

June 5, 2008

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
United States Capitol
Washington, DC 20515

The Honorable Steny Hoyer
Majority Leader
United States House of Representatives
United States Capitol
Washington, DC 20515

Dear Madam Speaker and Majority Leader Hoyer:

I am writing to you as counsel for senior pilots who lost their benefits, seniority, and status under the "Fair Treatment for Experienced Pilots Act," P.L. 110-135. Although this law sought to end a widely ridiculed policy known as the Age 60 rule, most members were unaware that the language created a new and even more arbitrary Age 60 rule – a punitive provision that has its greatest impact on veterans who lost their jobs and benefits with no right to a hearing or relief.

While we are currently challenging the law, I believe that this controversy calls for a legislative solution. To that end, I have been meeting with members to discuss a simple amendment to address this problem. I have been joined by representatives of veterans and other public interest groups who want to see a truly equitable and fair treatment of our pilots. Every member and staffer that we have briefed on the impact of this law has expressed complete surprise at the provision stripping pilots of their professional and legal status. The law was enacted in a very short period of a few days and most members simply did not understand that the elimination of the old Age 60 rule had the unintended consequence of creating a new Age 60 rule. For some members, it is an example of the law of unintended consequences. Unfortunately, my clients have been left bearing those consequences – as are literally thousands of families of pilots across the country. We respectfully ask that you intervene in this matter and facilitate a resolution that would achieve the original purposes of the Fair Treatment for Experienced Pilots Act.

The Age 60 Rule and P.L. 110-135

Since 1959, the Federal Aviation Administration (FAA) barred pilots under the Age 60 rule. This rule prevented pilots from flying based solely on their age without any individual consideration of the capabilities, health, or performance of individual pilots. The rule was a flagrant policy of age discrimination, providing that "[n]o certificate holder may use" and "[n]o person may serve as . . . a pilot on an airplane engaged in operations under [14 C.F.R. Part 121] if that person has reached his 60th birthday." 14 C.F.R. 12.

The United States maintained this rule despite the fact that it violated our international agreements and the approach of every other leading nation in the industry. On March 10, 2006, the International Civil Aviation Organization (ICAO) governing Council adopted a recommendation of the Air Navigation Commission to use the age 65 as the age limit for air carrier pilots-in-command. Under this standard, an older pilot may serve as a pilot-in-command on a multi-pilot crew so long as the co-pilot is under the age of 60. Thus, the only limitation is that both pilot and co-pilot cannot be over the age of 60. This international standard became effective on November 23, 2006 and the United States must conform to the rule.

The international agreement created a bizarre anomaly in the United States. As a member, the United States had to comply with the international agreement and thus has allowed older pilots to fly within the United States on foreign carriers despite the fact that they are over 60. However, U.S. airlines continued to be barred from using such pilots, even if every record and examination showed them to be fully capable. A pilot, therefore, could be fired by an airline under the Age 60 rule and immediately fly into the same airport as a pilot aboard a foreign carrier. The FAA itself admitted that the rule was archaic and unnecessary. On January 30, 2007, the FAA administrator Marion Blakey spoke of the lack of support for the Age 60 rule at the National Press Club. *See Paul Beebe, Pilots' Age Rule Change Stirs Dissent*, Salt Lake Tribune, March 10, 2007, at 5.

Congress finally acted on the long-standing controversy in passing the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007), (hereinafter "the Act") which President Bush signed on December 13, 2007. However, unbeknownst to the vast majority of legislators, this law replaced the age discriminatory rule with new age-discriminatory provisions barring benefits and procedural rights.

Under the law, any pilot who turned 60 before December 13, 2007 loses everything: seniority, status, and benefits. The specific unlawful provisions include the nonretroactivity provision found at 49 U.S.C. 44729(e):

- 1) NONRETROACTIVITY- No 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--
 - (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or

- (B) 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 length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

49 U.S.C. 44729(e)(1)(B). Pilots can apply to come back to work, but the law actually prevents airlines from re-hiring them at their earned seniority and salaries. There is no attempt to explain why it is in the interest of air safety or the public to wipe out the benefits and status of these pilots. For those pilots who return, there are additional requirements imposed on them due only to their age.

The law not only imposes a new and arbitrary Age 60 rule but it bars pilots from any chance to seek judicial relief for such losses. Under the immunity provision, Congress mandates:

(2) PROTECTION FOR COMPLIANCE- 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 section 121.383(c) of title 14, Code of Federal Regulations (as in effect before such date of enactment), may not serve as a basis for liability or relief in a proceeding, brought under any employment law or regulation, before any court or agency of the United States or of any State or locality.

Thus, the mere fact that a citizen turned 60 on December 13, 2007 rather than December 14, 2007 is the only criteria for determining whether the citizen has access to the court and judicial relief.

The Impact of Public Law 110-135

The current law does little in terms of fairness for pilots. Rather, the primary result is the loss of lifetime seniority and benefits for pilots while denying them any chance to contest such losses. Not surprising, only two percent of the pilots (less than 60 of the 3,000 pilots) affected by the original Age 60 rule have been rehired after this legislation. Instead, some of our best pilots have been forced to move to other nations like Kazakhstan, India and Panama to fly aircraft for foreign carriers. Typical of the class of displaced American pilots is Herb Holland, who started out flying for the Marines in Vietnam and became one of the most experienced and respected pilots at US Airways. He missed the cut off date under the law by only 43 days. Holland now has to spend six of every eight weeks away from his family in Phoenix to fly planes out of Kazakhstan for Air Astana.

It is difficult to understate the impact of this law on the public and Congress. The high cost of this legislation is reflected in the fact that various senior citizen groups, veterans groups, and public interest groups have rallied against the new law. The veterans are the most affected group by the new Age 60 rule. More than 9 out of 10 of the grounded pilots are veterans of the Vietnam and the Gulf Wars. They are now being

forced out of the cockpit (and into foreign countries) without even an explanation as to why it was important to air safety that they be stripped of their hard-earned benefits and status. These veterans gave up productive years as pilots to serve the country, only to have their savings and retirement plans wiped out by arbitrary conditions buried in this new law.

The 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.

We are in the process of challenging this law before the United States Court of Appeals for the District of Columbia. Yet, the costs of this litigation will ultimately be born by the public – as they were with the Elizabeth Morgan Act. As noted below, the litigation is likely to result in the striking down of the law with the creation of precedent that will bind Congress in the future on such immunity provisions. Moreover, if successful, the case could result in further confusion in the industry and among these thousands of pilots as to the controlling rule.

Legal Challenge to Public Law P.L. 110-135

Because the pilots had pending challenges under the original Age 60 rule when the new law was enacted, the challenge to P.L. 110-135 will occur at the Court of Appeals without the delay of a trial determination. I will not lay out the entirety of our legal arguments in this letter, but I do believe that you should understand the strengths of this challenge. The most important factor is that the law imposed this punitive measure on older pilots without any explanation of its value to air safety or the flying public. Thus, even under the lowest rational basis test, the law does not contain an express or implied rationale for disenfranchising these pilots. It just wipes away their financial and professional benefits.

The law is being challenged under various constitutional and statutory provisions. For example, the law creates a flagrant policy of age discrimination – even though there is no intent by members to do so. This creates a conflict with the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, which prohibits age discrimination by employers on the basis of age. The Fair Treatment For Experienced Pilots Act does not simply allow such discrimination by employers, it orders airline companies to deny seniority and benefits to pilots based on their age. Under 49 U.S.C. 44729(e), pilots can only be re-hired if they return “without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire.” 49 U.S.C. 44729(e). There is no record or support for such discrimination as tied to a *bona fide* occupational qualification. The Act constitutes a major rollback on the statutory and regulatory scheme in place to enforce the ADEA. It not only negates the policies and provisions of the ADEA, but prevents pilots and companies from “find[ing] ways of meeting problems” over the age question through their past and future contractual agreements. *Id.*

The Act also violates the protections of the due process clause in the imposition of such punitive conditions without a hearing or any ability to contest that punitive action. See *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 459-60 (1989). It directly denies the pilots of the benefits of prior and future contracts without a hearing or compensation. Cf. *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 348-50 (1935) (holding that Congress violated due process in imposing new pension obligations with respect to past service by employees.) The Supreme Court has emphasized that “[t]he Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation.” *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). Under both procedural and substantive due process analysis, the actions of Congress violate the due process rights of older pilots.

The Act also constitutes an unconstitutional bill of attainder in violation of Article I, section 9 of the Constitution, which provides that “no Bill of Attainder . . . shall be passed.” U.S. CONST. art. I, § 9, cl. 3. The Act imposes punitive measures upon a small, definable group of older pilots who turned 60 years before December 13, 2007, but who are both younger than 65 years and seeking continued service as a pilot. For the group of eligible older pilots, the Act imposes heavy financial and administrative penalties based on their age. Congress cannot enact “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). Recently, this Court ruled that the bill of attainder prohibition applies to legislation negating prior legal benefits or rights acquired in litigation. *Foretich v. United States*, 351 F.3d 1198 (2003).

While admittedly more novel than the other constitutional violations discussed above, the Fair Treatment for Experienced Pilot Act also contravenes protections under the Takings Clause of the United States Constitution. U.S. Const. amend. V cl. 4. The clause prohibits the deprivation of private property interests for “public use” absent payment of “just compensation.” The older pilots have alleged that they have vested property interests in their seniority and benefits that have been extinguished by this Act. Congress negated these property interests to favor younger pilots who could be displaced or negatively affected by the returning pilots. Cf. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). Indeed, the result is that Congress forced older pilots who are returning to service to yield their status and benefits as a pre-condition for employment.

Any of these challenges would create binding precedent for Congress in the future – particularly in its use of immunity provisions that have become increasingly common in recent legislation. Given the complete absence of any record justifying this punitive measure against older pilots, the chances of being struck down appear particularly high.

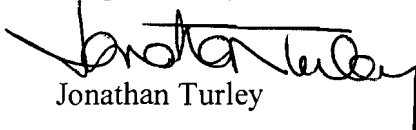
Conclusion

I have consulted with members of Congress for many years on constitutional and statutory questions. I have always taken the view that litigation should be the last option when constitutional and equitable problems arise in legislation. 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.

I have been meeting with members and staff in both the House and Senate in the last few weeks. I would be happy to meet with you and other members to further explain the necessity for a legislative correction in this area. I appreciate your attention to this matter and I look forward to working with you on a final and equitable resolution of this controversy.

Respectfully yours,



Jonathan Turley

cc: The Honorable John Conyers, Jr.
The Honorable James L. Oberstar