

TOO EXPERIENCED FOR THE FLIGHT DECK? WHY THE AGE 65 RULE IS NOT ENOUGH

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The safety of airline passengers, the primary concern of the airline industry, led to questions about the ability of elderly pilots to safely transport passengers. In response, the Federal Aviation Administration, using its power as a government agency to establish industry regulations, initially required airline pilots to retire at age sixty. Claiming that this forced retirement was based on an arbitrary and age-discriminatory cutoff, pilots affected by this mandatory retirement age petitioned for exemptions from this mandatory retirement regulation and brought constitutional and statutory challenges in the courts. However, it was not until constant lobbying caused the U.S. legislature to pass the Fair Treatment for Experienced Pilots Act in 2007 that any real progress was made in favor of elderly pilots. The Act raises the mandatory retirement age to sixty-five but does not provide retroactive relief to pilots who were already forced into retirement at the age of sixty under the old regulations. Many elderly pilots affected by both the new and old regulations, therefore, remain unsatisfied. This Note proposes that mandatory retirement at any age be completely abolished and replaced with a system of individualized testing designed to determine whether each individual pilot is fit to safely transport passengers. By implementing such a system, elderly pilots will no longer be arbitrarily discriminated against because of their age. Moreover, the author believes the safety of airline passengers will increase due to the vast experience of elderly pilots who will still be found fit to fly.

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I. Introduction

The federal government has required mandatory retirement for airline pilots for the last half decade.¹ In doing so, it cites safety concerns associated with older pilots who may have health issues that could compromise their safety in the cockpit.² From 1959 until 2007, airline pilots were forced to retire at age sixty.³ During that period, the Age 60 Rule was rigorously challenged, but the federal courts consistently upheld it.⁴ However, there was an outspoken movement to abolish the mandatory retirement age.⁵ Several completed aeromedical studies suggested that advancing age did not necessarily correlate with an increased health risk for older pilots who were still capable of passing the required Federal Aviation Administration (FAA) medical exams.⁶ As a result of these studies and the lobbying of the Airline Pilots Association and other interest groups, Congress decided to make a compromise.⁷

In 2007, Congress passed the Fair Treatment for Experienced Pilots Act, which moved the mandatory retirement age for airline pilots from sixty to sixty-five.⁸ While many older pilots view this as a victory, many object to the language of the new statute and still remain adamant that the rule should be abolished entirely.⁹ In its agreement to move back the age, Congress virtually acknowledged that the mandatory retirement age is based on an arbitrary cutoff.¹⁰ Airline pilots have to undergo rigorous medical testing throughout their entire careers, and at any time a pilot may be deemed medically unqualified to fly.¹¹ An older pilot who cannot meet the strict medical requirements

1. 14 C.F.R. § 121.383(c) (2008).

2. Geneve Dubois, *The Age 60 Rule—It Is Time to Defeat It!*, 70 J. AIR L. & COM. 319, 325 (2005).

3. See, e.g., *Carswell v. Air Line Pilots Ass'n Int'l*, 540 F. Supp. 2d 107, 111 (D.D.C. 2008) (explaining the history of the Age 60 Rule and the subsequent transition to the Age 65 Rule).

4. *Id.* at 116; *Yetman v. Garvey*, 261 F.3d 664, 679 (7th Cir. 2001); *Baker v. Fed. Aviation Admin.*, 917 F.2d 318 (7th Cir. 1990).

5. See Dubois, *supra* note 2, at 321 (describing the increasing momentum to amend or overturn the rule).

6. AEROSPACE MED. ASS'N, *THE AGE 60 RULE 2* (2004), http://www.age60rule.com/docs/2004_ASMA_Position.pdf.

7. See 49 U.S.C.A. § 44729 (West 2009).

8. *Id.*

9. See Dubois, *supra* note 2, at 321.

10. See *id.* at 325–26.

11. 14 C.F.R. § 67.101 (2008) (detailing the general eligibility for a first-class airman medical certificate that is required for all airline pilots).

will not be in the cockpit.¹² In light of this, airline pilots should be subject to an individualized medical testing regiment rather than an arbitrarily discriminatory age requirement.

This Note will examine mandatory retirement for airline pilots in three parts. Part II will detail the history of the Age 60 Rule from its inception and the case law that kept it alive for a half decade. Part III will scrutinize the Fair Treatment for Experienced Pilots Act of 2007 (the Age 65 Rule) and the current challenges to that statute. Lastly, Part IV will argue that the forced retirement of pilots based solely on age is unnecessary and arbitrary and should be eliminated.

II. Background

A. The Origins of the Age 60 Rule

In 1959, the FAA first implemented the Age 60 Rule for airline pilots.¹³ This was done through the statutory authority given to the Agency by Congress in 49 U.S.C. § 44701.¹⁴ This statute gives the FAA authority to make “regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers[] and regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.”¹⁵ On June 27, 1959, the Agency explained its reasoning for enacting the Age 60 Rule:

(1) aging leads to progressive and unpredictable deterioration of certain physiological and psychological functions; (2) no method can be used to detect the deterioration of aging; (3) sudden incapacity might be induced by the increasing risk of cardiovascular disease among older people; and (4) the ability to learn is known to decline with age.¹⁶

Essentially, the Agency was expressing its concern that the failing health of older pilots may be harder to detect using the conventional means of analysis.¹⁷ More specifically, the FAA worried about older pilots suffering a debilitating heart attack or stroke while at the controls.¹⁸

12. *Id.*

13. 14 C.F.R. § 121.383(c) (2008), revised by 49 U.S.C.A. § 44729 (West 2009).

14. 49 U.S.C. § 44701 (2006).

15. *Id.* § 44701(a)(4)–(5).

16. Dubois, *supra* note 2, at 325.

17. *See id.*

18. *Id.* at 336 (explaining that the Federal Aviation Administration’s main concern is incapacitation due to cardiovascular disease).

Using this rationale, the FAA drafted regulations to address its concerns. The Agency enacted 14 C.F.R. § 121.83(c) (more commonly known as the Age 60 Rule), stating:

No certificate holder may use the services of any person as a pilot on an airplane engaged in [Part 121] operations . . . if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in [Part 121] operations if that person has reached his 60th birthday.¹⁹

It is important to note that this regulation only applied to commercial aircraft operations under 14 C.F.R. Part 121 (Part 121).²⁰ Part 121 encompasses the operation of air carriers.²¹ While the precise definition of Part 121 operations is somewhat complex, for the purposes of this Note it is only necessary to understand that in its broadest terms Part 121 governs airliners.²² In effect, this means that, with a few exceptions, corporate pilots, charter pilots, etc. were not subject to the Age 60 Rule.²³

B. Challenging the Age 60 Rule

1. CONSTITUTIONAL CHALLENGES

In 1976, the U.S. Supreme Court decided a case challenging the constitutionality of mandatory retirement laws.²⁴ In *Massachusetts Board of Retirement v. Murgia*, a Massachusetts state police officer challenged a state statute that required the retirement of state police officers at age fifty.²⁵ The officer claimed that this statute violated the Fourteenth Amendment's Equal Protection Clause.²⁶ The state police surgeon testified that the risk of cardiovascular failures increases with age but that certain individuals over fifty remain capable of performing the stressful functions of a police officer.²⁷ The police department claimed that the chance that a given older police officer may not be able to perform his duties was such a serious threat to public safety that it required this admittedly discriminatory law.²⁸

19. 14 C.F.R. § 121.383(c) (2008), revised by 49 U.S.C.A. § 44729 (West 2009).

20. *Id.*

21. *Id.* § 121.1.

22. *See id.*

23. *See id.* § 121.383(c), revised by 49 U.S.C.A. § 44729 (West 2009).

24. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

25. *Id.* at 308.

26. *Id.*

27. *Id.* at 311.

28. *Id.* at 314.

The Court first addressed the proper test to be utilized in such a situation, deciding to reject the strict scrutiny test in favor of the rational basis test.²⁹ It explained that “strict scrutiny of a legislative classification only [applies] when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.”³⁰ The Court cited precedent in its determination that “old age” did not define a suspect class because it was not a “‘discrete and insular’ group in need of ‘extraordinary protection from the majoritarian political process.’”³¹ It also held that government employment was not a fundamental right.³² The Court then applied the rational basis test and held that discrimination based on age was rationally related to the state’s interest in “protect[ing] the public by assuring physical preparedness of its un-informed police.”³³

In its per curiam opinion, the Court acknowledged the burden put on those who are forced into retirement: “We do not make light of the substantial economic and psychological effects premature retirement can have on an individual; nor do we denigrate the ability of elderly citizens to contribute to society. The problems of retirement have been well documented and are beyond serious dispute.”³⁴ The Court then indicated a strong measure of reservation as it issued its judgment:

“We do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be revised.” We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.³⁵

Interestingly, while the Court green-lit mandatory retirement on the basis of age alone where there is a legitimate state interest, it made a less-than-subtle indication that the state could probably find a more

29. *Id.* at 312–13.

30. *Id.* at 312.

31. *Id.* at 313 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938)).

32. *Id.*

33. *Id.* at 314.

34. *Id.* at 316–17.

35. *Id.* at 317 (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (alteration in original)).

accurate, nondiscriminatory method of ensuring that it has an effective police force.³⁶

2. STATUTORY ARGUMENTS—THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Because constitutional challenges have not given relief to those seeking to end mandatory retirement, proponents of ending these laws have pursued another avenue. They have challenged mandatory retirement laws on a statutory basis.³⁷ In 1967, Congress passed the Age Discrimination in Employment Act (ADEA).³⁸ The purpose of the ADEA is to “promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment.”³⁹ The Act includes specific language that is intended to eliminate age discrimination practices.⁴⁰ Section 623 of the Act sets out the specific provisions:

It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.⁴¹

This language seems relatively clear, but it does come with one major limitation of particular importance: subsection 623(f) of the ADEA states that these age discrimination requirements do *not* have to be met “where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”⁴² The Equal Employment Opportunity Commission has further defined what constitutes a “bona fide occupational qualification” (BFOQ) that

36. *Id.* at 316 (“[T]he State perhaps has not chosen the best means to accomplish this purpose.”).

37. *Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758, 760 (D.C. Cir. 1997) (challenging the FAA on the Age 60 Rule on the basis of the Age Discrimination in Employment Act); see *Carswell v. Air Line Pilots Ass'n Int'l*, 540 F. Supp. 2d 107, 110 (D.D.C. 2008) (describing how a pilot challenged his employer (U.S. Airways), his union (AFL-CIO), and the Air Line Pilots Association for violations of the Age Discrimination in Employment Act).

38. 29 U.S.C. § 621 (2006).

39. *Id.* § 621(b).

40. *Id.* § 623(a).

41. *Id.*

42. *Id.* § 623(f)(1).

is "reasonably necessary."⁴³ In order to prove the BFOQ defense, an employer must show:

(1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.⁴⁴

Naturally, the ADEA was attractive to aging pilots who wanted to challenge the Age 60 Rule. In 1997, the Sixth Circuit heard *Coupe v. Federal Express Corp.*⁴⁵ In *Coupe*, a Federal Express (FedEx) pilot sued the company for violating the ADEA.⁴⁶ He claimed that FedEx did not have the evidence necessary for a BFOQ defense.⁴⁷ Furthermore, he asked the court to strike down the Age 60 Rule altogether.⁴⁸ The Sixth Circuit refused to strike down the rule because the FAA was not a party to the suit.⁴⁹ They did, however, continue with the analysis of the pilot's ADEA claims against FedEx.⁵⁰ They noted first that the FAA never purported that the Age 60 Rule meets the criteria of the BFOQ defense.⁵¹ In fact, the court said that federal agencies do not need even to show that their regulations merit this defense.⁵²

However, the court then went on to perform a hypothetical analysis.⁵³ It found that if the Age 60 Rule had in fact been subject to the ADEA's BFOQ test, it would have passed it.⁵⁴ As to the first prong, reasonable necessity, the court found that the safety concerns that prompted the FAA to create the rule in the first place were sufficient evidence that the rule was "reasonably necessary."⁵⁵ As to the second prong of the BFOQ, the court found that the FAA had suffi-

43. 29 C.F.R. § 1625.6(b) (2009).

44. *Id.*

45. 121 F.3d 1022 (6th Cir. 1997).

46. *Id.* at 1024.

47. *Id.*

48. *Id.*

49. *Id.* at 1025–26.

50. *Id.* at 1025.

51. *Id.*

52. *Id.* at 1026.

53. *Id.* at 1025.

54. *Id.*

55. *Id.*

ciently justified that individualized testing could not accurately assess which older pilots would become a safety risk.⁵⁶ Furthermore, the court reasoned that the FAA had explored sufficient alternatives, such as performance tests and medical evaluations, before deciding that the Age 60 Rule was the safest.⁵⁷ Finally, the court addressed the substantive claim against FedEx. The court held that FedEx automatically gained the BFOQ defense because it was simply following a federal regulation and had no duty to “second-guess” the rules that it was required to follow.⁵⁸ Furthermore, the court added that even if FedEx had imposed that age limit absent any federal regulation, the age restriction still would have met the elements necessary for the BFOQ defense.⁵⁹ The Sixth Circuit, therefore, left little room for alternative interpretations as it went out of its way to examine the hypothetical situation in order to make it clear that, in the court’s opinion, the Age 60 Rule does not run afoul of the ADEA.⁶⁰

Failure was a common result as pilots tried to sue their employers under the ADEA. In *Carswell v. Air Line Pilots Ass’n, International*, the D.C. Circuit Court cited the reasoning in *Coupe* when it dismissed a pilot’s claim against his employer (U.S. Airways) and his labor union (AFL-CIO) for a violation of the ADEA.⁶¹

One group attempted to take on the FAA and force the agency itself to prove that the Age 60 Rule did not violate the ADEA.⁶² In *Professional Pilots Federation v. FAA*, the petitioners argued before the D.C. Circuit that the FAA’s Age 60 Rule violated the ADEA because “the FAA need not have relied upon an age-based Rule in order to achieve its objective of air safety.”⁶³ The FAA countered that the ADEA was a statute aimed at employers, and in making the rule, the FAA was acting “in its capacity not as an employer but as a regulator.”⁶⁴ The FAA claimed that there was no intent by Congress that the ADEA should apply to the regulatory arm of federal agencies.⁶⁵ As evidence, it cited

56. *Id.*

57. *Id.*

58. *Id.* at 1026.

59. *Id.*

60. *See generally id.*

61. 540 F. Supp. 2d 107, 116 (D.D.C. 2008) (ruling that U.S. Airways, AFL-CIO, and Air Line Pilots Association were not in violation of the ADEA because they were simply following a mandatory FAA regulation).

62. *Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758, 760 (D.C. Cir. 1997).

63. *Id.* at 762.

64. *Id.* at 763.

65. *Id.*

the Rehabilitation Act, where Congress had made it unequivocally clear that no disabled person should be discriminated against “under any program or activity conducted by an Executive agency.”⁶⁶ In its drafting of the ADEA, the legislature did not use this type of deliberate language.⁶⁷ The court agreed with the FAA that “the ADEA places no substantive limitation upon the agency’s authority to act as a regulator of the airline industry If the Congress intends to limit the means available to the FAA in its pursuit of air safety, we trust it will say so rather than leave it to the courts to infer.”⁶⁸ The ADEA arguments, therefore, provided virtually no relief to the aging pilots looking at a forced retirement.

3. SEEKING RELIEF THROUGH ADMINISTRATIVE MEANS

A final method by which those concerned attempted to challenge the Age 60 Rule was through administrative means. Groups of older pilots filed petitions seeking exemptions from mandatory retirement based on their individual healthiness and functionality.⁶⁹ The basis for this was a regulation allowing individuals to petition for exemption from any of the Federal Aviation Regulations.⁷⁰ In this request, the petitioner must show:

[t]he reasons why granting [the] request would be in the public interest; that is, how it would benefit the public as a whole; . . . [t]he reasons why granting the exemption would not adversely affect safety, or how the exemption would provide a level of safety at least equal to that provided by the rule from which [the petitioner] seeks the exemption.⁷¹

Several pilots filed these petitions for review and were denied by the FAA.⁷² They appealed the agency’s denial to the U.S. Court of Appeals, and the Seventh Circuit reviewed some of these cases.⁷³ In a review of this type of agency directive, the court utilizes an abuse of discretion standard.⁷⁴ Using this standard, the court found that the

66. *Id.* (quoting 29 U.S.C. § 794(a)).

67. *Id.*

68. *Id.*

69. *Yetman v. Garvey*, 261 F.3d 664, 667 (7th Cir. 2001).

70. 14 C.F.R. § 11.61 (2009) (indicating that a petition can be made for an exemption to any of the Federal Aviation Regulations if that petition complies with 14 C.F.R. § 11.81).

71. *Id.* § 11.81(d)–(e).

72. *Yetman*, 261 F.3d at 667; *Starr v. FAA*, 589 F.2d 307, 308–09 (7th Cir. 1979).

73. *Yetman*, 261 F.3d at 667; *Starr*, 589 F.2d at 308–09.

74. 5 U.S.C. § 706(2)(A) (2006) (outlining standards of review for administrative agencies of the Federal Government).

FAA was within its rights to deny the petitions.⁷⁵ It explained that while the statute required the FAA to allow petitions for exemptions, it also allowed the agency to use its discretion in assessing those petitions.⁷⁶ It would not be an abuse of discretion for the FAA to deny these requests unless the petitions were denied for “unsavory reasons.”⁷⁷ For example, “the FAA Administrator could not circulate a list of persons whom he personally disliked, saying he found these persons ‘unfit for exemptions.’”⁷⁸ The court, however, found that the agency’s blanket denial of exemptions for pilots over sixty based on their categorical health risk was a valid use of its discretion.⁷⁹

The Seventh Circuit would revisit the exemption issues in 1990 and 2001 in *Baker v. FAA* and *Yetman v. FAA*, respectively.⁸⁰ In both of these cases, the court heard significant new scientific evidence supporting the position that older pilots did not pose a serious risk to public safety.⁸¹ The court found the evidence compelling but stopped short of siding with the petitioners.⁸²

In *Baker*, the Seventh Circuit decided not to overrule the FAA due to the sensitive nature of the issue but did provide the agency with some strong paternalistic guidance: “The FAA should not take this as a signal that the age sixty rule is sacrosanct and untouchable. Obviously, there is a great body of opinion that the time has come to move on. The agency must give serious attention to this opinion.”⁸³

In *Yetman*, over ten years later, the Seventh Circuit again took up the issue of mandatory pilot retirement.⁸⁴ This time the court suggested that the Age 60 Rule was “better suited to 1959 than to 2001”⁸⁵ but went on to explain that it was not an expert in aeromedical issues

75. *Yetman*, 261 F.3d at 679; *Starr*, 589 F.2d at 314.

76. *Yetman*, 261 F.3d at 678.

77. *Id.* at 679.

78. *Starr*, 589 F.2d at 312.

79. *Id.* at 312–13.

80. *Yetman*, 261 F.3d at 679 (holding that even in light of new scientific evidence, it still will not overrule the FAA on mandatory retirement); *Baker v. FAA*, 917 F.2d 318, 322 (7th Cir. 1990) (finding, hesitantly, that the FAA did not abuse its discretion in enacting the Age 60 Rule).

81. *Baker*, 917 F.2d at 320; *Yetman*, 216 F.3d at 670–78.

82. *Yetman*, 261 F.3d at 676 (advising the FAA to give serious consideration to the position that granting exemptions for pilots over sixty would not affect air safety); *Baker*, 917 F.2d at 321.

83. *Baker*, 917 F.2d at 322–23.

84. *Yetman*, 261 F.3d at 667 (“Since [Baker], over a decade has passed, but the FAA has held fast to its blanket policy of denying requests for exemptions.”).

85. *Id.* at 679 (“[T]his court is not an expert in aerospace medicine, and Congress did not endow this court with the duty to make such a policy judgment.”).

and, therefore, still was not comfortable delving into the territory of the FAA.⁸⁶ Even after another round of testimony and scientific evidence, the court once again balked at the proposition of telling the FAA what was and was not safe in terms of air safety and pilot qualifications.⁸⁷

It is understandable that the courts would be hesitant to overrule such a regulation. Although it seems that they have been convinced over and over that the rule needs to be abolished,⁸⁸ they continue to defer to the FAA's judgment as the governmental body designated to protect the millions of passengers who take to the skies everyday.⁸⁹ It is understandable that the judicial branch is hesitant to make such a decision, but it is not so easy to comprehend why the FAA did not react to the highly cautious opinions. When an administrative agency establishes this level of immunity from the court system, it is the duty of the legislative branch to take whatever measures are necessary to keep that agency acting in the best interests of the nation as a whole.

III. Analysis

A. Progress Through Legislation: The Age 65 Rule

Since its inception in 1959, the Age 60 Rule has been litigated from all angles. None of the courts, however, have provided any relief to those older pilots who simply wanted to keep their jobs while they still were physically able to do so. The only answer left seemed to be in the form of a legislative remedy. The concerned parties needed to lobby Congress and convince it to pass legislation that would eliminate mandatory retirement at age sixty and allow pilots to continue to fly until they could no longer pass individualized medical tests.

The groups lobbying for a change in the law started to point out that many other countries were reevaluating their age restrictions for pilots.⁹⁰ Australia, Canada, and New Zealand abolished age restrictions for pilots;⁹¹ the European Union changed its mandatory retire-

86. *Id.*; see *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1979).

87. *Yetman*, 261 F.3d at 679.

88. *Id.*; *Baker*, 917 F.2d at 319 (serious consideration should be given to this opinion); *Starr*, 589 F.2d at 309.

89. See, e.g., *Yetman*, 261 F.3d at 667.

90. See *Dubois*, *supra* note 2, at 350.

91. *Id.* at 342.

ment age to sixty-five.⁹² The International Civil Aviation Organization (ICAO), the international aviation oversight body of which most developed nations are signatories, reviewed its own pilot retirement policy.⁹³ On November 23, 2006, the ICAO instituted a new rule which allows airline pilots of member states to fly up until age sixty-five.⁹⁴ However, if a pilot is over sixty years of age, the other pilot in the cockpit must be under sixty.⁹⁵

The changes in the international community reflected talks that had been in the process for the years preceding 2006.⁹⁶ In fact, before the ICAO standard was established, the U.S. Congress had already started to discuss amending the Age 60 Rule.⁹⁷ On September 14, 2004, the Senate Special Committee on Aging held a hearing to decide whether it was time to reevaluate the Age 60 Rule.⁹⁸ Captain Joseph Eichelkraut, President of the Southwest Airlines Pilots' Association, presented testimony at the hearing.⁹⁹ He testified that the rule was outdated and based on the norms of 1959, not those of the twenty-first century.¹⁰⁰ He explained that retirement at sixty was normal when the rule was created but that in the present day many people have productive working lives into their eighties.¹⁰¹ He cited a National Institute of Health study commissioned by Congress which concluded that age sixty is "of no particular significance for piloting."¹⁰² Mr. Eichelkraut then pointed to specific older pilots who had completed strenuous tasks such as triathlons and aerial competitions.¹⁰³ Finally, he presented statistics from Southwest Airlines' training records which showed that the failure rate in recurrent training declines dramatically as a pilot gets older and more experienced.¹⁰⁴

92. *Id.*

93. National Business Aviation Association, Age 60, <http://www.nbaa.org/admin/personnel/age-60> (last visited Nov. 7, 2009).

94. *Id.*

95. *Id.*

96. See *A Fresh Look at Mandatory Retirements: Do They Still Make Sense: Hearing Before the S. Spec. Comm. on Aging*, 108th Cong. 1 (2004) [hereinafter *Hearings*] (statement of Larry Craig, Chairman, Senate Special Committee on Aging).

97. See *id.*

98. See *id.*

99. *Id.* at 38 (statement of Captain Joseph Eichelkraut, President, Southwest Airlines Pilots' Association).

100. *Id.*

101. *Id.* at 39.

102. *Id.*

103. *Id.*

104. *Id.* at 40.

At the same Senate hearing, Abby Block, Deputy Associate Director at the Center for Employee and Family Support Policy, testified on behalf of the Director of the Office of Personnel Management.¹⁰⁵ She first gave a brief history of the Civil Service Retirement Act of 1960 and the changes in the mandatory retirement policies for civil service workers over the last century.¹⁰⁶ She urged that before Congress made any change to a mandatory retirement law, they look at how it would effect the organization.¹⁰⁷ Ms. Block then explained that “[m]andatory retirement should take into account any unique requirements associated with the duties of any given occupation, . . . while also preventing the imposition of overly restrictive hiring barriers or forced retirements.”¹⁰⁸ She added, “setting too low a mandatory retirement age for an occupation may result in the premature loss of an organization’s most experienced personnel.”¹⁰⁹ These statements thus reiterate the point that in making these decisions it is critical to remember that the individuals that are being forced out, in most cases, are the employees with the most training and experience.¹¹⁰

The Executive Board of the Air Line Pilots Association voted to use its resources to fully influence legislation that would amend the Age 60 Rule.¹¹¹ James Oberstar, Chairman of the House Transportation and Infrastructure Committee, introduced a bill that proposed changing the mandatory retirement age for pilots from sixty to sixty-five.¹¹² This change would conform FAA policy to the ICAO standard.¹¹³ In December of 2007, Congress passed the Fair Treatment for Experienced Pilots Act.¹¹⁴ This act amended 49 U.S.C. § 44729 by changing the language regarding mandatory retirement.¹¹⁵ The statute now reads “subject to the limitation in subsection (c), a pilot may

105. *Id.* at 7 (statement of Abby L. Block, Deputy Associate Director, Center for Employee and Family Support Policy, Office of Personnel Management).

106. *Id.* at 7–9.

107. *Id.* at 9.

108. *Id.* at 10.

109. *Id.*

110. *Id.* at 5.

111. Press Release, Air Line Pilots Ass’n, ALPA Sets New Course on Age 60 (May 24, 2007), http://www.alpa.org/portals/alpa/pressroom/pressreleases/2007/2007-5-24_07.029.htm.

112. Madhu Unnikrishnan, *Bush Signs Pilot Retirement Age Act*, AVIATION DAILY, Dec. 17, 2007, available at http://www.aviationweek.com/aw/generic/story_generic.jsp?channel=comm&id=news/BUSH12177.xml&headline=Bush%20Signs%20Pilot%20Retirement%20Age%20Act.

113. 49 U.S.C.A. § 44729(c)(1) (West 2009).

114. *Id.* § 44729.

115. *See id.*

serve in multi-crew [air carrier] operations until attaining 65 years of age."¹¹⁶ The statute included the standard limitation set by the ICAO that "[a] pilot who has attained 60 years of age may serve as pilot-in-command in [air carrier] operations between the United States and another country only if there is another pilot in the flight deck crew who has not yet attained 60 years of age."¹¹⁷ This means that on an international flight where the pilot-in-command (captain) is over sixty years of age, the second-in-command (first officer) must be under sixty years old.¹¹⁸ The new law enacts no such limitations on domestic flights or international flights where the pilot over sixty is the second-in-command.¹¹⁹

In addition, 49 U.S.C. § 44729(g)(1) includes language that addresses medical testing issues for older pilots.¹²⁰ The statute indicates that air carrier pilots over sixty years of age "shall not be subject to different medical standards, or different, greater, or more frequent medical examinations, on account of age."¹²¹ This provision, it appears, is an indicator that older pilots are not in a position where they need to be evaluated under a different standard. It is virtually an admission by the FAA that older pilots are not more susceptible to health risks that cannot be determined through the normal pilot medical testing routine. If there was a legitimate concern about the health of these older pilots, as the FAA had insisted for so many years, the statute would have provided for a different medical testing regimen.

B. The Nonretroactivity Provision

One provision of the new Age 65 Rule did spark immediate controversy and criticism within the pilot community.¹²² Subsection (e)(1) of the Fair Treatment for Experienced Pilots Act specifies that

116. *Id.* § 44729(a) (outlining the new age regulations for pilots under Part 121).

117. *Id.* § 44729(c)(1).

118. *See id.*; *see also* Carole Fleck, *Experience Counts in the Cockpit*, AARP BULL. TODAY, Jan. 16, 2009, http://bulletin.aarp.org/yourworld/gettingaround/articles/experience_counts_in_the_cockpit_.html.

119. *See* 49 U.S.C.A. § 44729 (West 2009).

120. *Id.* § 44729(g)(1) (outlining the medical testing and requirements for air carrier pilots who have reached sixty years of age).

121. *Id.*

122. Letter from Jonathan Turley, J.B. and Maurice Shapiro Professor of Law, George Washington Univ. Law Sch., to the Honorable Nancy Pelosi, Speaker, The United States House of Representatives (June 5, 2008) (on file with author) [hereinafter Letter from Jonathan Turley].

[n]o person who has attained 60 years of age before the date of enactment of this section may serve as a pilot for an air carrier engaged in covered operations unless . . . such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to the length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.¹²³

This nonretroactivity provision is so restrictive that it essentially prohibits pilots between sixty and sixty-five years of age who have already been forced to retire from returning to their old jobs, even though their nonretired contemporaries can keep flying until age sixty-five.¹²⁴ In order to fly for an airline again, a pilot who missed the cutoff would have to reapply and be rehired.¹²⁵ This means that a senior pilot in this category would have to accept the drastically lower pay and benefits of a new hire.¹²⁶ The law is structured so that pilots have no recourse against the airline from an employee benefits standpoint.¹²⁷ It bars the pilots from any judicial relief against the airlines in terms of "employment law or regulation."¹²⁸ As a result, several groups have instituted challenges to this provision arguing that it is arbitrary and punishes pilots for what simply amounts to "bad timing."¹²⁹

The Senior Pilot's Coalition is a national organization of older pilots working to fight the mandatory retirement rules.¹³⁰ The group released a statement outlining its reaction to the Fair Treatment for Experienced Pilots Act that specifically addressed the nonretroactivity

123. 49 U.S.C.A. § 44729(e)(1) (West 2009) (laying out the nonretroactivity provision for pilots who have already retired).

124. *See id.*

125. Letter from Jonathan Turley, *supra* note 122, at 3.

126. *See id.*

127. *See* 49 U.S.C.A. § 44729 (West 2009); Letter from Jonathan Turley, *supra* note 122.

128. 49 U.S.C.A. § 44729(e)(2) (West 2009):

An action taken in conformance with this section, taken in conformance with a regulation issued to carry out this section, or taken prior to the date of enactment of this section in conformance with [14 C.F.R. § 121.383], may not serve as a basis of liability or relief in a proceeding, brought under any employment law or regulation, before any court or agency in the United States or of any state or locality.

Id.; *see* Letter from Jonathan Turley, *supra* note 122.

129. Railway Labor Act Blog, Court Rules Against Pilots in Age Discrimination Case Against Their Own Union, <http://bapwild.com/blog/?p=348> (July 2, 2009, 13:29 EST).

130. Senior Pilots Coalition, <http://www.spcllegal.org> (last visited Nov. 7, 2009).

provisions: "The new law is poorly written and expressly denies carriers the right to treat older pilots fairly, even countermanding prior contractual positions between pilots and their companies."¹³¹ The group claims that less than sixty pilots of the thousands affected by the Age 60 Rule have been able to go back to work.¹³²

Furthermore, the statement recounts the stories of several older pilots disenfranchised by the legislation.¹³³ Herb Holland, a member of the Senior Pilot's Coalition, was a Marine Aviator in Vietnam who went on to become a top Captain for U.S. Airways.¹³⁴ Holland missed the cutoff for the enactment of the new law by forty-three days, "which cost him his ability to get a job, his seniority and his right to redress."¹³⁵ Like many of the senior pilots affected by this legislation, Holland has been forced to work overseas: "[He] now can only spend two out of every eight weeks at his home in Phoenix, with the balance of his time in Kazakhstan, where he now is a pilot for the 51-percent state-owned Air Astana."¹³⁶ This is not an uncommon situation for pilots who have been subjected to mandatory retirement.¹³⁷ There are countless stories of former senior captains who have been forced overseas to find employment.¹³⁸ Of these jobs, many of them are in developing nations such as India and Panama.¹³⁹

Jonathan Turley, a professor of public interest law at George Washington University Law School, has taken up the cause of the Senior Pilot's Coalition in response to the nonretroactivity provision of the Age 65 Rule.¹⁴⁰ In a June 2008 letter to U.S. Speaker of the House Nancy Pelosi, Turley challenged Congress to come up with a legislative solution to this problem.¹⁴¹ Professor Turley wrote: "The current law does little in terms of fairness for pilots. Rather, the primary re-

131. Press Release, Senior Pilot's Coal., Memorial Day Shame: Only 2 Percent of Veteran Airline Pilots Grounded by Congress Are Rehired, Many Forced to Work for Foreign Carriers 2 (May 22, 2008), <http://www.age60rule.com/docs/MEMORIAL%20DAY%20SHAME.pdf>.

132. *Id.* at 1.

133. *Id.* at 2 (reciting the story of pilots who have been forced into retirement including Troy G. Alvera (former senior captain for United) and Herb Holland (former Air Force/U.S. Airways pilot)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1.

139. *Id.* at 2; see Fleck, *supra* note 118.

140. Letter from Jonathan Turley, *supra* note 122.

141. *Id.* at 1.

sult is the loss of lifetime seniority and benefits for pilots while denying them any chance to contest such losses.”¹⁴² He asserts that ninety percent of the newly grounded pilots are veterans of the Vietnam and/or Gulf Wars.¹⁴³ Professor Turley further explains that

[t]he public is now losing its most experienced pilots to countries like Vietnam and India. These pilots constitute some of the most decorated and accomplished pilots in the world. If public safety is the touchstone of our aviation policy, we should be imposing skill-based standards, not age-based standards, on our aviators.¹⁴⁴

Finally, Turley delves into the legal challenges which he is in the process of litigating in the U.S. Court of Appeals for the District of Columbia. He claims that the Fair Treatment for Experienced Pilots Act violates due process because it imposes “punitive conditions without a hearing or any ability to contest that punitive action . . . [and] denies the pilots of the benefits of prior and future contracts without a hearing or compensation.”¹⁴⁵ He further contends that the nonretroactivity provision of the Age 65 Rule is a violation of the Fifth Amendment’s taking-without-just-compensation provision based on the fact that the pilots who were forced to retire had “vested property interests in their seniority and benefits that have been extinguished by this Act.”¹⁴⁶ Congress negated these property interests to favor younger pilots who could be displaced or negatively affected by the returning pilots.¹⁴⁷ In his conclusion, Turley urges Congress to find a legislative solution to this problem:

This is an obvious case where the solution should be legislation rather than litigation. By simply removing the retroactive provision, Congress would succeed in doing what it set out to do in 2007—to create a policy that is consistent with both our domestic and international laws. Indeed, it would put the United States in the same position as all other nations. It would also end the disturbing practice of our best pilots having to move to third world countries to continue to work. Most importantly, it would eliminate a discriminatory provision from federal law and do the right thing for our veteran and non-veteran pilots.¹⁴⁸

The inequality of the retroactivity provision is another reason why Congress needs to reassess the Fair Treatment for Experienced Pilots

142. *Id.* at 3.

143. *Id.*

144. *Id.* at 4.

145. *Id.* at 5 (citing *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 459–60 (1989); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 348–50 (1935)).

146. *Id.* (citing *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1997)).

147. *Id.*

148. *Id.* at 5–6.

Act and enact legislation that will completely ban the mandatory retirement age for airline pilots.

B. Moving Forward

Congress took a step in the right direction when it passed the Fair Treatment for Experienced Pilots Act. It acknowledged that the mandatory retirement age of airline pilots needed to be addressed, but it failed to take the Act further and abolish the mandatory retirement age completely.¹⁴⁹ A legislative solution to mandatory retirement is necessary because the court system has continually showed deference to the FAA instead of tackling the constitutional and statutory challenges head on.¹⁵⁰

In handling these cases, the courts have time and time again suggested that the FAA could find a better way to evaluate pilots than based on a discriminatory measure.¹⁵¹ It is critical that Congress takes action on this measure immediately because (1) the rule is discriminatory and violates the ADEA, even though the courts refuse to take a stand on the issues; (2) the rigorous testing procedures for airline pilots ensure that those who are not healthy will not continue to fly; and (3) extensive research has shown that age, on its own, does not negatively affect the ability of a pilot to perform his or her duties.¹⁵²

1. FAILURE OF THE COURTS TO ADDRESS CLAIMS SUFFICIENTLY

The federal courts have faced the issue of airline pilot retirement several times, but each time they have failed to address the issue and have found a way to avoid the question.¹⁵³ In *Carswell v. Air Line Pilots Ass'n, International*, the D.C. Circuit told the pilot that he could not take an ADEA action against his employer or union because they

149. See 49 U.S.C.A. § 44729 (West 2009).

150. *Yetman v. Garvey*, 261 F.3d 664, 679 (7th Cir. 2001); *Baker v. FAA*, 917 F.2d 318, 322 (7th Cir. 1990).

151. *Yetman*, 261 F.3d at 678.

152. *Carswell v. Air Line Pilots Ass'n Int'l*, 540 F. Supp. 2d 107, 115 (D.D.C. 2008) (explaining that U.S. Airways did not "dispute that retirement policy constitutes direct evidence of age discrimination"); *Hearings, supra* note 96, at 39-40 (statement of Captain Joseph Eichelkraut, President, Southwest Airlines Pilots' Association).

153. *Yetman*, 261 F.3d at 679; see *Baker*, 917 F.2d at 322; *Carswell*, 540 F. Supp. 2d at 116 (explaining that U.S. Airways, AFL-CIO, and Air Line Pilots Association were not in violation of the ADEA because they were following a mandatory FAA regulation).

simply were following federal regulations.¹⁵⁴ The court did not think it was appropriate to make a ruling on an FAA regulation when the FAA was not a party to the suit.¹⁵⁵ In *Professional Pilot's Federation v. FAA*, the D.C. Circuit refused to tackle the question of whether the Age 60 Rule was in violation of the ADEA, but rather told the petitioners that the FAA was acting as a rulemaking body and not an employer and therefore it was not subject to the ADEA.¹⁵⁶ One can easily see the contradiction between these rulings. One essentially is telling the parties to sue the FAA, not the employer, while the second is saying that the FAA cannot be sued because it is not acting in its capacity as an employer.¹⁵⁷ There is no easy way to reconcile these rulings, and they suggest that further litigation will not provide any relief to aging pilots.

The courts on several occasions, however, have used language that indicates they do not agree with the decisions of the FAA. In *Western Air Lines, Inc. v. Criswell*, the Supreme Court wrote:

Increasingly, it is being recognized that mandatory retirement based solely upon age is *arbitrary* and that chronological age alone is a poor indicator of ability to perform a job Such forced retirement can cause hardships for older persons through loss of roles and loss of income *Society, as a whole suffers* from mandatory retirement as well . . . skills and experience are lost from the work force resulting in reduced GNP. Such practices also *add a burden to* Government income maintenance programs such as social security.¹⁵⁸

Furthermore, in *Baker v. FAA*, the Seventh Circuit spoke directly to the Federal Aviation Administration and urged them to amend the rule.¹⁵⁹ As discussed earlier, the subsequent *Yetman* decision echoed many of those same themes, and in the landmark Supreme Court retirement case dealing with Massachusetts State Police, *Massachusetts Board of Retirement v. Murgia*, the Court suggested that a system that did not

154. *Carswell*, 540 F. Supp. 2d at 116.

155. *See id.*

156. 118 F.3d 758, 763 (D.C. Cir. 1997).

157. *Compare id.*, with *Carswell*, 540 F. Supp. 2d. at 116.

158. Dubois, *supra* note 2, at 324 (quoting *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410–11 (1985)).

159. *Baker v. FAA*, 917 F.2d 318, 322 (7th Cir. 1990) (explaining that the FAA rule is not “sacrosanct or untouchable” and should be reevaluated in light of the new medical studies and reports that have been presented to the courts within the last few years).

discriminate by age would be preferable.¹⁶⁰ Courts just do not feel comfortable with this type of forced retirement.

The courts have been very consistent in their unwillingness to second-guess the actions of government bodies when it comes to the issue of mandatory retirement.¹⁶¹ But time and time again, they make it clear that these age discriminatory restrictions do not sit well with them.¹⁶² The legislature, therefore, must be willing to do what the courts will not.

2. PHYSICAL HEALTH

In his dissent in *Murgia*, Justice Marshall rejects the notion that strict scrutiny should not be used when judging mandatory retirement.¹⁶³ He believes that having a healthy, fit police force is a rational and legitimate interest.¹⁶⁴ However, he argues that forcing every police officer over fifty to retire is overinclusive.¹⁶⁵ He goes on to describe the rigorous physical examination that the police officers must go through every two years in order to requalify for the job.¹⁶⁶ When the officers reach forty years of age, they become subject to this testing annually and must pass to keep their jobs.¹⁶⁷ "Thus, the only members of the state police still on the force at age 50 are those who have been determined—repeatedly—by the Commonwealth to be physically fit for the job."¹⁶⁸ Marshall writes:

[T]he Commonwealth is in the position of already individually testing its police officers for physical fitness, conceding that such testing is adequate to determine the physical ability of an officer to continue on the job, and conceding that that ability may continue after age 50. In these circumstances, I see no reason at all for automatically terminating those officers who reach the age of 50; indeed, that action seems the height of irrationality.¹⁶⁹

160. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316–17 (1976); *Yetman v. Garvey*, 261 F.3d 664, 679 (7th Cir. 2001) (holding that even in light of new scientific evidence that suggests that the Age 60 Rule may be somewhat arbitrary, it still will not overrule the FAA on mandatory retirement).

161. *See Murgia*, 427 U.S. at 317; *see also Yetman*, 261 F.3d at 679; *Baker*, 917 F.2d at 322.

162. *See Murgia*, 427 U.S. at 317; *see also Yetman*, 261 F.3d at 679; *Baker*, 917 F.2d at 322.

163. *Murgia*, 427 U.S. at 321 (Marshall, J., dissenting).

164. *Id.* at 325.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 326.

169. *Id.* at 327.

As Marshall points out, the restriction is indeed very overinclusive. It filters out officers who are both physically able and experienced simply because of an arbitrary age cutoff.

In this same vein, all pilots must continuously undergo rigorous medical testing in order to stay qualified to fly.¹⁷⁰ They must pass semiannual flight physicals given by designated Aviation Medical Examiners.¹⁷¹ When a pilot turns forty years of age, an EKG must be administered at every other physical to ensure that he or she is not suffering from any cardiovascular issues that could detrimentally affect the safety of flight.¹⁷²

The FAA argues that its main concern is the incapacitation of pilots during flight.¹⁷³ The original justification for FAA-implemented mandatory retirement was the fear that an older pilot may have a heart attack or stroke in flight.¹⁷⁴ It seems, however, that the occurrences of such incidents are extremely rare.¹⁷⁵ The International Air Transport Association conducted a study assessing the risk of a cardiovascular occurrence during flight.¹⁷⁶ They found that “the risk of incapacitation due to cardiovascular disease is only 1 event in more than 20 million flight hours.”¹⁷⁷ Furthermore, they found that a crash occurring as a result of incapacitation was only one event in 8.3 billion flight hours.¹⁷⁸ The risk of an accident due to incapacitation is so small because an airline flight deck crew consists of at least two pilots, either of whom are qualified to take over the controls if the other becomes incapacitated.¹⁷⁹ Given the statistics, it is difficult to justify taking away jobs over such a remote risk and one which some may even consider nonexistent.

170. *Hearings, supra* note 96, at 36–37 (statement of Captain Joseph Eichelkraut, President, Southwest Airlines Pilots’ Association).

171. *Id.*

172. *Id.*

173. Dubois, *supra* note 2, at 336.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (quoting Robin Wilkening, Statement in Support of Senate Bill 361 (Mar. 13, 2001), http://www.age60rule.com/docs/2001_wilkening_tmony.pdf).

178. *Id.*

179. AEROSPACE MED. ASS’N, *supra* note 6 (addressing the statistics for pilot incapacitation and why it is a smaller risk than other types of factors).

3. SKILL DETERIORATION

Another concern often given by the FAA is the concept of skill deterioration.¹⁸⁰ The idea is that as a pilot ages, his or her cognitive skills deteriorate, and there is no measure of telling just how fast or how much those skills have deteriorated.¹⁸¹ In reality, those skills are measured on an ongoing basis. Pilots constantly undergo recurrent training and must pass a series of checks biannually in order to keep their jobs.¹⁸² In Captain Joseph Eichelkraut's testimony before the Senate Special Committee on Aging, he explained just how rigorous of a process it is for a pilot to stay flying:

Pilots must also successfully pass semiannual simulator training and flight checks designed to evaluate the crewmember's ability to respond to various aircraft emergencies and/or competently handle advances in flight technology and the Air Traffic Control (ATC) environment. Captains must demonstrate, twice yearly, complete knowledge of systems and procedures, safe piloting skills and multi-tasking by managing emergency and normal flight situations [in the simulator] There is no greater test of cognitive ability and mental dexterity than these simulator rides.¹⁸³

He then goes on to present evidence from Southwest Airlines' training records.¹⁸⁴ The evidence shows that pilots approaching age sixty have the smallest number of failures during simulator training.¹⁸⁵ He attributes this to the experience of the older pilots: "As pilots get older, they know how to better handle the extreme situations they may have encountered in simulator checks."¹⁸⁶ Another study found that while pilots age twenty-four to thirty-nine had the highest number of accidents, those over fifty-five had virtually none.¹⁸⁷ During his testimony, Captain Eichelkraut also addressed the training procedures for an unpredictable incapacitation:

If either pilot should become incapacitated, even at touchdown, the other pilot is capable of assuming control in order to fly the airplane to a safe landing. The passengers would probably re-

180. *Baker v. FAA*, 917 F.2d 318, 324 (7th Cir. 1990) ("[T]he FAA's second longstanding justification begins with the observation that at age 60 skills are not only deteriorating but beginning to do so at an increasing and increasingly unpredictable rate.").

181. *Id.*

182. *Hearings*, *supra* note 96, at 36 (statement of Captain Joseph Eichelkraut, President, Southwest Airlines Pilots' Association).

183. *Id.* at 39.

184. *Id.* at 40-41.

185. *Id.* at 40.

186. *Id.*

187. Fleck, *supra* note 118.

main unaware that a pilot had become ill until the aircraft was met at the gate by Emergency Medical Technicians¹⁸⁸

This is a procedure that each pilot must successfully perform in the simulator.¹⁸⁹

Some of the nation's most notable aviators have been those who are reaching an advanced age. In the summer of 2004, Spaceship One became the first manned commercial vehicle in space.¹⁹⁰ That aircraft was flown by sixty-three-year-old pilot Mike Melvill.¹⁹¹ While Mr. Melvill was capable of piloting a vehicle to space a few short years ago, as of now, he would not be eligible to fly a commercial airliner in the United States.¹⁹²

More recently, Chesley B. Sullenberger III was only weeks away from his fifty-eighth birthday when he navigated a disabled U.S. Airways Airbus A320 to a safe landing on the Hudson River.¹⁹³ Many lives were saved that day because of Captain Sullenberger's quick thinking and considerable flying experience.¹⁹⁴ If the rules do not change, this heroic Captain will be forced to retire in just a few years time regardless of whether or not he is still qualified to fly.

There are countless stories of senior pilots who have used their experience to accomplish major feats in the aviation industry. How is it, then, that the FAA can categorically deny older pilots the right to work simply because they have reached a certain birthday?

IV. Recommendation

The nation is entering its fiftieth year of age discrimination towards airline pilots.¹⁹⁵ Since the 1950s, the FAA has kept a tight control over this regulation.¹⁹⁶ In those fifty years, it has given no new jus-

188. *Hearings, supra* note 96, at 40 (statement of Captain Joseph Eichelkraut, President, Southwest Airlines Pilots' Association).

189. *Id.* at 39.

190. *Id.*

191. *Id.*

192. *Id.* at 36.

193. Robert D. McFadden, *Pilot Is Hailed After Jetliner's Icy Plunge*, N.Y. TIMES, Jan. 16, 2009, at A1, available at <http://www.nytimes.com/2009/01/16/nyregion/16crash.html>.

194. *See id.*

195. *See* Maximum Age Limitations for Pilots, 24 Fed. Reg. 9767 (proposed Dec. 5, 1959) (to be codified at 14 C.F.R. pt. 40).

196. *See id.*; The Age 60 Rule, 60 Fed. Reg. 65,977, 65,977-78 (proposed Dec. 20, 1995) (to be codified at 14 C.F.R. pt. 121) ("The FAA promulgated the Age 60 Rule in 1959 because of concerns that a hazard to safety was presented by utilization of aging pilots in air carrier operations."); *id.* at 65,978 ("[In 1984,] [t]he FAA found

tifications for why it is necessary to discriminate against pilots based on age. When taken to task, it has simply responded that this type of discrimination is necessary because older pilots are more likely to become incapacitated.¹⁹⁷ Even though the FAA has never really proven that this risk exists and independent studies have shown the risk to be remote at best, the agency still refuses to either remove the restriction or come up with a new rationale for the discrimination.¹⁹⁸

The courts have been an ineffective forum for those interested in the welfare of older pilots.¹⁹⁹ Courts have been willing to lend a listening ear and, in many instances, even scold the FAA for its behavior.²⁰⁰ In the end, however, the judicial branch has been unwilling to take any major steps towards ending this discriminatory practice. It continues to show total deference to the agency, which is understandable given the precarious position that a court is put in when it is forced to make a decision that might affect the safety of the American public.

When the courts refused to provide any remedy, however, the legislature was called upon to craft a new policy that was better suited to the modern day aviation industry. Eventually, the Age 65 Rule was passed in order to appease the older pilots who were gradually becoming more vocal.²⁰¹ The FAA chose the age of sixty-five in order to put the United States closer in line with the ICAO standard.²⁰² It still provided no real explanation for the significance of that number. This is why it is essential to call on Congress to abolish this discriminatory practice.

When it comes to the airline industry, safety is always the first priority. Few would argue that any step should be taken which would compromise the safety of the traveling public. I believe that strict medical testing combined with a continued emphasis on recurrent training and evaluation in the simulator will ensure that only the

that valid tests did not exist for selecting a group of pilots age 60 and over who could act as the test group for collecting data."); *id.* at 65,980 ("After considering all comments and known studies, FAA concludes that concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced.").

197. *Baker v. Fed. Aviation Admin.*, 917 F.2d 318, 323 (7th Cir. 1990) (Will, J., dissenting).

198. Dubois, *supra* note 2, at 325–28.

199. *Id.* at 345.

200. *See, e.g., Yetman v. Fed. Aviation Admin.*, 261 F.3d 664 (7th Cir. 2001).

201. *See generally Hearings, supra* note 96 (providing testimony from different pilot organizations petitioning for change of age rules).

202. *U.S. Airline Pilot Retirement Age Raised to 65*, AIR SAFETY WK., Dec. 17, 2007, http://findarticles.com/p/articles/mi_m0UBT/is_47_21/ai_n27477054.

safest pilots are in the skies. Legislators should be urged to remove all age restrictions in favor of individualized testing so that the most experienced pilots we have can continue to keep a watchful eye in the cockpit.

The Age 60 Rule was created in 1959 during a completely different era. At that time, it was not uncommon for workers to retire at sixty.²⁰³ With stronger pension plans and shorter life expectancies, the need to continue working past this age was not as prevalent as it is today.²⁰⁴ In the modern era, workers in every industry are staying at their jobs longer either out of economic necessity, intellectual stimulation, or just because they love their job.²⁰⁵ For some it may just be one, but for most it is likely a combination of the three.

Pilots are no exception to this rule. Many of our most experienced aviators have flown in combat and/or dedicated their lives to safely transporting millions of passengers to their destinations. We cannot just categorically strip them of the right to fly without giving them a valid reason. The vague medical justifications that were used in the 1950s are outdated and should not be relied upon to determine the fate of people's livelihoods.

V. Conclusion

Congress has already made progress in enacting the new Age 65 Rule in 2007. Now that it is on the right path, the legislature should move forward and abolish the rule completely. It should be replaced with a regulation allowing any qualified individual to sit at the controls of an airliner. If this happens, we will make the most out of the nation's collective aviation experience and use all of our resources without sacrificing safety.

203. William J. Wiatrowski, *Changing Retirement Age: Ups and Downs*, MONTHLY LAB. REV., Apr. 2001, at 3, 3, available at <http://www.bls.gov/opub/mlr/2001/04/art1full.pdf>.

204. See David Pratt, *Retirement in a Defined Contribution Era: Making the Money Last*, 41 J. MARSHALL L. REV. 1091, 1131 (2008).

205. PAUL TAYLOR ET AL., PEW RESEARCH CTR., AMERICA'S CHANGING WORKFORCE: RECESSION TURNS A GRAYING OFFICE GRAYER 1-2 (2009) (showing that older workers surveyed continue to work because they need money or want to work).