATORY RETIREMENT, *supra* note 22, at 34-37, see generally sources cited note 35 *supra*.

40. *Id.*

41. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (Marshall, J., dissenting); *Bradley v. Vance*, 436 F. Supp. 134 (D.D.C. 1977), *rev'd*, 440 U.S. 93 (1979); Eglit, *Another Name for Discrimination*, CIV. LIB. REV., Fall 1974, at 87; Note, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748 (1975); Note, *Mandatory Retirement*, 23 S.D. L. REV. 358 (1978).

42. 427 U.S. 307 (1976).

43. *Id.* at 312.

44. *Id.* at 312-13. In applying the rational basis standard, the Court cited *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973), for precedent that strict scrutiny of a legislative classification is necessary only "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 312 (footnotes omitted). Accordingly, the Court concluded that government employment is not *per se* a fundamental right and that the class of uniformed officers over 50 years of age does not constitute a suspect class.

The relative ease with which the Court reached its conclusion is surprising in light of some of the Court's earlier equal protection decisions in which irrebuttable presumptions were struck down in favor of individualized treatment under the rationality standard. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973).

45. 440 U.S. 93, 96-97 (1979).

46. In an eight-to-one decision, the Court upheld the constitutionality of § 632 of the Foreign Service Act of 1946, 60 Stat. 1015 (current version at 22 U.S.C. § 1002 (1976)), which requires that individuals covered by the Foreign Service retirement system retire at age 60.

As in *Murgia*, the Court in *Bradley* reversed the decision of a three-judge district court. However, in a significant expansion of the deference shown the legislature by the

The Supreme Court's reluctance to provide greater age protection for federal employees as evidenced by *Murgia* and *Bradley* is at cross purposes with Congress' efforts to achieve greater protection for elderly federal employees. Congress, for example, in the 1974 amendments to the ADEA extended the Act's coverage to most government employees and raised the age protection limit to seventy for federal civil service employees,⁴⁷ five years higher than for private sector employees.⁴⁸ The 1978 Amendments went further, eliminating the seventy-year age limit and prohibiting the mandatory retirement of those federal employees covered by the ADEA.⁴⁹ The 1978 Amendments also provided protection for state and local government employees between the ages of sixty-five and seventy,⁵⁰ but did not affect the established exceptions to ADEA coverage for hazardous federal jobs⁵¹ and for certain foreign service personnel.⁵²

C. Private Sector Employees

Protection for private sector employees under the original ADEA terminated when the employees reached age sixty-five.⁵³ Legislative reports reveal that the age sixty-five ceiling was chosen for the ADEA because social security benefits generally begin at that age.⁵⁴ In turn, the Social Security Act of 1935 borrowed age sixty-five from "the Old Age and Survivors Pension Act which Otto von Bismarck pushed through as the first chancellor of the German Empire in 1889."⁵⁵ During the debate preceding the passage of the ADEA, some legislators attacked the

Court in *Murgia*, the majority in *Bradley* placed a substantial burden upon plaintiffs who challenge the factual bases for legislative classifications. The plaintiff's burden in an equal protection case of this type is to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." 440 U.S. at 111 (citations omitted).

47. 29 U.S.C. §§ 630(b), 633a (1976).

48. It is estimated that the 1974 amendments brought 95% of the federal civilian work force under the ADEA. CCH, NEW 1978 MANDATORY RETIREMENT AND AGE DISCRIMINATION RULES 14 (1978) [hereinafter cited as AGE DISCRIMINATION RULES (CCH)].

49. 29 U.S.C. § 633a(a) (Supp. III 1979).

50. *Id.*

51. 123 CONG. REC. 29,002 (1977) (*e.g.*, federal firefighters, law enforcement officials, and air traffic controllers).

52. AGE DISCRIMINATION RULES (CCH), *supra* note 48, at 14.

53. 29 U.S.C. § 631 (1976) (amended 1978).

54. S. REP. NO. 95-493, 95th Cong., 1st Sess. 31 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 525.

55. MANDATORY RETIREMENT, *supra* note 22, at 1.

setting of age sixty-five or any other age limit as arbitrary and unfounded since the life expectancy in Bismarck's time was half what it is today and advancements in medical science preserve the fitness and working capacity of many people beyond sixty-five years of age.⁵⁶

Opponents of the "arbitrary" age sixty-five protection limit claimed partial victory with the 1978 Amendments when ADEA protection was expanded to include most private sector employees from ages forty to seventy.⁵⁷ Congress settled on the increase to age seventy as "a compromise between some who favor removing the age limit entirely, and others who are uncertain of the consequences of changing the present age sixty-five limit."⁵⁸ Age seventy proved to be a popular compromise figure since data was available from states such as New York showing that the work of employees ages sixty-five to seventy "was 'about equal to and sometimes noticeably better than younger workers.'"⁵⁹

D. Studies and Reports Required

The 1978 Amendments foreshadow a possible removal of the age limit altogether for ADEA protection in the private sector within the next few years. The elimination of the seventy-year age limit for federal government employees is some evidence of congressional movement in that direction. An even more significant indication is the 1978 amendment requiring the Secretary of Labor to determine "the feasibility of raising such limitation above 70 years of age" and "the feasibility of eliminating such limitation."⁶⁰

In 1977 there were an estimated twenty-two million Americans over age sixty-five—about the same number as there were

56. 113 CONG. REC. 31,256 (1967).

57. 29 U.S.C. § 631(a) (Supp. III 1979). The very limited exceptions to the extended coverage are discussed in text accompanying notes 79 to 98 *infra*.

58. H.R. REP. NO. 95-527 (pt. 1), 95th Cong., 1st Sess. 7 (1977).

59. S. REP. NO. 95-493, 95th Cong., 1st Sess. 3 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 506. See also *id.* 4-5, 7; *Public Policy and the Future of Work and Retirement: Hearings Before the House Select Comm. on Aging*, 95th Cong., 2d Sess. 131-34 (1978) (section entitled "The Potential Labor Market Impact of Prohibiting Mandatory Retirement Before Age 70") [hereinafter cited as *Public Policy and the Future of Work and Retirement*].

60. 29 U.S.C. § 624 (Supp. III 1979) (interim report due Jan. 1, 1981; final report due Jan. 1, 1982).

blacks.⁶¹ The percentage of persons aged sixty-five and over in the U.S. has increased from 9.9% in 1970 to approximately 11.2% in 1980 and is expected to increase to some 15.9% in 2020 and 19.0% in 2030.⁶² Life expectancy has already increased from 61.7 years in 1935, when the Social Security Act was passed, to 72.5 years in 1976.⁶³ It has been estimated that thirty-four percent of workers who reach retirement age "have both the ability and the desire to continue working."⁶⁴ Other surveys reveal that "over half of those employees who are forcibly retired are bitter about it."⁶⁵

In making his report, the Secretary of Labor should consider the impact of mandatory retirement on the individual. For instance, mandatory retirement has been shown to cause mortality rates to jump as much as thirty percent.⁶⁶ Also, the American Medical Association has confirmed that "[t]he sudden cessation of productive work and earning power of an individual, caused by compulsory retirement, often leads to physical and emotional illness and premature death."⁶⁷ Mandatory retirement can have a significant psychological impact,⁶⁸ which in turn contributes to "such disorders as hypochondria, chronic fatigue states, neurotic depression and, primarily among business executives, alcoholism. The unmistakable signs of stress and anxiety are also reflected by higher rates of suicide and functional mental illness in the over-65 population."⁶⁹

While "[p]eople in lower socio-economic groups have been found to have only slightly poorer adjustment to retirement,"⁷⁰ mandatory retirement does create greater difficulties for the elderly poor. Persons age sixty-five and older comprise a disproport-

61. 123 CONG. REC. 29,005 (1977).

62. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979 at 29 (100th ed. 1979). *Public Policy and the Future of Work and Retirement*, *supra* note 59, at 116-17.

63. 123 CONG. REC. 34,320 (1977).

64. *Mandatory Retirement Myths*, *supra* note 35, at 117-18.

65. *Retirement Age Policies* (pt. I), *supra* note 21, at 40. The significance of this figure is reduced by the concomitant finding that 39% of retirements are based on ability, not age. *Id.*

66. H.R. REP. NO. 95-527 (pt. 1), 95th Cong., 1st Sess. 2 (1977).

67. S. REP. NO. 95-493, 95th Cong., 1st Sess. 4 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 507.

68. *See Note, Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150, 155-58 (1971) (section entitled "Psychological Aspects of Retirement").

69. *Age Discrimination*, *supra* note 5, at 1323 (footnotes omitted).

70. *Id.* at 1320.

tionately large share of Americans whose annual incomes are below the poverty level. The elderly poor are naturally more opposed to mandatory retirement than other older citizens. "In other words, those who want to work beyond 65 are most often those who need to work in order to maintain a minimal standard of living."⁷¹ Some legislators also feel that mandatory retirement is bankrupting the social security system and must be eliminated to save the system for the elderly who really need it.⁷²

From an employer's perspective the Secretary of Labor should also investigate the validity of arguments contending that abolishing mandatory retirement would impose administrative and financial hardships on business.⁷³ While some experts have predicted that abolishing mandatory retirement would boost the GNP and benefit business generally,⁷⁴ the documented trend toward voluntary early retirement suggests that the impact on individual employers of abolishing mandatory retirement may be only slight.⁷⁵ "A recent Roper poll found that nearly two-thirds of Americans would like to retire before age 62, and over one-third prefer to retire before reaching 60."⁷⁶ Furthermore, the great majority of those desiring to work beyond age sixty-five would prefer a part-time job.⁷⁷ Congress is also willing to allow downward adjustments in pension plan benefits for workers who work beyond the "normal retirement" age.⁷⁸ In short, in order to comply with the 1978 Amendments' mandate to determine the feasibility of abolishing mandatory retirement in the private sector, the Secretary of Labor's report must weigh the impact of

71. S. REP. No. 95-493, 95th Cong., 1st Sess. 3-4 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 506, 507. See also, *Retirement Age Policies* (pt. 1), *supra* note 21, at 12.

72. MANDATORY RETIREMENT, *supra* note 22, at 47. See also, 123 CONG. REC. 29,007, 30,555 (1977).

73. See notes 35-39 and accompanying text *supra* (discussion of myths about the administrative convenience of mandatory retirement).

74. S. REP. No. 95-493, 95th Cong., 1st Sess. 4 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 507; H.R. REP. No. 95-527 (pt. 1), 95th Cong., 1st Sess. 2 (1977).

75. See H.R. REP. No. 95-527 (pt. 1), 95th Cong., 1st Sess. 3, 29 (1977).

76. S. REP. No. 95-493, 95th Cong., 1st Sess. 32 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 526.

77. *Public Policy and the Future of Work and Retirement*, *supra* note 59, at 96. A survey showed: prefer not to work = 28%; prefer to work part-time = 48.4%; prefer to work full-time = 5.4%; not sure = 18.2%. *Id.*

78. See 124 CONG. REC. S4,450 (daily ed. Mar. 23, 1978); S. REP. No. 95-493, 95th Cong., 1st Sess. 14-16 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 517-19. Regulations setting forth the guidelines for such adjustments are found at 29 C.F.R. § 860.120 (1980).

mandatory retirement on employees' physical, psychological, and economic welfare against employers' possible administrative and financial hardships.

III. PENSION PLAN FORCED RETIREMENT

A. *Congress and Supreme Court Disagree*

Congress' movement away from mandatory retirement was substantially hindered by judicial interpretations of the exception to ADEA coverage carved out for retirement and pension plans.⁷⁹ Section 4(f) of the ADEA as originally enacted provided:

It shall not be unlawful for an employer . . . to observe the terms of a . . . bona fide benefit employee plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this [Act].⁸⁰

Because the language of this provision is susceptible to more than one interpretation, a split emerged in the circuits concerning whether a retirement or pension plan that imposed mandatory retirement based solely on age was a subterfuge to evade the purposes of the ADEA. On the one side, the Fourth Circuit⁸¹ relied upon the Act's legislative history to find that the exception was intended to allow age discrimination only with respect to the benefits paid under certain plans. Presumably Congress felt that this narrow exception would overcome employers' hesitancy to hire older workers who might demand full pension benefits even though they may work only a few years.⁸² The Secretary of Labor's interpretation of the statute supported the Fourth Circuit's position. On the other side, the Second, Third, and Fifth Circuits, along with district courts in the Seventh, Eighth, Ninth, and District of Columbia Circuits, construed the exception more broadly to permit the involuntary retirement of older employees before age sixty-five pursuant to the terms of a pension or retirement plan.⁸³

79. See H.R. REP. No. 95-527 (pt. 1), 95th Cong., 1st Sess. 8 (1977).

80. 29 U.S.C. 623(f) (1976). The section also affords exceptions for discharges for cause or discrimination based on a bona fide occupational qualification.

81. *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977).

82. 113 CONG. REC. 31,255 (1967); H.R. REP. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2217.

83. See *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir.), *cert. denied*, 434 U.S. 1008 (1977); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974); *McKinley v. Bendix Corp.*, 420 F. Supp. 1001 (W.D. Mo. 1976); *Bradley v. Kissinger*, 418 F. Supp. 64

In *United Air Lines v. McMann*,⁸⁴ the Supreme Court rejected the Fourth Circuit's position and instead adopted the broad interpretation of the exception. In doing so, the Supreme Court relied principally upon the ordinary meaning of section 4(f)'s language and only cursorily examined the legislative history.⁸⁵ The Court also held that a bona fide plan established before the passage of the Act in 1967 could not be a subterfuge to evade the Act.⁸⁶ Finally, the Court rejected any "per se rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act."⁸⁷

Justice Marshall, joined by Justice Brennan in dissent, massaged the legislative history more rigorously than the majority did and reached a contrary conclusion. The dissent argued that the majority violated principles of statutory construction⁸⁸ and misconstrued congressional intent⁸⁹ by adopting a broad in-

(D.D.C. 1976); *Dunlop v. Hawaii Telephone Co.*, 415 F. Supp. 330 (D. Hawaii 1976); *De Loraine v. MEBA Pension Trust*, 355 F. Supp. 89 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); *Kincaid v. United Steelworkers of Am.*, 5 Empl. Prac. Dec. 7258 (N.D. Ind. 1972).

84. 434 U.S. 192 (1977).

85. *Id.* at 199-202.

86. *Id.* at 203. The Court did not discuss the exact language of the exception, however, which does not allow a subterfuge to evade the purposes of the Act.

87. *Id.*

88. The majority did examine the ADEA's legislative history, 434 U.S. at 199-202, but clearly felt that the plain language of the statute supported its position. After noting the dissent's heavy reliance upon the legislative history, the Court observed that under traditional canons of interpretation resort to legislative history is "irrelevant" where an unambiguous statute exists. *Id.* at 199.

Justice Marshall, writing for the dissent, disputed the correctness of the majority's plain meaning interpretation. He stated:

The opinion of the Court assumes that this language is clear on its face.

Ante, at 199. I cannot agree with this premise. In my view, the statutory language is susceptible of at least two interpretations, and the only reading consonant with congressional intent would preclude involuntary retirement of employees covered by the Act.

Id. at 209 (Marshall, J., dissenting).

89. Both the majority and the dissent believed that they correctly followed congressional intent in reaching their respective conclusions. Chief Justice Burger, writing for the majority, stated:

Giving meaning to each of these provisions leads inescapably to the conclusion they were intended to permit observance of the mandatory retirement terms of bona fide retirement plans, but that the existence of such plans could not be used as an excuse not to hire any person because of age.

434 U.S. at 201-02.

Justice Marshall wrote in defense of the dissent's interpretation:

To construe the § 4(f)(2) exemption broadly to authorize involuntary retirement when no statement in the Committee Reports or by the Act's floor managers or sponsors in the debates supports that interpretation flouts this funda-

interpretation of the exception. While *McMann* was under consideration by the Court, the amendment machinery was already operating to clarify the statute's legislative intent by adopting the interpretation the dissent followed. Indeed, "[t]he mischief the Court fashions today may be short-lived."⁹⁰

The 1978 Amendments to the ADEA added the following clarification to section 4(f)(2): "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual."⁹¹ The Conference Report accompanying the 1978 Amendments emphasizes that the Supreme Court had misconstrued the exception in *McMann*:

The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.

In *McMann* . . . , the Supreme Court held to the contrary. . . . The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.⁹²

Congress was compelled to make this clarification and reverse the effect of *McMann* for the increased age limit to seventy years to have any real meaning⁹³ since over ninety percent of the pension plans in the private sector designate sixty-five as the age for retirement.⁹⁴

mental principle of construction [remedial statutes should be liberally interpreted].

. . . But the Committee Reports of both Houses make plain that, properly understood, the existing Act already prohibits involuntary retirement, and that the amendment [one of the 1978 Amendments] is only a clarification necessitated by court decisions misconstruing congressional intent [citations omitted].

434 U.S. at 218 (Marshall, J., dissenting).

90. 434 U.S. at 218 (Marshall, J., dissenting).

91. 29 U.S.C. § 623(f)(2) (Supp. III 1979).

92. H.R. REP. NO. 95-950, 95th Cong., 2d Sess. 8, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 528, 529.

93. H.R. REP. NO. 95-527 (pt. 1), 95th Cong., 1st Sess. 8 (1977).

94. *Broader Social Context*, supra note 35, at 400. See also H.R. REP. NO. 95-527 (pt. 1), 95th Cong., 1st Sess. 9 (1977); MANDATORY RETIREMENT, supra note 22, at 2.

B. Bona Fide Occupational Qualification Remains Unchanged

Since Congress has plugged the section 4(f)(2) pension plan loophole, employers will likely turn to section 4(f)(1), the bona fide occupational qualification (BFOQ) exception to ADEA protection, which was left untouched by the 1978 Amendments. Early cases involving the BFOQ exception dealt with age discrimination in hiring,⁹⁵ yet more recently such actions have been brought in a termination context.⁹⁶ The three courts of appeals that have considered the application of the BFOQ exception under the ADEA have fashioned two different approaches, yielding different results.⁹⁷ The two approaches that have emerged

95. See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir.), cert. denied, 419 U.S. 1122 (1974); *Aldendifer v. Continental Air Lines*, 19 Fair Empl. Prac. Cas. 1090 (D. Cal. 1978).

96. See, e.g., *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Rodriguez v. Taylor*, 420 F. Supp. 893 (E.D. Pa. 1976), remanded on other grounds, 569 F.2d 1231 (3d Cir.), cert. denied, 435 U.S. 1010 (1978).

97. In *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), the Seventh Circuit upheld the defendant bus company's maximum hiring age of 35 for intercity bus drivers. The court reasoned that when public safety is involved, employers owing a duty of safety to the public have a minimal burden in proving a rational basis for the discriminatory hiring practice.

The Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), also considered an unsuccessful applicant's attack against a maximum hiring age of 40 for intercity bus drivers. In addition to requiring that the employer show that its job qualifications were "reasonably necessary" to achieve public safety—the *Hodgson* standard—the Fifth Circuit further required that the employer show that job applicants over a certain age were incapable of meeting its job qualifications. *Id.* at 235-36. The defendant employer in *Tamiami* prevailed because the court of appeals upheld the district court's finding that no effective and reliable individual testing procedure existed to verify older applicants' compliance with safety standards. *Id.* at 238.

Contrary to the outcome in *Tamiami* and *Hodgson*, the Eighth Circuit in *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 966 (1977), though following the *Tamiami* line of analysis, refused to grant the defendant employer a BFOQ exemption. In *Houghton*, the employee test pilot contested his employer's reduction of its pilot staff on the basis of the age of the pilots. While conceding the absence of a functional individual testing procedure, the court held that the employer had failed to meet its burden of establishing a factual basis showing that all, or substantially all, older pilots were incapable of performing test pilot duties safely. *Id.* at 564. The employer's failure to meet its burden proved determinative in light of the employee's impressive array of evidence to the effect that safety risks attributable to aging among professional pilots are minuscule. *Id.* The result in *Houghton* may also be distinguished from *Hodgson* and *Tamiami* in that it was a termination action while the latter were hiring cases.

Since the Supreme Court denied certiorari in both *Hodgson* and *Houghton*, it is uncertain what standard of review the Supreme Court will eventually apply in BFOQ cases—the less exacting standard of *Hodgson* or the stricter standard of *Tamiami* and *Houghton*.

from these three cases have been criticized,⁹⁸ and this particular conflict among the circuits appears ripe for consideration in the Supreme Court.

IV. JURY TRIAL

A. Congress & Supreme Court Agree

The original ADEA section 7(c) provided that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this [Act]."⁹⁹ Courts split over the question of whether the statute's language guaranteed a right to a jury trial, as in FLSA actions, or denied a jury trial, as in title VII actions. The Third and Fourth Circuits and district courts in the Seventh, Eighth, and Ninth Circuits decided that the parties in an ADEA action are entitled to a jury,¹⁰⁰ while the Sixth Circuit and district courts in the Second and Fifth Circuits held that the right to a jury trial does not exist.¹⁰¹

The question of the right to a jury trial in an ADEA action brought against a private party was finally resolved in *Lorillard v. Pons*.¹⁰² In *Lorillard*, a unanimous Supreme Court held that ADEA's provision assuring "legal or equitable relief" means the right to a jury trial.¹⁰³ The 1978 amendments incorporated the *Lorillard* holding by stating: "[A] person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter"¹⁰⁴ It should also be noted that although it was the employee who requested the jury in *Lorillard*, the decision granting the claimant such a right does not necessarily indicate a pro-

98. Comment, *Age Discrimination in Employment—The Bona Fide Occupational Defense—Balancing the Interest of the Older Worker in Acquiring and Continuing Employment Against the Interest in Public Safety*, 24 WAYNE L. REV. 1339, 1354-61 (1978).

99. 29 U.S.C. § 626(c) (1976).

100. *Rogers v. Exxon Research & Eng'r Co.*, 550 F.2d 834 (3d Cir.), cert. denied, 434 U.S. 1022 (1977); *Pons v. Lorillard*, 549 F.2d 950 (4th Cir. 1977), aff'd, 434 U.S. 575 (1978); *Fellows v. Medford Corp.*, 431 F. Supp. 199 (D. Or. 1977); *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976), aff'd on rehearing, 432 F. Supp. 952 (N.D. Ill. 1977); *Cleverly v. Western Elec. Co.*, 69 F.R.D. 348 (W.D. Mo. 1975).

101. *Morelock v. NCR Corp.*, 546 F.2d 682 (6th Cir. 1976); *Travers v. Corning Glass Works*, 76 F.R.D. 431 (S.D.N.Y. 1977); *Polstorff v. Fletcher*, 430 F. Supp. 592 (N.D. Ala. 1977).

102. 434 U.S. 575 (1978).

103. *Id.* at 584-85. See also *Rogers v. Exxon Research & Eng'r Co.*, 550 F.2d 834 (3d Cir.), cert. denied, 434 U.S. 1022 (1977).

104. 29 U.S.C. § 626(c)(2) (Supp. III 1979).

elderly opinion. In title VII actions, for example, the denial of a jury trial can be considered prodiscriminatee because it prevents an employer from rehearsing before a jury the damaging effects and losses suffered because of a plaintiff's incompetence. Frequently, juries are more sympathetic toward the employer's cause than the plaintiff's plight. Age discrimination claimants may run the same risk.

Although the Supreme Court has not addressed the question of whether claimants bringing age discrimination suits against the federal government are entitled to a jury trial, the United States Court of Appeals for the District of Columbia Circuit has ruled that they do.¹⁰⁵

B. Available Damages Unchanged

Congress bypassed the opportunity in the 1978 amendments to explicitly delineate the types of damages available for ADEA violations. Liquidated damages have been allowed in "cases of willful violations" since the ADEA's inception,¹⁰⁶ but the Act is silent with regard to punitive damages and damages for pain and suffering. The Conference Report accompanying the 1978 amendments does state that punitive damages should not be available.¹⁰⁷ Most courts agree¹⁰⁸ with one exception.¹⁰⁹

105. *Nakshian v. Claytor*, 22 Empl. Prac. Dec. 14,455 (D.C. Cir. 1980). In *Nakshian*, a 62-year-old civilian employee brought an age discrimination suit against the United States Department of the Navy and demanded a jury trial. The Government opposed the jury demand on the ground that because Congress in authorizing ADEA actions did not specifically authorize jury trials, they were barred by the doctrine of sovereign immunity. The District of Columbia Circuit dismissed the sovereign immunity argument by observing that Congress waived the Government's sovereign immunity when it authorized ADEA suits to be brought against the government, even though it did not specify what trial procedure was to be used in such cases. *Id.* at 14,458.

The court of appeals also referred to the district court's opinion where it was noted that the phrase "legal relief," which had been a key point of the Supreme Court's reasoning in *Lorillard*, was also used in ADEA's provision regarding federal employees (29 U.S.C. § 633a(c) (1976)). Moreover, the court of appeals' own review of the statute and its legislative history persuaded it to accept the "inference that Congress intended to provide for jury trials in ADEA actions against the Government." 22 Empl. Prac. Dec. at 14,458.

106. 29 U.S.C. § 626(b) (1976).

107. H.R. REP. No. 95-950, 95th Cong., 2d Sess. 14, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 528, 535.

108. *Murphy v. American Motors Sales Corp.*, 570 F.2d 1226, 1227 (5th Cir. 1978); *Dean v. American Security Ins. Co.*, 559 F.2d 1036, 1038-39, (5th Cir.), cert. denied, 434 U.S. 1066 (1977); *Douglas v. American Cyanamid Co.*, 472 F. Supp. 298, 300-04 (D. Conn. 1979); *Stevenson v. J.C. Penney Co.*, 464 F. Supp. 945, 946-49 (N.D. Ill. 1979); *Riddle v. Getty Refining & Marketing Co.*, 460 F. Supp. 678, 679-80 (N.D. Okla. 1978); *Fellows v.*

The Conference Report made no reference to damages for pain and suffering.¹¹⁰ With no definitive direction from either Congress or the Supreme Court, the current status of the law concerning damages for pain and suffering is unsettled. Most courts that have addressed the question have referred to damages for pain and suffering as compensatory damages. The majority position is represented by the First, Third, Fourth, and Fifth Circuits and district courts in the Second, Sixth, Eighth, and Ninth Circuits, which have held that compensatory damages for pain and suffering are not available.¹¹¹ The opposite position—permitting recovery of damages for pain and suffering—has been initially taken by some district courts, only to be reversed in most instances by the courts of appeals.¹¹² The Seventh¹¹³ and Tenth¹¹⁴ Circuits have district courts holding both

Medford Corp., 431 F. Supp. 199, 202 (D. Or. 1977); *Looney v. Commercial Union Assurance Cos.*, 428 F. Supp. 533, 537 (E.D. Mich. 1977); *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215, 218 (D. Colo. 1977); *Platt v. Burroughs Corp.*, 424 F. Supp. 1329, 1337 (E.D. Pa. 1976).

109. *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008, 1009-11 (D. Colo. 1978). The *Kennedy* holding has been questioned by a sister district court of the same circuit in *Riddle v. Getty Refining & Marketing Co.*, 460 F. Supp. 678, 679-80 (D. Okla. 1978).

Two district courts that originally permitted recovery of punitive damages were subsequently reversed. See *Walker v. Pettit Constr. Co.*, 437 F. Supp. 730, 731 (D.S.C. 1977), *rev'd*, 605 F.2d 128, 129-30 (4th Cir. 1979); *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403, 1405-06 (N.D. Ga. 1976), *aff'd in part, rev'd and remanded in part per curiam*, 570 F.2d 1226, 1227 (5th Cir. 1978).

110. The phrase "damages for pain and suffering" is used here to include closely allied damages such as psychological, psychic, and mental or emotional distress damages. This generic grouping is necessary since some courts do not draw precise distinctions.

111. *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1296 (4th Cir. 1979); *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 112 (1st Cir. 1978); *Dean v. American Security Ins. Co.*, 559 F.2d 1036, 1038-39 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Eng'r Co.*, 550 F.2d 834, 839-42 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Catlett v. Owens-Illinois, Inc.*, 454 F. Supp. 358, 365-67 (W.D. Mo. 1978); *Ellis v. Philippine Airlines*, 443 F. Supp. 251, 252 (N.D. Cal. 1977); *Postemski v. Pratt & Whitney Aircraft Corp.*, 443 F. Supp. 101, 103 (D. Conn. 1977); *Looney v. Commercial Union Assurance Cos.*, 428 F. Supp. 533, 535-37 (E.D. Mich. 1977); *Travers v. Corning Glass Works*, 76 F.R.D. 431, 435-36 (S.D.N.Y. 1977); *Rechsteiner v. Madison Fund, Inc.*, 75 F.R.D. 499, 501 (D. Del. 1977); *Platt v. Burroughs Corp.*, 424 F. Supp. 1329, 1335-38 (E.D. Pa. 1976); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976).

112. *Walker v. Pettit Constr. Co.*, 437 F. Supp. 730, 732 (D.S.C. 1977), *rev'd*, 605 F.2d 128, 129-30 (4th Cir. 1979); *Coates v. National Cash Register Co.*, 433 F. Supp. 655, 663-64 (W.D. Va. 1977); *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403, 1404-06 (N.D. Ga. 1976), *aff'd in part, rev'd and remanded in part per curiam*, 570 F.2d 1226, 1227 (5th Cir. 1978).

113. *Compare Morton v. Sheboygan Memorial Hosp.*, 458 F. Supp. 804, 807 (E.D. Wis. 1978); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 713-14 (E.D. Wis. 1978), and

ways. The Supreme Court has denied certiorari in two cases disallowing damages for pain and suffering.¹¹⁵ Moreover, some authorities infer from the 1978 amendments' Conference Report that congressional intent agrees with the majority of courts that damages for pain and suffering in ADEA actions should be denied.¹¹⁶

V. "JURISDICTIONAL" REQUIREMENTS

A. *Exhaustion of State Remedies*

The ADEA provides that "no suit may be brought" under the Act until sixty days after state proceedings have been commenced if the alleged age discrimination occurred in a state which prohibits such discrimination and has an enforcement mechanism.¹¹⁷ Forty-one states plus the District of Columbia and Puerto Rico now have laws prohibiting age discrimination in employment.¹¹⁸ Hence, the question whether exhaustion of state

Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123, 1132-33 (N.D. Ill. 1976), *aff'd on rehearing*, 432 F. Supp. 952 (N.D. Ill. 1977) (these three cases allowed recovery of compensatory damages), with Jaeger v. American Cyanamid Co., 442 F. Supp. 1270, 1272-73 (E.D. Wis. 1978) (disallowing recovery of damages).

114. Compare Kennedy v. Mountain States Tel. & Tel. Co., 449 F. Supp. 1008, 1009-11 (D. Colo. 1978), and Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976) (these two cases allowed recovery of compensatory damages), with Riddle v. Getty Ref. & Marketing Co., 460 F. Supp. 678 (N.D. Okla. 1978) (disallowing recovery of damages).

115. Dean v. American Security Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 839-42 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

116. See, e.g., Riddle v. Getty Ref. & Marketing Co., 460 F. Supp. 678, 679-80 (N.D. Okla. 1978); 29 S.C.L. REV. 705, 715 (1978).

But see Note, Damage Remedies Under the Age Discrimination in Employment Act, 43 BROOKLYN L. REV. 47, 51-68 (1976) (pre-Conference Report arguments that compensatory damages for pain and suffering should be allowed).

117. 29 U.S.C. § 633(b) (1976). Expressly, the ADEA does not preempt state regulation, *id.* § 633(a), and state acts can properly provide broader protection than the minimum standards of the ADEA, Simpson v. Alaska State Comm. for Human Rights, 423 F. Supp. 552 (D. Alaska 1976). See generally Comment, *The 1967 Age Discrimination in Employment Act and Preemption: A Case for Broader State Laws*, 12 U.S.F. L. REV. 283 (1978).

118. AGE DISCRIMINATION RULES (CCH), *supra* note 48, at 33-42. Nine states have no law against age discrimination in employment (Alabama, Arkansas, Kansas, Mississippi, Missouri, Tennessee, Vermont, Virginia, and Wyoming); four states protect only very limited groups of employees (Arizona, Oklahoma, South Carolina, and South Dakota); fifteen states and the District of Columbia protect the elderly to a specified age but have a *McMann*-type exception (Delaware, Georgia, Idaho, Indiana, Kentucky, Louisiana, Nebraska, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and Wisconsin); six states and Puerto Rico protect the elderly to a specified age

remedies is a jurisdictional prerequisite to an ADEA action was one of general concern. Because of the considerable controversy among the circuits, the Supreme Court recently resolved the question in *Oscar Mayer & Co. v. Evans*.¹¹⁹ In *Evans* a terminated employee had filed a notice of intent to sue with the Department of Labor, which in turn erroneously advised the plaintiff that he need not file a state complaint. By failing to do so, plaintiff violated section 14(b) of the ADEA.¹²⁰ Concluding that section 14(b) was patterned after section 706(b) of title VII,¹²¹ which requires initial resort to state proceedings, a unanimous Court held that resort to state remedies in ADEA actions is also mandatory before federal relief is sought.¹²² Concerning the second aspect of the Court's holding, a divided Court ruled that the plaintiff's cause of action was not defeated for failure to comply with the state's statute of limitations.¹²³

(Colorado, Massachusetts, New Hampshire, Ohio, Texas, and West Virginia); nine states have no age limit on age discrimination protection but have a *McMann*-type exception (Connecticut, Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Nevada, and New Mexico); and seven states simply prohibit any age discrimination in employment (Alaska, California, Michigan, Minnesota, Montana, New Jersey, and North Carolina).

119. 441 U.S. 750 (1979).

120. *Id.* at 754.

121. Civil Rights Act of 1964, § 706(b), 42 U.S.C. § 2000e-5(c) (1976). The pertinent language of § 706(b) states:

In the case of an alleged unlawful employment practice occurring in a State, . . . which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . , no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated.

Id.

122. It may be argued that the Court's decision to compel initial resort to state remedies was in part motivated by a desire to reduce the federal caseload. See sources cited note 147 *infra*.

123. In a five-to-four decision on this point, the majority interpreted the language of § 14(b) to only preclude the filing of a federal action until 60 days after state proceedings have been commenced. 441 U.S. at 759. The majority justified its construction of the statute on two grounds: (1) it aids laymen, who, unassisted by counsel, initiate the filing process, and (2) it fulfills the statute's purpose of granting "state agencies a limited opportunity to settle grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief." *Id.* at 761.

Justice Stevens on the other hand, writing for the four member dissent, criticized the majority for "volunteer[ing] some detailed legal advice about the effect of a suggested course of conduct that respondent may now pursue and then order[ing] that his suit be held in abeyance while he follows that advice." *Id.* at 767 (Stevens, J., dissenting). The question of whether the respondent would be entitled to relief in federal court if his complaint were found to be time-barred by state law, reasoned Justice Stevens,

The Court's decision in *Evans* was in marked contrast to the Senate Report regarding the 1978 Amendments, which states "that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual."¹²⁴ In other words, the sixty days restriction was not intended to be jurisdictional, rather it was intended to "give the State the prescribed minimum period in which to take remedial action" if a person elected to apply first to a state agency for relief.¹²⁵ However, since the 1978 Amendments did not reenact the section in question, the lower federal courts in addition to the Supreme Court have felt free to disregard the congressional comments.¹²⁶

B. 180-Day Charge

Section 8(d) of the original ADEA provided that no civil action could be brought under the Act until the Secretary of Labor had received notice of intent to sue within 180 days "after the alleged unlawful practice occurred."¹²⁷ Controversy has arisen regarding when the time period begins to run¹²⁸ and what constitutes adequate notice,¹²⁹ but the most significant issue has been whether the requirement is a jurisdictional prerequisite or whether it is subject to tolling on equitable grounds.¹³⁰ The 1978 Amendments relaxed the standard for what constitutes adequate notice to the Secretary of Labor from "notice of an intent to file such an action" to filing "a charge alleging unlawful discrimina-

would be appropriately raised only after the respondent had pursued his state court remedies. To rule otherwise would be to render an advisory opinion on the merits of his claim. *Id.*

124. S. REP. No. 95-493, 95th Cong., 1st Sess. 7 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 510.

125. *Id.* at 6 (emphasis added).

126. See, e.g., *Hadfield v. Mitre Corp.*, 459 F. Supp. 829, 831-32 (D. Mass. 1978).

127. 29 U.S.C. § 626(d)(1) (1976).

128. Compare *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), and *Marshall v. Kimberly-Clark Corp.*, 14 Empl. Prac. Dec. 5097 (N.D. Ga. 1977), with *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977); *Payne v. Crane Co.*, 560 F.2d 198 (5th Cir. 1977), and *Davis v. RJR Foods, Inc.*, 420 F. Supp. 930 (S.D.N.Y. 1976).

129. Compare *Noto v. JFD Elec. Corp.*, 16 Fair Empl. Prac. Cas. 1044 (E.D.N.C. 1978); *Sutherland v. SKF Indus., Inc.*, 419 F. Supp. 610 (E.D. Pa. 1976), and *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973), with *Enos v. Kaiser Indus. Corp.*, 443 F. Supp. 798 (D.D.C. 1978); *Berry v. Crocker Nat'l Bank*, 13 Fair Empl. Prac. Cas. 673 (N.D. Cal. 1976), and *Hughes v. Beaunit Corp.*, 12 Fair Empl. Prac. Cas. 1564 (E.D. Tenn. 1976).

130. See generally Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457, 459-74 (1977).

tion" with the EEOC.¹³¹ On the more controversial issue the 1978 Conference Report stated, "The conferees agree that the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act."¹³²

The circuits are evenly split concerning whether the 180-day charge requirement is jurisdictional. The Third Circuit and district courts in the First and Second Circuits have held that the 180-day charge is not jurisdictional.¹³³ Contrary holdings are found in the Fifth and Sixth Circuits and in district courts in the Fourth and Ninth Circuits.¹³⁴ The Tenth Circuit and district courts in the District of Columbia and Third Circuits have held both ways.¹³⁵ The Supreme Court granted certiorari in *Shell Oil Co. v. Dartt*,¹³⁶ a pre-1978 Amendments case, to resolve the con-

131. 29 U.S.C. § 626(d) (Supp. III 1979). "[T]he conferees intend that the 'charge' requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory." H.R. REP. No. 95-950, 95th Cong., 2d Sess. 12, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 528, 533-34.

Pursuant to Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978 Compilation), reprinted in 5 U.S.C. app., at 354 (Supp. III 1979) and in 92 Stat. 3781 (1979), most of the functions relating to age discrimination administration and enforcement that had originally been vested in the Secretary of Labor and the Civil Service Commission were transferred to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by Exec. Order No. 12,106, 3 C.F.R. 263 (1978 Compilation). Accordingly, the charge requirement is filed with the Equal Employment Opportunity Commission.

132. H.R. REP. No. 95-950, 95th Cong., 2d Sess. 12, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 528, 533-34.

133. *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977); *Jackson v. Alcan Sheet & Plate*, 462 F. Supp. 82 (N.D.N.Y. 1978); *Franci v. Avco Corp.*, 460 F. Supp. 389 (D. Conn. 1978); *Postemski v. Pratt Whitney Aircraft*, 443 F. Supp. 101 (D. Conn. 1977); *Abbott v. Moore Business Forms, Inc.*, 439 F. Supp. 643 (D.N.H. 1977); *Skoglund v. Singer Co.*, 403 F. Supp. 797 (D.N.H. 1975).

134. *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *Hiscott v. G.E. Corp.*, 521 F.2d 632 (6th Cir. 1975); *Woodburn v. LTV Aerospace Corp.*, 531 F.2d 750 (5th Cir. 1976); *Edwards v. Kaiser Alum. & Chem. Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975); *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485, rehearing denied, 498 F.2d 1402 (5th Cir. 1974); *Clark v. Emerson Elec. Mfg. Co.*, 430 F. Supp. 216 (N.D. Miss. 1977); *Rayner v. Greater Atl. & Pac. Tea Co.*, 400 F. Supp. 357 (E.D. Va. 1975); *Oshiro v. Pan Am World Airways, Inc.*, 378 F. Supp. 80 (D. Hawaii 1974).

135. *Compare Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977); *Mazzare v. Burroughs Corp.*, 473 F. Supp. 234 (E.D. Pa. 1979); *Wagner v. Sperry Univac, Div. of Sperry Rand Corp.*, 458 F. Supp. 505 (E.D. Pa. 1978), and *Bishop v. Jelleff Assocs.*, 398 F. Supp. 579 (D.D.C. 1974), with *Law v. United Air Lines, Inc.*, 519 F.2d 170 (10th Cir. 1975); *Bengochea v. Norcross, Inc.*, 464 F. Supp. 709 (E.D. Pa. 1979), and *Gebhard v. G.A.F. Corp.*, 59 F.R.D. 504 (D.D.C. 1973).

136. 434 U.S. 99, rehearing denied, 434 U.S. 1042 (1977), *aff'g* 539 F.2d 1256 (10th

flict but did nothing more than affirm without opinion "by an equally divided Court"¹³⁷ the lower court's conclusion that the 180 days is not jurisdictional. Thus, the Supreme Court is only tentatively aligned with congressional intent expressed in comments to the 1978 Amendments that the 180-day requirement be susceptible to modification on equitable grounds.

C. Conciliation by Federal Agency

The primary reason for the 180-day charge requirement is to afford the EEOC an opportunity to encourage conciliation and settlement of the dispute before it proceeds to trial. Some courts have been willing to stay an ADEA proceeding in order to make conciliation more meaningful.¹³⁸ The 1978 Amendments sought to accomplish the same result by making a one-year tolling of the statute of limitations available "[while] the Commission [EEOC] is attempting to effect voluntary compliance with requirements of [the ADEA] through informal methods of conciliation, conference, and persuasion."¹³⁹

The Conference Report accompanying the 1978 Amendments stated "that conciliation is not a jurisdictional prerequisite to maintaining a cause of action under the act."¹⁴⁰ The Eighth Circuit and a district court in the Fourth Circuit agree with that interpretation,¹⁴¹ but district courts in the Fifth, Sixth, Ninth and Tenth Circuits have held that conciliation by the federal agency is jurisdictional.¹⁴² The issue has never reached the Supreme Court, and the decision in *Dartt*¹⁴³ is too tenuous to

Cir. 1976).

137. *Id.* (Stewart, J. did not participate).

138. *See, e.g.*, *Brennan v. Texas Instruments, Inc.*, 12 Fair Empl. Prac. Cas. 1724 (E.D. Ky. 1976); *Dunlop v. Sandia Corp.*, 13 Fair Empl. Prac. Cas. 128 (D.N.M. 1975). *See also* *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974) (recognizing the court's power to stay ADEA proceedings).

139. 29 U.S.C. § 626(c) (Supp. III 1979).

140. H.R. REP. No. 95-950, 95th Cong., 2d Sess. 13, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 528, 534.

141. *Brennan v. Ace Hardware*, 495 F.2d 368 (8th Cir. 1974); *Marshall v. Newburg R-2 School Dist.*, 469 F. Supp. 1030 (E.D. Mo. 1979); *Marshall v. Baltimore & O.R.R. Co.*, 461 F. Supp. 362 (D. Md. 1978); *Brennan v. Texas Instruments, Inc.*, 12 Fair Empl. Prac. Cas. 1724 (E.D. Ky. 1976) (action stayed); *Dunlop v. Sandia Corp.*, 13 Fair Empl. Prac. Cas. 128 (D.N.M. 1975) (action stayed).

142. *Vasquez v. City of Reno*, 461 F. Supp. 1098 (D. Nev. 1978); *Usery v. Sun Oil Co. (Delaware)*, 423 F. Supp. 125 (N.D. Tex. 1976); *Dunlop v. Resource Sciences Corp.*, 410 F. Supp. 836 (N.D. Okla. 1976); *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich. 1974).

143. 434 U.S. 99 (1977), *aff'g* 539 F.2d 1256 (10th Cir. 1976).

apply by analogy. Perhaps the strongest factor in favor of the nonjurisdictional view of conciliation is that the 1978 Amendments addressed that specific section of the ADEA and congressional comment should, therefore, be persuasive evidence of legislative intent.¹⁴⁴

VI. RESOLVING THE TENSION

The tension between Congress and the courts regarding ADEA issues is not incurable. The concept of protection against age discrimination in employment has been discussed on a national level for nearly twenty years and has been codified for the last fourteen years.¹⁴⁵ During that time research has generated voluminous studies and statistical data which have been compiled and digested to shape current policy. This extended gestation period coupled with the ongoing studies should convince the courts that Congress' persistent movement toward greater protection of the elderly is prudent and sound. For these reasons, the time has arrived for Congress and the courts to pull together.

Both the federal courts and Congress must bear some of the blame for significant differences of opinion that have arisen with respect to many of the major ADEA issues. The federal judiciary's, and most notably the Supreme Court's, lack of deference to the clear movement in Congress to provide greater employment protection for the elderly may involve more than a simple lack of sensitivity to the problem.¹⁴⁶ The narrow interpretations of the ADEA and particularly the establishment of certain "jurisdictional" requirements could be just another manifestation of the federal judiciary's trend to contract jurisdictional boundaries in order to relieve an overloaded federal docket.¹⁴⁷ The judiciary also has cause to complain that Congress should be more

144. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 48.02-.16 (4th ed. 1972).

145. See text accompanying notes 2 to 6 *supra*.

146. In contrast to some members of the federal judiciary, many state judges have been quick to condemn mandatory retirement, especially when the issue has applied to them personally. See Calvert, *Mandatory Retirement of Judges*, 54 JUD. 424 (1971); *Federal Courts Uphold Differing Retirement Rules*, 59 JUD. 304 (1976); *New York Civil Judges Attack Mandatory Retirement*, 58 JUD. 304 (1975); *Mandatory Retirement of Judges Upheld in Massachusetts*, 56 JUD. 260 (1973).

147. See Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977); Yarbrough, *Litigant Access Doctrine and the Burger Court*, 31 VAND. L. REV. 33 (1978).

consistent and explicit in formulating its employment protection policies for the elderly, especially since Congress has enacted a hybrid ADEA composed of bits and pieces of other acts.¹⁴⁸

Since Congress undoubtedly had the constitutional power to incorporate a more comprehensive and exact expression of intent in the ADEA and in the 1978 Amendments, there must be reasons why it did not. First is the political reality of compromise. In order to obtain the necessary votes and satisfy competing interests, the sponsors must frequently substitute diluted language, thereby muddling the clarity of intent. Also, it is not uncommon for Congress to issue its legislative mandates in general terms so as to afford administrative agencies broad discretion in implementing congressional directives.¹⁴⁹ Desirable flexibility and innovative license are lost as congressional specificity increases. Furthermore, it is unrealistic to expect an overloaded Congress to hammer out the minute details of each measure it passes. The adversarial system can sharpen the issues if litigation does result, and permit a case-by-case treatment of delicate problems. This in turn allows courts and the inertia of the status quo to filter out faddish or ill-conceived movements spawned by broad-sweeping concerns so that only reform of sound merit survives. And finally, Congress' method of dealing with employment discrimination against the elderly may be intentionally piecemeal so as to approach, rather than reach beyond, the necessary degree of specific regulation and control.¹⁵⁰

The factors favoring more explicit enactment of legislative intent vary in their degree of importance. Congressional mandates regarding the ADEA issues over which courts have disagreed should reduce litigation costs and conserve scarce judicial resources. Greater specificity by Congress ensures the retention

148. See note 18 and accompanying text *supra*.

149. The ADEA specifically provides in relevant part:

[T]he Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as he may find necessary and proper in the public interest.

29 U.S.C. § 628 (1976). *But see* note 151 *infra*.

150. The current popularity of deregulation acts indicates that Congress is aware of and desires to avoid overregulation. Two recent examples include the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 and the Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221, 94 Stat. 142. See also S. 1400, 96th Cong., 1st Sess. (1979) (proposal to deregulate the trucking industry); *Economic Regulation of the Trucking Industry: Hearings on S. 1400 Before the Senate Comm. on Commerce, Science, and Transportation* (pt. 2), 96th Cong., 1st Sess. (1979).

of policy decisionmaking power in the legislature—a body responsive to the political process—rather than delegating implementation to the burgeoning administrative bureaucracy.¹⁵¹ Also, the time for implementing needed social reform is hastened when congressional intent is unequivocal. Most important, enactment of a more explicit legislative mandate improves the chances that the courts will uphold congressional intent regarding the ADEA.

Despite the obstacles, the most workable resolution of the tension would be for Congress to clarify its intent by enacting the substance of its comments by further amendment to the ADEA. The alternative of the federal judiciary giving credence to the legislative history and comments of the amended ADEA is unlikely to occur inasmuch as the courts seem to insist on interpreting the ADEA by reference to analogous legislative acts instead.¹⁵² Therefore, Congress must provide the necessary specificity itself. Under such circumstances it would be much more difficult for federal courts to frustrate Congress' intent and the tension could be cured—resolved in favor of the working elderly.

VII. CONCLUSION

Full and rapid achievement of the ADEA's principal purpose of providing greater protection to the elderly against employment discrimination has been hindered because of the Supreme Court's and some federal courts' failure to recognize or follow expressed congressional intent, thereby creating a tension between Congress and the federal judiciary over questions of age discrimination. The 1978 Amendments represent another step forward by Congress to clarify its original intent and to extend greater protection against age discrimination. Controversy remains, however, with respect to damages for pain and suffering, bona fide occupational qualification exceptions, and the mandatory retirement of state and local government employees. In addition, Congress must still determine whether even greater protection will be afforded to the elderly.

151. Only meager interpretative regulations for the ADEA were issued by the Secretary of Labor. See 29 C.F.R. § 860 (1979). Shortly after enactment of the 1978 Amendments, administration of the ADEA was transferred to the EEOC. See Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978 Compilation), reprinted in 5 U.S.C. app., at 354 (Supp. III 1979) and in 92 Stat. 3781 (1979).

152. See, e.g., *Hadfield v. Mitre Corp.*, 459 F. Supp. 829 (D. Mass. 1978) (knowingly ignores Congress' explanation that exhaustion of state remedies is not jurisdictional).

Several proposals for further amendment of the ADEA are currently under intensive review, and findings were being transmitted by the Secretary of Labor to the President and Congress by January 1, 1981 in an interim report and by January 1, 1982 in final form. Once these reports are received, a solid basis should exist for the next Congress to confidently amend the ADEA. Hopefully, Congress will have learned by frustrating experience that its intent and the substance of its comments need to be expressly enacted in the ADEA by amendment. Then Congress together with the courts can attain what the 1978 Amendments presage—more complete protection against age discrimination in employment.

John A. Adams
Jay D. Pimentel