Twenty-Fifth Anniversary Reflections on ERISA

by Michael S. Gordon

The author reflects upon ERISA over the past 25 years. The article discusses the original goals and spirit of the statute and what ERISA has accomplished, including issues such as universality versus equity. *The history of the pension industry is presented from the perspective of the challenges of politics and personalities at the time ERISA was enacted. Finally, the author suggests that we may need to reexamine the relationship of ERISA to changes in today's economy.*

After 25 years we might find something to say against almost every provision of ERISA, and yet the great and unique value of the entire statute would remain unaffected. Despite the flaws, the legislative vision at the heart of ERISA provides a source of continual strength to all those who seek fairer, more adequate pension and health benefits and an investment regime that lives up to the highest standards of professional responsibility.

ERISA also stands out as a remarkable example of creative legislative activity during a period of almost unparalleled domestic political turbulence. Does anyone think it would have been possible to enact anything like ERISA during the past few years? Yet, we need to recall that ERISA was enacted at the height of the anti-Vietnam War protests and the drive to secure President Nixon's impeachment. Indeed, as we shall see, the all-consuming political struggle between Congress and the Nixon White House played a decisive role in the final drive for ERISA's enactment.

What is important to bear in mind is that ERISA's core principles have endured for 25 years and will still be serviceable long after the murky politics of the present period are forgotten. To understand why, we need to take a brief look at the underlying regulatory dilemma that ERISA resolved.

What ERISA Accomplished

Everyone knows that ERISA is a law that protects a worker's pension. Those who are somewhat more knowledgeable may also know about some of the key features of the law, such as vesting, funding, fiduciary standards, benefit claims procedures, defined benefit plan termination insurance, etc.

Most may also perceive that the law does not require their employer to set up a private pension plan or to keep one or to provide the same benefits as other employers. Herein lies a paradox that is taken for granted. The paradox, of course, is the mandatory imposition of substantial regulatory standards on a totally voluntary system.

When ERISA was just a gleam in the eyes of would-be pension reformers, dealing with this paradox represented a very formidable undertaking. To many it seemed impossible to reconcile the freedom to establish and disestablish plans with the need to assure that these plans would not degenerate into a shell game in which the hopes and dreams of countless Americans might be cruelly shattered.

Those who worried that a voluntary system ultimately would be put in jeopardy by its subjection to mandatory standards pointed their fingers at the many employers that had not set up a plan for their employees. How would this situation be improved, they asked, if regulatory standards were introduced that gave those employers a further excuse for steering clear of plan installation? On the other side, the advocates of a federal takeover of private pensions contended that something like ERISA had to fail because, if the standards imposed were too rigorous, employers would abandon their plans and, if they were too weak, they would not provide the necessary level of protections for workers.

ERISA proved both sides were wrong. The reformers discovered that, without greater equity, a voluntary system could not be preserved. With greater equity, a voluntary system did not have to be made universal. We already had a universal system, i.e., Social Security, and it succeeded at being universal precisely because it did not need to concentrate on equity.

The significance of ERISA is that it aimed at making private pensions more equitable rather than universal. In doing so it captured the underlying American passion for fair play, a passion that is greater than any social theory or political ideology. More than any single factor, it is this passion that will guide ERISA's future course.

ERISA and Its Critics

Which is not to say that both then and now ERISA lacked for critics. Despite the overwhelming support for ERISA in the final stages of the law's enactment, the statute was very controversial. For reasons that might baffle those not intimately involved with the legislative maneuvering, pension reform caught it not just from the business community—which seems logical—but also from a major portion of the labor movement—which seems illogical.

As between the two, the opposition from the conservative labor unions was infinitely more dangerous than that from business because Congress was controlled by the Democratic Party and, in the 1970s, these unions exercised great influence on the party, especially in the House. To counter that influence, the ERISA supporters made an alliance with the more reform-minded industrial unions, like the Steelworkers and UAW, whose members were solidly behind ERISA style legislation. This led to the somewhat anomalous spectacle of a conservative business-labor alliance lining up against a grassroots liberal labor organization coalition.

The collision between the conservative business-labor alliance and the grassroots proreform labor groups was a bruising one and left many scars, most of which have now healed. In the process the reformers learned that not every type of pension plan could be regulated in exactly the same way, while the conservative critics learned that their plans would be strengthened rather than weakened by incorporating the main reform features specified by ERISA.

As a result, only minimal interference in plan design decisions actually occurred. The legislative approach embodied in ERISA paved the way for the steady growth of private pensions in the post-ERISA period. In the long run both sides won.[1]

The Spirit of ERISA

Justice Scalia has stated about ERISA that it is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor

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of potential plaintiffs [i.e., plan participants]."[2] This is undoubtedly true; certainly the framers of ERISA went out of their way to balance the interests of participants vis-a-vis plan sponsors and to establish a system of adequate safeguards for participants without damaging the prospects for better benefits or future growth.

What is missing from these and other similar judicial pronouncements, however, is a sense of ERISA's mission. ERISA came into being because the private pension system experienced a crisis of legitimacy. That crisis was due to the fact that the law continued to treat private pensions as a form of gratuity even though by the late 20th century it was plain that concept was inconsistent with the economic realities of modern industrial life and intolerable to working people at virtually every step of the corporate ladder.

As far as pensions were concerned, ERISA's goal was to eradicate the gratuity theory. Thus, ERISA is more than just a balancing act. It has a dynamic aimed at assuring that in every dispute the ultimate question is whether the participants' interests are being treated fairly and in a way that promotes confidence that the private pension system is being run for their benefit and not just for the benefit of those who control the purse strings. Above everything else, ERISA is about making participants count.

ERISA AS A LEGISLATIVE MASTERPIECE

ERISA took close to a decade to enact. For most of that period it looked like a doomed enterprise. When I left the Department of Labor to go to work for Senator Javits and the U.S. Senate Labor Committee on pension reform, my former colleagues treated me as if I had contracted a fatal disease. They thought I had thrown my "career" away, but it would have been a "career" not worth having.

Herewith some vignettes from the extremely rocky road to ERISA's enactment.

The Problem of Dealing With the Mostly Unregulated Pension Industry

I didn't understand this problem very well when I was working on pension reform issues at the Department of Labor—there was very little contact with interest group representatives at that stage. This is how I came to understand the problem.

Within a month or two after arriving at the Senate Labor Committee I was visited by the Washington representative of the leading employee benefit trade association. He had heard that I was working up a survey on vesting practices to determine their impact on employee mobility and the receipt of pensions.[3] The purpose was to verify, if possible, the long-held suspicion that the lack of early vesting in plans deprived most employees of any chance of obtaining a private pension during their working careers.

My visitor pretended to take notes but, unknown to me, he had a tape recorder in his pocket and was busy taping away (shades of Linda Tripp!). Several weeks after that an article appeared in the trade association's newsletter. Adroitly quoting out of context some of my specific utterances on the survey, the article painted the picture of a power-mad legislative aide out to wipe the private pension industry off the face of the earth.

Needless to say, the reaction seemed paranoid besides being dishonest. *Lesson:* Just like a successful monopoly wants to stay a monopoly, an unregulated industry wants to stay unregulated and will use all means, fair, if possible, foul, if necessary, to accomplish this objective. Notwithstanding their lofty, nonprofit, social purpose aura, the pension plans circa 1970 were no different.

President Kennedy and Pensions

In 1962 President Kennedy established a Cabinet-level committee known as the Committee on Corporate Pension Funds and other Private Retirement and Welfare Programs. President Kennedy, as a senator on the Labor Committee, had tried to amend the predecessor to ERISA, the Welfare and Pension Disclosure Act (WPPDA), in order to beef it up. So he knew something about benefit plans.

Although the formal reform recommendations of the Cabinet committee never got anywhere, it was the first comprehensive effort to survey private pension problems and served as something of a road map for the subsequent pension reformers. It is commonly assumed that the event that triggered the appointment of the Cabinet committee was the notorious Studebaker plant closing that started to unravel in 1962. When the company shut down its automobile facility in South Bend, Indiana in 1963, approximately 4,400 workers with vested pension rights lost all or part of their pensions.

But Studebaker may not have been the only factor that led to the Cabinet committee. In 1962 Congress had amended WPPDA to add bonding requirements and to make theft, embezzlement and kickbacks in employee benefit funds federal crimes. Bobby Kennedy told his staff at the Justice Department to immediately ascertain whether the newly amended WPPDA could be used effectively in his ongoing war with Jimmy Hoffa Sr. and the Central States Teamsters Pension Fund.

The Justice Department sat down with the Labor Department, and the latter told the former that Hoffa's alleged misdeeds did not fit within the new criminal provisions added by WPPDA amendments. To add insult to injury, there was no federal civil authority that could be used to curtail Hoffa's questionable activities.

Bobby Kennedy was furious. He penned a nasty note to former Supreme Court Justice Arthur Goldberg—who was then secretary of labor—accusing the Labor Department staff of being totally out-to-lunch or worse, and thought Goldberg would do himself and the Kennedy administration a big favor if he got rid of the whole bunch.

Fortunately, Secretary Goldberg did not follow this advice. But the incident did convince Goldberg of the need to strengthen pension regulation, and the Cabinet committee was a useful forum for Goldberg to demonstrate to both the Kennedys that the Labor Department would not pull its punches when it came to proposals to curb pension and welfare fund abuse.

Incidentally, Hoffa was later convicted of mail fraud for the pension fund transactions that could not be targeted under WPPDA. Which only goes to show, where there's a will, there's a way.

Pensions, Politics and Personalities in the Executive Branch

When President Johnson succeeded President Kennedy, it was thought that the wave of sympathy that greeted President Johnson's ambitious legislative agenda would, in due course, encompass pension reform. Secretary Goldberg was succeeded by Willard Wirtz, an experienced Midwest labor lawyer who had been part of former Democratic presidential candidate Adlai Stevenson's inner circle of political advisors. He, like Goldberg, saw the Cabinet committee's task as being a vital one.

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Unfortunately, with the Kennedys no longer exerting influence and President Johnson preoccupied with his favorite Great Society initiatives (as well as the escalating Vietnam War), the business and labor opponents of reform saw their opportunity to scuttle the entire project. When the Cabinet committee issued its report in 1965—recommending vesting and funding reforms and further studies into the feasibility of plan termination insurance and portability—a private sector advisory board that was attached to the Cabinet committee dissented vigorously. The practical effect was to discourage the White House from giving the report serious consideration.

Wirtz, Wilbur Cohen (secretary of what was then HEW), Assistant Secretary of Treasury Stanley Surrey (a famous tax law professor at Harvard) and Manny Cohen, the chairman of the SEC and the guiding spirit of securities regulation for decades, all agreed that pension reform should not be abandoned. Notwithstanding the business-labor opposition that had surfaced, they commissioned the drafting of legislation to implement the Cabinet committee's recommendations. Wirtz put Assistant Secretary Tom Donahue (later secretary-treasurer of the AFL-CIO) in charge of the drafting.

As the drafting neared completion, Surrey paid a visit on the powerful chairman of the House Ways and Means Committee, Wilbur Mills, to see if Mills would be receptive to a Johnson administration bill on pension reform. Mills checked around and subsequently told Surrey that because of business opposition Ways and Means wouldn't touch such a bill with a ten-foot pole. Ever the pragmatist, Surrey told Wirtz to change the bill into a labor bill so that it would be referred to the labor committees instead of the tax committees in Congress.

However, Mills had also spoken to President Johnson and told him to deep-six the legislation. By this time the rift within the Democratic Party over Johnson's conduct of the Vietnam war had intensified greatly, and Johnson, who still harbored thoughts of running again, spoke to advisors about how to deal with a looming left-wing challenge to his candidacy.

They advised reaching out to business, and Johnson spoke to Henry Ford II about heading a business group that would support Johnson's reelection bid. Ford told Johnson he would do it providing Johnson dropped that blankety-blank pension reform bill. Johnson assured Ford that he would, and he did.

Ironically, the bill had cleared Johnson's budget office. When Wirtz discovered that Johnson would not give official approval to the bill, he decided to stage a revolt. He had already had sharp words with Johnson over Johnson's Vietnam policy and knew that antiwar sentiment was growing stronger everyday. To Wirtz, Johnson's retreat from endorsement of the arduously drafted pension bill was one more example of how the Vietnam conflict was sabotaging the Democrats' social policy agenda.

So Wirtz sent to Congress as a "Department of Labor" legislative initiative the bill that Johnson had repudiated. Hearings were held on the Wirtz bill in 1968, but it died shortly thereafter. And, as we all know, President Johnson decided not to seek reelection, so the services of Henry Ford II were no longer required.

At this point no one in his or her right mind would have thought pension reform had a future. But there were people who were not in their right minds about this particular subject. They worked for Senator Javits.

Senator Javits and the Legislative Branch Takeover

I have written a fair amount elsewhere about the role of Senator Javits, so I will not repeat it here. There is only one thing worth remembering: no Javits, no ERISA. It's as simple as that.[4]

It's important to recall that Javits was a minority (i.e., Republican) member of the Senate Labor Committee. The Wirtz bill was a product of a Democratic administration, shot down by a Democratic president, mainly because of business opposition whose natural allies were in the Republican Party. This meant that when Javits went after pension reform he was isolated from both the Democrats and Republicans. The only senator to support Javits in the early days was Senator Ted Kennedy, and this could have been interpreted more as a sign of respect for his brothers than as a real working political commitment.

Javits single-handedly rescued pension reform from oblivion. He did it by organizing a technical staff that knew the issues as well if not better than anyone else, by orchestrating a public campaign to dramatize the shortcomings in private pensions, by persuading his Democratic colleagues, starting with Chairman Harrison "Pete" Williams of the Labor Committee, to overcome their anxieties about the potential political negatives that might flow from their support of pension reform, by skillfully confronting and disarming a scornful but powerful opposition force in the labor movement, and by not yielding an inch to conservative business groups and their allies in the Nixon administration and the Republican Party who were determined to torpedo any Javits-originated pension bill the same way they had disposed of President Kennedy's Cabinet committee proposals.

What Javits essentially did was to take over the role of the entire executive branch and establish himself as the legitimate successor to the Cabinet committee. He courted economists, academics and pension intellectuals of every stripe in order to promote his ideas on pension reform. Regardless of the topic, when interviewed he did his best to squeeze in a word about pensions.

The price Javits paid in terms of alienating long-time political allies in business, finance and labor was high. But what most seasoned political observers regarded as a legislative pipe dream turned out to be just the opposite. What the purveyors of conventional wisdom had overlooked was the public reaction.

In Javits—not exactly the most personable of politicians—the public found the messenger, the message and their champion all rolled up into one. They knew, even if their representatives did not, that their pensions needed protection and that their economic security in retirement depended on it. To work so hard for so many years for a decent pension and then lose it all was unacceptable—indeed, it was un-American. Javits understood that and much to the amazement of everybody—probably including Javits himself—his pension reform legislation became unstoppable.

Who Rules, Labor or Tax?

It became unstoppable because business conservatives decided to use the Congressional tax committees to kill it. Joined behind the scenes by the Nixon administration, they went to the Senate Finance Committee and its chairman Russell Long in 1972 and charged that Javits and the Senate Labor Committee had trespassed on the Finance Committee's jurisdiction by sending a bipartisan pension reform bill to the full Senate for action. Annoyed by all the media attention that had been given to the Labor Committee's reform activities, Long and his Finance Committee colleagues quickly agreed that something had to be done about this jurisdictional insult.

While the White House and conservative lobbyists chortled gleefully in the background, Long moved successfully to obtain and mark up the Labor Committee bill and in no time flat reported it stripped of all its major provisions. In essence, the Finance Committee had declared war on the Labor Committee, precluding the full Senate from taking any action. Once again, a pension reform bill had bit the dust.

Or had it? Javits gave one of the angriest speeches of his legislative career on the Senate floor. Copies of the speech were sent everywhere and, when the legislators went home to campaign during the 1972 election year, they got an earful from their constituents about the Finance Committee's dirty deed.

Public outrage against the Finance Committee action liberated moderate elements in the business community who feared that an all-out war between the committees would do irretrievable damage to the private pension system and make it ripe for radical restructuring efforts. The moderates vowed to throw their weight behind the Javits approach and line up Finance Committee support.

The staffs of the Labor and Finance Committees started to draft a joint bill. In a state of shock the conservatives went into temporary hiding, where they tried to atone for their colossal blunder and figure out their next move.

In due course they decided to try a variation on the same jurisdictional tactic when the Senate reform bill passed and went to the House. There they succeeded in tying up the House in jurisdictional knots for months on end. But ultimately the deadlock was broken in favor of pension reform. Thus did the tax committees preserve their jurisdiction over pensions that otherwise they surely would have lost.

Waiting and Waiting for the White House

The reconciliation between the Senate labor and tax committees put the Nixon administration in a quandary. It had previously offered a weak vesting proposal but had rejected funding and plan termination insurance. Its fiduciary standards proposal was close enough to the Senate approach to indicate that negotiations would be about details, not major principles. But as part of a strategy to shift control over reform to the tax committees, it had proposed the first IRA legislation.

Except for those who operated on the premise that anything the Nixon administration proposed was suspect, many legislators from both parties liked the IRA proposal. Javits thought it was an important step in the right direction and that those who believed it was only of value for well-off workers missed the point. ERISA was about fairness, and it was unfair for the professional self-employed to get a tax deduction for their Keogh plans while the employed professional had nothing if his or her employer failed to set up a company pension plan.

For its part, the Nixon administration turned up the rhetoric on its IRA proposal in the wake of the Finance Committee's reversal of fortune. It insisted that the real problem was lack of pension coverage rather than loss of pensions by those who were covered. However, even the conservatives on the Finance Committee grew weary of this contention, since the Labor Committee, with some liberals holding their noses, made it clear that IRAs would be included in the package of reforms earmarked for action by the full Senate.

IRAs became so popular after ERISA passed that it is difficult to understand now why they were not proposed long before the protection of workers' pensions became the principal objective of the pension reformers. The reason is simple if not obvious: The Treasury Department opposed it because of the potential revenue loss.

Without the pension reforms stimulated by President Kennedy's Cabinet committee and converted into legislative reality by Javits and his Senate colleagues, IRAs never would have happened. It is strange to think that today an entire ideology of pension plan design and responsibility—extending even into the debates on Social Security "privatization"—originated in the Nixon administration's efforts to counter the bipartisan ERISA reforms developed in the Senate in 1972.

After some further polemics the Nixon administration finally agreed to funding requirements but refused to endorse plan termination insurance. By that time nobody cared.

The Movable Conference, or Shall the Table Be Square, Round or None of the Above

With much travail the House responded to the Senate-passed version of ERISA with a bill of its own. The killer jurisdictional issue—labor vs. tax—had been subdued on orders from high, the speaker of the House, Carl Albert. Behind the scenes, the reform-oriented unions, led by the Steelworkers, had gone to the mat with their conservative union brethren and had choked off a last-minute plot to chop the bill into pieces so as to expose its more controversial features to political attack. The AFL-CIO arranged an uneasy truce between the warring factions, but all was not well.

Unlike the Senate, the House overcame most of its jurisdictional dilemma by simply reproducing it in its bill. There was Title I, which represented the reform standards adopted by the House Labor Committee, and Title II, which represented more or less the same standards as adopted by the House Ways and Means Committee. This schizophrenic product was then presented to the Senate for conference.

The object, of course, was to make the conference so unwieldy that any practical effort to clarify the Title I-Title II format would only result in sinking pension reform into a political quicksand from which it could never be extricated. To demonstrate that this was indeed the object, the House representatives initially took the position that at conference House Labor Committee conferees could only talk to Senate Labor conferees and House Ways and Means conferees could only talk to Senate Finance conferees. Staffs of the House committees involved then took the same tack, insisting that they would only discuss the bills with their appropriate staff counterparts.

After a period of some uncertainty, this farcical posturing ceased, and it was decided that the First Amendment could be usefully applied so that staff from all the respective House-Senate committees could meet and talk with each other about anything in the bills, even if the staff of House Labor declined to talk to House Ways and Means and vice versa.

But the games still were not over. Borrowing a tactic from Viet Cong negotiators at the Paris peace talks on ending the Vietnam War, the House staff haggled among themselves and with their Senate counterparts as to the physical location of the initial meetings, the type of table to be used and who would sit where. Ultimately, this too was resolved when the conference room of the staff director of the Joint Committee on Taxation was selected. That committee was regarded as "neutral." The table turned out to be round, well, maybe oval.

If, gentle reader, you think this is trivial stuff, unworthy of our greatest legislative body, think again. This substantively empty maneuvering was designed both as a provocative probe to test the strength and "cool" of the Senate reform team as well as a signal to the diehard antireform House constituencies that their interests were still being pursued by their ever-faithful representatives.

However, it was too obvious. Even conservative senators, who had cast a vote for ERISA in the Senate after being told it would be killed by the House, felt obliged to protest the House tactics and urge the conferees to get down to business. When they finally did, the meeting venues rotated all over the Capitol but the end game was in sight, or so it seemed.

ERISA Enacted—Thank You Vietnam, Watergate and Closed Panel Legal Services Plans

While the ERISA conferees were laboring away, the government and the nation seemed to be falling apart. The Senate Watergate Committee issued its findings, and the House Judiciary Committee had commenced its impeachment deliberations. Always in the background was Vietnam; the disputes continued to rage over the peace process and the pace and manner of our withdrawal.

At some point staff wondered whether their principals would be able to focus sufficiently on the complexities of pension reform to make the crucial decisions necessary to obtain agreement and file a report. Those who still were hoping secretly to see the conference end in failure tried delaying tactics and either rehashed earlier tentative decisions or avoided dealing with certain issues altogether. Precious time was slipping away.

The Senate and House leadership had different ideas. They realized that the actions of the House Judiciary Committee made President Nixon's impeachment almost inevitable. Each assault from Judiciary further weakened the standing of the Nixon administration in the eyes of the public. The conservative opponents of ERISA could no longer rely on a Nixon White House veto threat or much else to block ERISA. They were out of running room.

The congressional leadership also wanted to dramatize the ability of Congress to function effectively notwithstanding the growing loss of public confidence in the Nixon administration. Pension reform had been a congressional rather than an executive branch initiative, since President Johnson had disapproved of the reforms proposed by high ranking members of his own administration. If Congress dropped the ball and failed to enact the popular pension bill, the disenchantment with President Nixon might spread to Congress itself.

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These factors spurred the congressional leadership to insist that the ERISA conferees stop dragging their heels and wind up the conference quickly. The time for fun and games was over; it was necessary to strike while Nixon was vulnerable.

Like the working of some obscure but inexorable Newtonian law, there was a reaction to this two-minute offense ordered by the leadership. In hardly any time at all, an attack on the proposed ERISA preemption clause was started by advocates of closed panel legal services plans[5] who contended that, unless it was changed, the ERISA preemption provision doomed their plans to extinction.

What was this all about? Nobody knew. What did it have to do with pension reform? Nobody could tell. Why was it being brought up at the 11th hour? Your guess is as good as mine. And so began the final page of the final chapter in the struggle to enact ERISA.

Nothing has been litigated more under ERISA than the scope of its preemption clause. Nothing has been written about more in ERISA law review articles than preemption. And nothing has been more detested by advocates of health insurance reforms than ERISA preemption. You can love it or hate it, but you cannot be neutral about it.

While the official ERISA legislative history does not directly link the legal services quarrel to the revision of ERISA preemption in conference, in fact that quarrel was the crucial, even though not the exclusive, reason why ERISA preemption was greatly expanded. Moreover, had it not been expanded in a way that was satisfactory to the adherents of closed panel legal services plans, the split between the conservative and liberal labor unions—that had been papered over by the AFL-CIO—would have burst out anew and would have dashed the hopes of the congressional leadership for a speedy and successful conclusion to the ERISA conference. In short, the legal services dispute was the proverbial monkey wrench in the gears.

Space limitations prevent a full exposition of the detailed maneuvering that led the key Senate conferees and their staffs to conclude that the legal services problem could only be resolved within the context of a greatly modified preemption clause—one that neither house had contemplated. Suffice it to say that those who raised the issue—which included many who had lobbied for the conservative unions in opposition to ERISA—were so pleased by the result that they now supported ERISA to the hilt.

Indeed, they got their congressional allies to proclaim that the new preemption clause was the legislation's "crowning glory." It certainly was in the sense that without it the ERISA conference would have ended in failure.

The Rose Garden Finale

The signing of ERISA by President Gerald Ford in a White House Rose Garden ceremony on September 2, 1974 was a splendid occasion. Everyone said so.

Members of Congress were beside themselves since virtually the entire Congress had been invited to the ceremony. Not only the members of the labor and tax committees but the political leadership of both houses and just about every other elected representative who had expressed an interest in ERISA (good or bad) was present.

But they were in a minority compared to the numbers of lobbyists. There were corporate lobbyists, banking lobbyists, insurance lobbyists, investment industry lobbyists, real estate lobbyists, trade union lobbyists, tax law lobbyists, senior citizen lobbyists, nonprofit organization lobbyists—well, you get the idea. I recognized many of them, but many I did not. I wondered who they were and what their ERISA role had been.

Also brought in for the ceremony were some of the pension plan participants who had lost their pensions because of a lack of ERISA type protections in their plans. They were joined by a group of Steelworkers who had demonstrated in support of ERISA at hearings held on the legislation.

The weather was stunning—a dry, picture-perfect sunshine-filled day. No one could have asked for better. President Ford signed the bill and started handing out pens. He handed out a great many of them. White House aides brought more pens when he started to run out. The people who made these pens must have been very happy.

It was fitting that President Ford was the one to sign ERISA into law. Although Ford's *personal*, as opposed to his *official*, views on ERISA were unknown, he was a very decent person and a very decent president. And that, after all, was the essence of ERISA—establishing minimum standards of decency for pension plans.

The ERISA signing spectacle was conceived and implemented as a demonstration that despite the brutal legislative battles that preceded the bill's enactment, friends and foes of the law could unite at the end and praise the contribution each side had made to making ERISA a better, more practical law. The signing ceremony was also symbolic of both the reunification of the nation after President Nixon's resignation and the government's ability to continue to function at a very high level and for the benefit of all the people.

As I started to depart the Rose Garden, out of the corner of my eye I spotted the very gentleman who four years before had surreptitiously tape recorded me in a bid to block ERISA before it could ever build up a head of steam. He was grinning from ear to ear and seemingly possessed of unspeakable delight. A great legislative victory makes converts of us all.

CONCLUSION

The enactment of ERISA unleashed two contradictory tendencies that still persist. The first, stimulated by pension rights activists, stressed the failure of ERISA to address continuing deficiencies in the private pension system, of which the most important was the asserted need to expand private retirement coverage to the approximately 50% of the workforce not covered by a private plan. The second, pushed primarily by plan sponsors and the commercial service provider network linked to the interests of sponsors, emphasized the threat to the further voluntary development of private plans created by heavy-handed regulation and frequent and complex tax law changes. Until recently, both sides took for granted that the U.S. economy would continue to behave pretty much the same as it did when ERISA was enacted. They also took for granted the central anchoring role of Social Security.

Within this familiar context a number of consequential but nonrevolutionary amendments to ERISA have been made that have either strengthened the rights of participants, such as the 1984 Retirement Equity Act, which added more vesting and joint and survivor annuity safeguards, or tightened the regulatory framework to close off potential opportunities for abuse, such as the Retirement Protection Act of 1994, which raised the minimum funding standards, or the 1986 Tax Reform Act, which significantly expanded the antidiscrimination, vesting, distribution and Social Security integration rules.

It should be noted that the only truly revolutionary concept—President Carter's pension commission's recommendation to mandate the employer establishment of a defined contribution pension plan for everyone—came to naught and the so-called coverage problem has persisted more or less in the same form that it was left by ERISA. A number of incentive approaches, based on plan "simplification" principles and/or tax inducements, have been enacted or offered, but their impact remains in doubt.

Without attempting to account for the constant stream of ERISA-related private pension proposals, the basic point should be clear: Powerful forces have precluded any drastic overhaul of ERISA, either in terms of serious expansion or of serious contraction. The question now is whether changes to the economy (and the problems with Social Security) require a new and different direction.

For my part, the answer is a qualified "yes," and elsewhere in this issue there is a brief exposition of my recommendations. But my "yes" should not be interpreted as implying that ERISA has outlived its usefulness. Rather, it is an acknowledgment that the next logical step is to reposition ERISA to meet new and unforeseen challenges. My guess is that, if all the original pension reformers were still on the scene, they would be exchanging their first drafts right about now. ◀

Endnotes

1. However, the first major amendment after ERISA, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), while seemingly cut from the same cloth as ERISA, in fact considerably slowed down the post-MPPAA development of multiemployer plans. The irony is that MPPAA probably does a better job of regulatory control than ERISA. However, it left multiemployer plans with far less breathing room and thereby discouraged new employer entrants to the plans.

2. See *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2071 (1993).

3. The survey ultimately appeared in a Senate Labor Committee report and indicated that in the sample of pension plans studied, only 5% of the employees covered by the plans since 1950 had ever received benefits, only 8% had ever qualified for benefits, and that a substantial number of these forfeitures involved long-term workers. See S. Rep. No. 92-634, 92d Cong., 2d Sess., 64 (1972).

4. Actually, no Frank Cummings, no ERISA, because Cummings, now a well-known Washington, D.C. ERISA attorney, was the original Javits legislative aide who got Javits interested in pursuing pension reform.

5. Closed panel legal services plans limited participants in such plans to legal representation by lawyers designated by the plans. At the time of the ERISA conference, such plans were under attack by state bar associations that contended states should bar such plans if they restricted a participant's choice of a lawyer.