

## PANEL 2: MAKING SAUSAGE – THE NINETY-THIRD CONGRESS AND ERISA

### MODERATORS:

*James Wooten, Professor of Law, SUNY Buffalo Law School*

*Damon Silvers, Policy Director and Special Counsel, AFL-CIO*

*Judy Mazo, past Director of Research, the Segal Company*

### PANELISTS:

*William J. Kilberg, past Solicitor for the U.S. Department of Labor*

*Jack Sheehan, past Legislative Director, United Steelworkers of America*

*Robert Nagle, past Executive Director, Pension Benefit Guaranty Corporation*

*Russell Mueller, past Staff, U.S. House Committee on Education and Labor*

**James Wooten:** So this is Panel Two, about “making sausage” in the Ninety-third Congress, which is the Congress that passed ERISA. Let’s just frame where we are at this point. In the first panel you sort of learned what events gave rise to concerns about three sets of problems: (1) that pension plans often defaulted to workers who were in the plan; (2) that people would mismanage or steal assets held for the benefit of workers; or (3) that workers would work for a long time, change jobs, quit, get laid off or something, and forfeit their benefit accruals. So we’ve learned about how those became issues that were on the public agenda and how some of the responses to those were developed.

The state of things by the Ninety-third Congress is this: there’s broad support for disclosure reforms to amend the Welfare and Pension Plans Disclosure Act – which was the bill that was in place before ERISA – fiduciary reforms, mandatory minimum vesting rules, and – less so – but there’s still pretty broad support for having mandatory funding rules. But as we’re going to see in this panel, agreement that reforms should take place was a very different thing than agreement about who ought to do it. Should it be an independent agency? Should it be the Department of Treasury and the IRS? Should it be the Department of Labor? And the particular mecha-

nisms—should we use the Internal Revenue Code to pass these reforms? Should we use the federal labor laws to implement these reforms?

In terms of administration, control of the legislation, there were fights between committees and agencies. You had several options. One was the option that Frank [Cummings] discussed, which was having an independent agency that was devoted solely to pension plans and did everything for pension plans. Another was to have a single agency do things. You could have pension plans and welfare and benefit plans taken care of by the Department of Labor or the Treasury Department. You could have both Labor and Treasury doing it and have Labor doing some things and Treasury doing other things. Or you could have what ERISA did, which was that Labor and Treasury end up sharing control of the funding rules, the vesting rules and things like that, which creates pretty complicated problems in implementation. And so one of the things we want to talk about here is why were some of these options abandoned, and why were others adopted?

Second, there were two issues that were very contentious for which there was not a great deal of support. One of those was termination insurance. The business community was still hostile to termination insurance in the Ninety-third Congress, as was the craft union multiemployer part of the labor movement.<sup>1</sup> The second issue about which there was a great deal of contention was portability: should there be some kind of centralized portability arrangement that would allow workers who left one job to move and sort of use this centralized portability mechanism to carry their benefits with them from job to job?

Those are the basic topics we have on our agenda. We'd like to start by having each of our panelists, as in the last panel, spend a couple of minutes describing how they got into the employee benefits area, what jobs, and what roles they were in that got them into employee benefits. So, we'll start with Bill Kilberg on the right.

**William Kilberg:** My involvement in the employee benefits field really came in two tranches. One was when I came into the [Labor] Department in the fall of 1969 as a White House Fellow, and George

---

1. Craft unions—for example, unions that organized workers in the construction trades—generally provided pensions and welfare benefits via multiemployer, rather than single-employer, plans. See JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 37–39 (2004). In contrast to industrial unions such as the Steelworkers and Auto Workers, which strongly supported termination insurance, many craft unions were skeptical of or hostile to termination insurance. See *id.* at 142, 226–27.

Shultz was Secretary of Labor. And the second was when I became Solicitor of Labor in April of 1973. Let me just take a minute and give you a little bit of a flavor of both periods. In the fall of 1969, there was a new administration that saw itself as a reform administration. For some of you that may sound strange, but in fact if you think back to the Environmental Protection Agency, clean air, clean water, occupational safety and health, and a whole host of other areas including, finally, desegregation of Southern schools, that all was on the Nixon Administration's reform agenda.

One of the reforms they had in mind was in the pension area. But their notion of reform was much more limited than what we have come to see in ERISA. It really was in terms of protection measures and in that regard you had people like Arthur Burns, who was in the transition for the Nixon team, and then George Shultz as Secretary of Labor, both of whom had spent time in the Eisenhower administration and had been involved in attempts to pass and then to reform the WPPDA – the Welfare and Pension Plans Disclosure Act.

So they had a view of the world that came from that perspective. In that regard, just by way of laying a foundation, because I wasn't a decision maker of any kind at this point, but I was an observer, and most of my activities were writing speeches for the Secretary, drafting testimony for the Secretary and the like, I had an opportunity to sit in on a lot of discussions. There was a task force; the administration had a blue-collar task force, and Jerry Rosow, who was the Assistant Secretary for Policy Evaluation and Research, was really the key person on that. Larry Silberman, who was then the Solicitor [of Labor], also spent a fair amount of time on it. And Peter Henle and Henry Rose were there as carryovers from the prior administration.

That's another thing a little unusual in today's world. We had lots of carryovers. Jack Gentry, who was the Executive Assistant to the Undersecretary, had the same job in the Wirtz<sup>2</sup> administration. Things were far less polarized than they are today and you have to put yourself in that mindset.

Peter [Henle], who had been at BLS [Bureau of Labor Statistics], was very much involved with working with Jerry Rosow, and by the spring of 1970, Jerry came out with an internal report at the Department of Labor, in which he recommended that we add vesting and funding to our pension reform proposals and that we engage in more study with regard to termination insurance and porta-

---

2. Willard Wirtz, U.S. Secretary of Labor from 1962–69, was a strong supporter of legislation to regulate private pension and welfare plans.

bility. Just want to lay that out there, that was an interesting change that I saw in about nine months' time.

Move ahead now. I left the department in September of 1970. I was with the Federal Mediation & Conciliation Service, its general counsel, and came back as Associate Solicitor for Labor Relations and Civil Rights and became Solicitor on April 6, 1973, four days before I appeared with George Shultz at the Treasury Department. Shultz was now Secretary of the Treasury. Peter Brennan was Secretary of Labor.

I appeared with Secretary Shultz to introduce the Administration's bill, our 1973 Pension Reform Bill,<sup>3</sup> which was part of a larger trade package that the administration was introducing. I was briefed by Henry [Rose] and told all about the Rule of 50<sup>4</sup> and I had to learn all this stuff in a couple of days. I was told about termination insurance only to find out right before I went over to Treasury, Henry came in and said, "Forget termination insurance! It's off the table!"

We went over, and did the briefing with Secretary Shultz. I've got a nice picture of myself with the Secretary, it appeared in the *Washington Post* on that day, and then I went looking for Ken Dam, who was the Deputy Treasury Secretary, to find out what happened to termination insurance. I'd just spent twenty-four hours learning about it and now it was off the table. He told me that it had gone to the President, and the President rejected it, that it was Nixon himself who rejected it and rejected it on the grounds of moral hazard,<sup>5</sup> that was the concern.

Steve Sacher was my Executive Assistant. I appointed Steve as Executive Assistant. I appointed Henry and Steve to run our task force on pension reform. Steve later told me that he had talked to a high-level person at Treasury who told him that termination insurance was killed by somebody at OMB [Office of Management and Budget]. I will never know what actually occurred, but those are the stories that I heard.

---

3. S. 1631, 93d Cong. (1973), reprinted in 1 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 325 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY].

4. See *id.* § 2(b) (adding § 401(a)(12)(A) to the Internal Revenue Code), reprinted in 1 ERISA LEGISLATIVE HISTORY, at 328-29.

5. See Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65, 68 ("[T]hose who are insured against certain risks have an incentive to use less than optimal care to avoid those risks."); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 109 (7th ed. 2007) (defining "moral hazard" as "[t]he tendency of an insured to relax his efforts to prevent the occurrence of the risk that he has insured against because he has shifted the risk to an insurance company.").

Just again by way of laying a foundation to give you an idea of what things were like, in April of 1973 the Administration was still at its apex. You'd had the Watergate break-in and you'd had the election, but nobody thought it was going to go where it went. There was a lot of hubris. There was very strong control from the White House over the agencies. There was an attempt, in fact, to reorganize the government, to strengthen the White House administration and to change the agency structure.

We were going to have super-cabinet secretaries over cabinet secretaries and the Labor Department was reasonably low down on this totem pole. We were not an agency that was viewed with a great deal of respect, either by the business community or by the White House. There was also an attempt to create a new Republican majority, which had both a Southern strategy to it and an organized labor strategy. Of course we'd had a lot of support from organized labor in the election of 1972.

Our new Secretary, Peter Brennan, came out of the building trades in New York. He had been head of the painters union. His part of the building trades was a part where benefits were virtually unknown and not desired. People were still paid with cash. The shop steward would come around every week and pay everybody out in cash and that's the way the men wanted it, and they were only men.

Pete Brennan had a building trades perspective. It was not Jack Sheehan that he looked to for organized labor's perspective on issues, it was Andy Biemiller.<sup>6</sup> Those were the days before the break between Brennan and [AFL-CIO president] George Meany that occurred a little bit later over the Fair Labor Standards Act, and Biemiller, who was the senior AFL-CIO legislative aide, represented Meany's views, which were cautious and somewhat conservative when it came to pension reform.

So that's kind of where we were at that time. I think George Shultz was supportive of stronger funding provisions, and was willing to consider some sort of limited termination insurance. He was still very much concerned about moral hazard from my conversations with him. But he felt if we were going to have termination insurance, its administration had to be housed in Treasury because, even though he'd been Secretary of Labor, he thought you couldn't really trust the Labor Department to administer termination insurance in a way where the moral hazard wasn't going to be greater—that is to say where Labor and Management would be permitted to create a benefits structure that would not be properly funded and al-

---

6. Andrew Biemiller was Director of the AFL-CIO's Department of Legislation.

lowed to take advantage of termination insurance to do that. That was the mindset. That's where we were when I became Solicitor in the Spring of 1973.

**James Wooten:** Bob Nagle.

**Robert Nagle:** My involvement with ERISA came about as a result of being General Counsel of the Senate Committee on Labor and Public Welfare, as it was then named, in the early 1970s. In 1970, the Senate passed a special resolution which came with extra funds, which was important, authorizing the Senate Labor Subcommittee to conduct, among other things, a study of pension and welfare plans. That money was used to develop a small staff that was then devoted to the ERISA effort and that staff carried out the hearings around the country that Frank talked about earlier,<sup>7</sup> which were very important in generating public support and press attention and consequently resulted in eventual support by many members of Congress. And it also developed proposed legislation, and commissioned some special studies relating to issues like vesting.

My own direct involvement came about in 1973 and 1974. In '73, the Senate Labor Committee had reported out a bill, as had the Senate Finance Committee, and I was part of the negotiations between the staffs of the Labor Committee and the Tax Committee to work out an agreed upon joint bill that could then pass the Senate – which it did.

I stayed directly involved during 1974, after the House passed its bill and the two houses went to conference over their respective versions, and I suppose you'll hear more about that conference. It was a long and very contentious process. Five years after ERISA was passed I got appointed as Executive Director of the Pension Benefit Guaranty Corporation, so I had the opportunity to try to administer an agency whose legislation I had been involved in drafting and of course wondering why we hadn't done it better then. [Laughter]

**James Wooten:** Russ Mueller.

**Russell Mueller:** Well, now I'll tell you why. [Laughter]

I was a group health actuary in the mid-sixties in New York and I gravitated to pension consulting and I got this call out of the blue

---

7. See Remarks of Frank Cummings, in Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 285-86 (2014).

from Washington and the Chief Actuary of Social Security said, "Russ, I need you here in Washington." I said, "For what?" He said, "We have a new program." "What's that?" "Medicare." So, I was one of the first Medicare actuaries and I was not only projecting what I saw as the coming insolvency after a number of years. I can tell you we knew back then that there were problems afoot and that's when they changed the seventy-five years to twenty-five years in the Trustees Report, compliments of the Nixon administration at the time. So you were right—Nixon was the one. [Laughter]

There were two fine gentlemen from the Hill. They were the attorneys Vance Anderson and John Smokevitch,<sup>8</sup> and they came down the Hill. I was working at the foot of the Rayburn Building at the time and they said, "We need some help on pension reform," and having a pension background, they asked for my assistance. I spent about a thousand hours of my own time assisting them and we'll get more into the cost of vesting and framework and so forth with regard to that, but John Smokevitch left. Vance said, "You should come up here." And I'll never forget [Congressman] John Erlenborn,<sup>9</sup> who was a ranking member on the General Labor Subcommittee who induced me to leave SSA and come up to the Hill. That was a subcommittee that got the extra funds from House administration to form this bipartisan Pension Task Force headed by [Congressman] John Dent<sup>10</sup> of Pennsylvania.

I said I'll take over Smokey's part. John Erlenborn always would talk about this afterwards. He said why John Smokevitch quit is, "Pension law is going to pass in a few months, I'll be out of a job." I guess I wrote myself into a thirty-year job on the Hill.

There were three rules that Vance Anderson—God rest his soul—taught me, which probably assisted me to stay up there thirty years. The first was jurisdiction is number one, and we'll be discussing that in great detail. Number two, he said, "Don't ever talk to the public and reporters on the record." So here I am—what can I do now? So that rule I guess will be broken actually for the first time. Thirdly, he said, and I wish all the staff would adhere to that to this day, "They're the members, you're the staff, don't pretend you're a

---

8. Vance Anderson and John Smokevitch were members of the staff of the House Committee on Education and Labor.

9. See Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 288 n.32 (2014).

10. Congressman John Dent (D-Penn.) was a member of the House Committee on Education and Labor and chairman of the General Subcommittee on Labor. He was an early supporter of legislation to regulate private pension and welfare plans and played a central role in the events that led to the enactment of ERISA.

member." But I have to break that rule today, I'm sorry, or the truth won't be all told.

**James Wooten:** And Jack Sheehan on my left.

**Jack Sheehan:** Thank you, I must say that when I retired I'd been working with the Steelworkers for forty-two years, but during all that time—I'd come off a merchant ship prior to that—during all that time with the Steelworkers, the most disagreeable, hardest time of my life was working on pension reform. [Laughter]

And here I find myself this morning, or this afternoon, back in that same mire or whatever—very, very, very difficult. I told Jim that I was going to read something from his book, which I have in front of me. I told him earlier on that when he had sent the copy of the book to me, I started to read it and stopped. This is almost ten years ago when you wrote the book, and I stopped reading it because I didn't know what he's talking about. And if I ever knew at the time I would have backed out of this field and wouldn't have been in it at all.

I'm going to make this quote since Frank Cummings alluded to it.<sup>11</sup> When Javits<sup>12</sup> proposed his first pension reform bill in 1967, he addressed it to the "insiders"—and you know what I'm talking about now—of pension policy-making, with "specialized knowledge or significant experience in the field."<sup>13</sup> The article goes on to say, however, Javits realized he was talking to the insiders and he wasn't going to get very far talking to the insiders. So he shifted to the "outside strategy of coalition building," requiring a completely new vocabulary.

Now if you weren't one of the insiders it was very difficult to understand the vocabulary that was being used, and this morning there was a lot of vocabulary, and after twenty years away from this legislation, I need a new dictionary. [Laughter]

This passage concludes, "It is time we stopped thinking about pensions as an esoteric specialty reserved for a select 'priesthood' of actuaries, consultants, insurance experts and other technicians . . ."—it doesn't say lawyers but I think he means that also—" . . . and started thinking of pensions in human terms."

---

11. See Cummings, *Setting the Stage*, *supra* note 7, at 285.

12. Senator Jacob K. Javits (R-N.Y.) was a member of the Senate Committee on Labor and Public Welfare. In 1967, he introduced the first comprehensive legislation to regulate private pension and welfare plans. He later played critical roles in generating public support for pension reform and in the enactment of ERISA.

13. See WOOTEN, *supra* note 1, at 158.



Certainly back at that time in the Congress we were coming out of a period, I would say, of a lot of social legislation. And being one of the CIO unions the whole idea of social justice was very strong in what we were being involved in. Then all of a sudden we're moving into this new category of social legislation. You were right to the extent that there was so little drive from the outside with regard to pension legislation.

I remember Phil Murray, President Murray of the Steelworkers and the CIO. With regard to pensions and funding thereof, he made a comment that he was not interested on how these pension promises were being funded, that was an obligation of the companies and we didn't have to track that. Obviously at the time of negotiations our actuaries and economists would try to figure out how much it was costing the companies, if you wish, to fund these pension liabilities. We never knew and I must say from the little experience that I had with that we were not much interested in it. That was the obligation of the companies to provide this and all Murray wanted to make sure is we got our benefits.

That may be because, to a large extent, the Steelworkers were single-employer plans, whereas with multi-employer plans obviously you've got to co-partner with the union there and you have to know what the cost was. So to a large extent that was not our obligation to figure out what was going on with these plans. So, when this legislation hit Congress, they were talking about vesting and funding; that was not something that was of immediate interest to us.

The other thing, however, is when the Congress started talking about the insurance of these pension plans. That strikes a very strong bell, and you're right to a large extent. There was very little union support for all this beforehand, but once in this area you talk about something that was of immediate interest to an individual working person, then that started a momentum going.

I remember that during the years up there, we used to bring busloads of people to Washington, around maybe a thousand, we rung the Capital at one time, it was if you wish, a picket line. But it was legislation that meant something individually when you talk about re-insurance. It was hard to talk about things that the panel was talking about this morning, very difficult. It was most difficult on the union's lobbyists in Washington to understand what that was all about, but the ingredients, the basic part of this thing, was the social justice of the insurance and the reimbursement.

**James Wooten:** Jack, I think we can come back to that. We're going to talk about termination insurance later, so I'm just going to shift on over and talk some about jurisdiction.

**Jack Sheehan:** Sure, ok.

**James Wooten:** As I said, one of the really controversial issues that arose during the Ninety-third Congress was who should administer this program and why shouldn't we adopt an independent agency. So I was wondering if any one of the panelists wants to talk about why there was such conflict? Some people wanted Treasury, some people wanted Labor, what were the sources of the conflict over who should do this that left us with this shared arrangement?

**Robert Nagle:** I'll comment somewhat on that. Just for a moment, for those of you who may be a little remote from some of this, there were four committees of Congress involved: the Tax and Labor Committees of each the House and Senate. In both the House and the Senate, the Labor Committees attempted to move forward with ERISA legislation without the involvement of the Tax Committees. That could not be done.

As many of you are aware, there is almost nothing more sacred in Congress than committee jurisdiction. If one committee encroaches on the jurisdiction of another, there is bound to be a great deal of pushback, sometimes very severe pushback. This is what happened in spades with ERISA. Much of the story of ERISA's passage necessarily becomes the story of the clash between the Tax and Labor Committees and how that was resolved.

The administrative jurisdiction was necessarily attached to committee jurisdiction. Prior to ERISA what regulation there was of pension plans, mainly with respect to vesting and funding, was done by the IRS in connection with the plan qualification rules.<sup>14</sup> That was tax business. That was the business of the Tax Committees, and they were not going to let go of that jurisdiction.

In the Senate, the Senate Labor Committee had first reported out a bill<sup>15</sup> in 1972, and we had a rather unpleasant encounter with the Senate Finance Committee over that. The result of that was killing the legislation for the Ninety-second Congress. I must say, when the

---

14. See Remarks of Daniel Halperin, in Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 273-75 (2014).

15. S. 3598, 92d Cong. (1972).

Senate Finance Committee did what it did and essentially rejected the legislation, there was a huge outcry about it, and there were a number of members of the Finance Committee who felt very uncomfortable about that result themselves.

So, in 1973 the Labor Committee again reported out a bill<sup>16</sup> and the Senate Finance Committee a few months later reported out a bill<sup>17</sup> that included just about all of the reforms, including termination insurance, that the Labor Committee bill had included, with the catch that participation and vesting and funding would be administered by the IRS. In the Senate, Senators Javits and Williams<sup>18</sup> from the Labor Committee, who had wanted Labor Department jurisdiction over those items, were realistic and knew that IRS jurisdiction over those features was going to be the cost of getting a bill. So we had a couple of weeks of negotiating between the versions of the Senate Finance Committee bill and the Senate Labor Committee bill in 1973. We quickly came to agreement, which was easy to do, as long as we were willing to let IRS have jurisdiction over participation, vesting, and funding, and a jointly agreed Senate bill was passed in September '73.<sup>19</sup> It then went to the House and the history there was unfortunately very, very much different.

**James Wooten:** Let me just refer to Jack [Sheehan] for a second. Jack, I know that the conflict over agency jurisdiction and committee jurisdiction really ended up making your job difficult in 1973 because there was a split in the AFL-CIO. I wonder if you have any recollections of that. There was a split between the Steelworkers and the AFL-CIO about who should have jurisdiction.

**Jack Sheehan:** Well, let me answer that a different way. While he was talking, I was thinking about what my answer to the question of the split would be, and in a way it's much more simple. You go where your friends are on the Hill, and labor had a particular interest in the Labor Committee and we obviously would like to keep legislation within the jurisdiction of that committee. Obviously be-

---

16. S. 4, 93d Cong. (as reported by S. Comm. on Labor and Pub. Welfare, Apr. 18, 1973), reprinted in 1 ERISA LEGISLATIVE HISTORY, at 389.

17. S. 1179, 93d Cong. (as reported by S. Fin. Comm., Aug. 21, 1973), reprinted in 1 ERISA LEGISLATIVE HISTORY, at 780.

18. Senator Harrison A. Williams (D-N.J.) was chairman of the Senate Committee on Labor and Public Welfare when Congress passed ERISA. He was an early supporter of legislation to regulate private pension and played a leading role in the enactment of ERISA.

19. H.R. 4200, 93d Cong. (1973), reprinted in 2 ERISA LEGISLATIVE HISTORY, at 1883.

fore that you had the Landrum-Griffin Bill,<sup>20</sup> so we were well aware of that committee.

Basically it was, from my point of view, not the Ways and Means Committee to which labor was oriented, it was oriented to the Labor Committee. Hence our position was basically, I think, based on that attitude.

**James Wooten:** But the Steelworkers were actually in a fight with the—

**Jack Sheehan:** —Okay, yeah—

**James Wooten:** —They were willing to accept Ways and Means and the AFL-CIO wasn't.

**Jack Sheehan:** Yeah. Somehow you have the questions coming out a different way. The issue came down, I think, fundamentally to the fact that the Ways and Means Committee was the committee of jurisdiction with regard to tax laws. The pension reform bill had substantial involvement with the tax system. AFL-CIO oriented toward, as I was saying, to the Labor Committees. It was not going to desert the Labor Committee. But the Steelworkers, UAW, said, "We're not going to get anything passed in this Congress, it's impossible to pass it with the Ways and Means Committee also seizing jurisdiction." And if the Labor Committee, the AFL-CIO and Andy Biemiller, as you mentioned, if he had continued opposition to moving this into the Ways and Means Committee, labor was strong enough to stop the bills from passing in Congress. And hence, the Steelworkers were very much involved and interested in the insurance program, and if all it meant was sharing the jurisdiction, then why not do it.

I guess to go complete stories on this you're supposed to kiss and tell and I don't know if you should do this, but nevertheless, we wrote a letter to [George] Meany and saying we would disaffiliate from the AFL-CIO. Kind of unheard of and—

**Damon Silvers:** That's not true, people do that all the time. [Laughter]

**Jack Sheehan:** At that time. We had just come together, the AFL and the CIO, and it was a very interesting meeting we had with

---

20. Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

Meany and just the Steelworkers and the building trades and he then at this very short meeting. I think it was on a Saturday morning. We stated our case that we needed the bill, we needed legislation passed, it's not going to pass if we maintain opposition to the Ways and Means Committee. So Meany simply turned to Andy Biemiller and he said, "Andy, go up and tell them that we're now supporting both jurisdictions."

The meeting ended and that was the end of it. We had no ideological feeling about this thing. It was just that on the Hill the bill would not pass. You had to make it—nowadays we talk about compromise—but you had to accept reality. Reality meant the two committees. If you were ideologically committed to one committee, you weren't going to get anywhere.

**James Wooten:** Bill?

**William Kilberg:** Just a few thoughts. At this time, 1973–74, the Commerce Department was much more powerful than when you think of the Commerce Department today. Today we perceive the Commerce Department as limited to the Weather Bureau, because all of their major trade functions have been taken over by independent agencies. But in those days Commerce was powerful. We [the Labor Department] were still at Fourteenth and Constitution. They were right across the street. It was the battle of Fourteenth Street, and they were much more conservative than we were. As a result of people like Peter Henle I mentioned earlier and Henry Rose, there was a rethinking at the Department [of Labor] and much more willingness to consider the legislative approach that Willard Wirtz had fostered. That wasn't true at Commerce.

That was a real battle. OMB, which was relatively new, created in 1970, played a significant role. Matt Lind, who later became executive director of the PBGC [Pension Benefit Guaranty Corporation], and Colin Blaydon, who was later dean of the Tuck School at Dartmouth, were both key players in finding compromises. While there was a lot of tension between Labor and Treasury and it got more severe as we got closer to legislation because you had different views of how this would work and you had interagency jealousy. But at the outset, because [George] Shultz was Secretary of Treasury, there was a lot less tension there than you might have thought, and more of it was coming from the Commerce Department.

One other point I would make is the brilliance of Jacob Javits. I mean, look, we've all recognized this and you recognize in your book, this is a bill that never should have come into being. This had

no support. Frank [Cummings] says it only had the people. Yeah, but it only had the support of the people because Javits made that happen. He used money that he shouldn't have had from the investigation of the Mine Workers and the Yablonski killing in 1969; then held hearings around the country; Frank described all the details of how they worked that.<sup>21</sup> That resulted in the elections of 1972, which were not favorable for those who were opposed to pension reform. There's a senator from Iowa who got defeated; he was an out front fellow, [Jack] Miller I think his name was. Russell Long<sup>22</sup> then appointed Gaylord Nelson of the Finance Committee, who also sat on the Labor Committee, and who was very pro-pension reform, to spearhead the Finance Committee's bill. So that's what made the difference in the Senate. The House, of course, was a much more difficult situation where you had [Ways and Means Committee chair] Wilbur Mills and John Dent at each other's throats, but even there you had a stroke of luck when Wilbur Mills got sick and was unable to continue. [Laughter]

**James Wooten:** Let me then ask Russ to comment since he was sort of in the belly of the beast at this point.

**William Kilberg:** It was that as well. [Laughter]

**Russell Mueller:** Yeah, jurisdiction is number one. That's where I came in. The momentum was from the Senate. You had H.R. 4200,<sup>23</sup> which was held at the desk [of the Speaker of the House when it arrived from the Senate]. And the [House] Labor Committee, our pension task force, the Republicans and Democrats, cut their deal. We had a bill. There's another little aspect of plan termination insurance that we can discuss under that topic regarding jurisdiction and so on—that put a little snag in there, but ultimately there was one bill reported by committee.<sup>24</sup> The jurisdiction was solely under the Labor Department for all the standards, and that bill then stood in the way of Ways and Means. But I guess I would postulate today looking back: where were all the hearings by the Finance Committee? Where were all the hearings by the Ways and Means Committee?

---

21. See Cummings, *Setting the Stage*, *supra* note 7, at 285.

22. Russell B. Long (D-La.) was chairman of the Senate Committee on Finance.

23. H.R. 4200, 93d Cong. (1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, at 1883.

24. The House Labor and Education Committee reported its pension reform bill on October 2, 1973. See H.R., 93d Cong. (as reported by the Educ. and Labor Comm., Oct. 7, 1973), *reprinted in* 1 ERISA LEGISLATIVE HISTORY, at 2181.

Where were these hearings discussing tax abuse and the need to reduce contributions to lower the deficit, et cetera? I could go on, but nonetheless —

**Judy Mazo:** They were waiting for 1982.

**Russell Mueller:** Yeah, until the '80s. We'll discuss that. But that wasn't there, but the jurisdiction was standing in the way. Al Ullman stepped in as temporary chairman of the House Ways and Means Committee, and we had competing bills at that point. Larry Woodworth, the Staff Director of [the] Joint Tax [Committee] at the time, wore multiple hats. So he could wear his Senate Finance hat and cut a deal with the [Senate] Labor [Committee] folks — sorry Mike Gordon isn't here to discuss that aspect. But Larry Woodworth wore his Finance hat in negotiating there. When he came to the House, of course, he had his Ways and Means hat on. But we had this internecine warfare between the two committees, jurisdiction being key as I said.

So there wasn't going to be legislation, as Jack [Sheehan] intimated, unless there was some accommodation regarding jurisdiction. Both [Al] Ullman and John Dent went to the Rules Committee and there they made their case, you know, "We can't have the other." And the Rules Committee said, "You're going to have to. Come back to us."

But the word had come down from higher sources, "We're going to have pension legislation." That word came from [Al] Ullman to Larry Woodworth, and Vance [Anderson], I, and Larry Woodworth sat down and other staff. Very few other staff came to the negotiations other than his [Woodworth's] staff, and a couple of IRS people. And we basically drafted the House bill because Larry at that point really was looking towards conference, so he wanted a final bill.

This is often the way it is. The Senate gets the credit. It's the "William-Javits" bill, and all the fine detail and real work gets done in the House. [Laughter]

**Judy Mazo:** It actually got done in conference, as I understood, by everybody. Your perspective, Bill, was particularly illuminating. We hear all of this battle between [the] Tax and Labor [Committees] and the interest groups of tax and labor. Did it matter that Javits was a Republican or was the party differential really irrelevant and it was the tax orientation and —

**Russell Mueller:** I didn't see that it was a party issue per se. I think in the Senate hearings and in the House hearings—these hearings were held in Democratic districts, Republican districts—the issues were the same. I mean I had to excuse myself from a number of them. I just have such a soft heart. Listening to people have their entire future taken away from them. There was a need, and there was a recognized need. Dan Halperin and his folks<sup>25</sup> and Henry [Rose]<sup>26</sup> had already set the stage before with legislation without the public support. But the hearings got the attention of the politicians.

NBC had a special called *Broken Promises*,<sup>27</sup> which kind of damned the whole private pension system, and at that point it kind of spurred John Erlenborn and Republicans in the House to come to the defense of pensions: “Look, there are things that need to be fixed, but look at the retirement security that it has brought people. We need to remedy the defects, but we want to encourage the future of the retirement system. We want to strengthen the three-legged stool of Social Security at the time and private pensions and then private savings.” The only real tax issues that came to the fore were from the administration, from Dan Halperin's shop [Treasury]: “Let's have tax fairness. People who don't have a pension, let's get them into an individual retirement account and raise the limits for Keogh plans.”<sup>28</sup>

That momentum from the Senate created this cauldron, and there had to be a resolution and it came from on high, the pressure. The result was we actually did have two bills—H.R. 12906<sup>29</sup> and I think it was 12855<sup>30</sup>—that both committees had identical language in certain minimum areas and fiduciary standards, prohibited transactions were in the code, but all the rest of the fiduciary standards

---

25. See Remarks of Daniel Halperin, in Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 272-73 (2014).

26. See Remarks of Henry Rose, in Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 271 (2014).

27. *Pensions: The Broken Promise* (NBC television broadcast Sept. 12, 1972), available at <http://archives.nbclearn.com/portal/site/k-12/flatview?cuecard=57200>.

28. In December 1971, the Nixon administration submitted legislation, H.R. 12272, 92d Cong., 1st Sess. (1971), that proposed individual retirement accounts and increases to the existing contribution limits for retirement plans sponsored by self-employed persons (so-called Keogh plans). For discussion, see WOOTEN, *supra* note 1, at 174-76.

29. H.R. 12906, 93d Cong. (1974), reprinted in 2 ERISA LEGISLATIVE HISTORY, at 2761. H.R. 12906 would become Title I, the labor law title, of H.R. 2.

30. H.R. 12855, 93d Cong. (1974), reprinted in 2 ERISA LEGISLATIVE HISTORY, at 2924, would become Title II, the tax law title, of H.R. 2.



were in Title I of ERISA. And it was resolved in that fashion as well as administration-wise.

**William Kilberg:** I think in answer to your question, Javits clearly was more liberal than most other Republicans, and he did stand outside in that regard, but he was highly respected. And if you look at people like John Erlenborn in the House, Al Quie,<sup>31</sup> others who were much more mainstream Republicans at the time, you see that it truly was a bipartisan effort. And as Russ said, the brilliance of Javits is that he used the public. He knew how to get this done and got the support. And within the Administration, I mean, what the Commerce Department was doing was saying, “Look at the studies.” And there was a study done. Ken Dam, I think, chaired the committee that did a study, and they concluded that if you just looked at the statistics, the numbers of plans that terminated were relatively few. The people who lost benefits were relatively few. But when you went to the hearings and you heard about the impact on those relatively few people, it was pretty severe. It allowed the Labor Department and Javits to turn around and say, “You know, you’re right, it’s not going to cost all that much so why don’t we do it because these people are really getting screwed.” That just changed the whole tone of the debate.

**Judy Mazo:** To what extent was there parallel pulling and hauling at the administration level as compared with the congressional level?

**William Kilberg:** It was a lot. But it decreased as we went into 1974. As Watergate became more serious, the White House was focused elsewhere and had less interest in and less ability to resolve inter-agency disputes. I’ll tell one of Henry Rose’s favorite stories—there was concern about litigation authority. Larry Silberman, who had been one of my predecessors as Labor Solicitor and was now Deputy Attorney General—and as Larry would say, “Where you stand depends upon where you sit”—Larry was absolutely determined that litigation authority was going to be with the Department of Justice and not with the Department of Labor, in spite of his prior Labor Department affiliations. I was just as determined that it was not going to go that way.

Larry sent an Assistant Attorney General for Legislation to sit in for the whole month of meetings that the staff was having and the conference committee that put the bill together. But I was working behind the scenes with my friend here Bob Nagle, and Don Elisburg

---

31. Albert Quie (R-Minn.) was a member of the House Committee on Education and Labor.

and others on the Senate Labor Committee. We made it clear to the Deputy Attorney General that his choice was a compromise, under which ERISA litigation would be done by the Department of Labor under the general direction and supervision of the Department of Justice and with a side agreement, which they would give us back—well, we viewed it as back, even though we never actually had it—the litigation authority under OSHA and we would retain our litigation authority under the Fair Labor Standards Act. Or, the [conference] committee was going to put all that authority into the bill and there would be no direction and supervision by the Attorney General. If we had not had Watergate and we had not had the impeachment hearings and all the rest of it, nobody would have let me get away with this—and Judge Silberman clearly would have gotten his way.

**Judy Mazo:** The Henry story about the impact of Watergate on the design of ERISA. I'm going to tell a Henry story, which he may not remember, but it's my favorite, and I've told this to some of you. The conference committee and all the staff and all these people were working like crazy starting in February or whatever of 1974 and meeting all over the Capitol and more and more people were involved. In the beginning of August of '74 the word came down that the President had been impeached and the Senate was going to be in the trial all fall, and if they didn't get ERISA up right away, there wouldn't be pension reform. And Henry told me that's why the definitions in Title I are not alphabetized. [Laughter]

They put all the paper together and sent it up. If it's true, I don't know. It's a great story.

**Russell Mueller:** Let me add one footnote there. Nixon, it was told by someone,<sup>32</sup> I forget, thought there was a moral hazard with regard to Title IV [termination insurance] and therefore rejected that when they sent the administration bill and it was introduced in the House without it, but ultimately Watergate changed that as well. From the Administration's point of view, when the White House sent up a statement that—I wish I had it here—but it started out, "If there is even one individual who loses a dollar of a benefit because of a plan termination, plan termination insurance is justified."

So the administration had caved. The Senate had sent over a bill,<sup>33</sup> and I'll fill in the rest of the story as to why the House Education

---

32. Remarks of William Kilberg *infra* pp. 293–94.

33. H.R. 4200, 93d Cong. (1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, at 1883.

and Labor portion of it was modified and alternatives were soon rejected. In the end, the administration, business, and labor all in their different ways and for different reasons came together to evaporate any opposition to Title IV.

**Jack Sheehan:** One small comment, Jim, if you don't mind. I don't think that we could overemphasize the environment in which this was going through the House and the Senate at that time. Think of the Congress today. If you had impending or hanging over the situation in which—I wrote down the notes—impeachment was pending, the Watergate was there, people were resigning from the administration, the Yom Kippur War was occurring there, [Vice-President Spiro] Agnew had resigned, Ruckelshaus,<sup>34</sup> that would be enough to stop whatever kind of a power truck you have going through it. It would have stopped in today's environment. So it's most unusual that a bill of such complexity as we were starting, at least what I was saying, going through it would not have kept the interest of the people in it.

One other point I wanted to make too, where it says there was very little interest and support for the legislation. I can accept that except for the fact that there were not that many big pension plans in place for the average working person. Frank<sup>35</sup> made a comment that the unions that had good plans, the Steelworkers, the UAW, and what not. Those companies were not going to terminate. They were there forever; I think you used it in one. So the interest in a very complex legalistic jargon among the specialists was not enticing people to be interested in this thing. What drove this thing finally is that then the individual worker became aware of the vulnerability of the plan and that it meant something to him particularly. It had a particular interest in him, not about the various aspects of it. I can't overemphasize that. I know in the Steelworkers when people down the valley of South Pittsburgh became aware that their livelihood was involved, then that's what took wings and wanted to fly and we got extremely strong support.

It may well be—and maybe I'm overstating this thing—it may well be that the drive for pension reform did not come from the spe-

---

34. The reference is to the "Saturday Night Massacre" of October 20, 1973, when Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than carry out President Nixon's order to fire Watergate Special Prosecutor Archibald Cox. See STANLEY L. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 405-07 (1990).

35. See Cummings, *Setting the Stage*, *supra* note 7, at 273.

cialists, did not come from the labor institution, but came from the people who were working in these plants who said, "What's our union doing about this? What are you guys doing about this?"

**Russell Mueller:** Let me add one quick note with regard to Henry's story. We had set forth a number of pamphlets showing the difference between the House and Senate [bills], and staff tried to hash all of these issues out. It was rough going. Mike Gordon was a very formidable opponent, and we all were quite stubborn about our own jurisdiction and provisions. But all of a sudden, one meeting, Larry Woodworth's office, in what looked like a gambling table with a green felt cloth about as long as this room is, down at the other end, all of a sudden, the folks—representatives of Javits, Williams, and Nelson—weren't objecting as loud anymore, and very quickly, staff came to an agreement on all but a very, very few issues, which then were taken to the conferees.

It did take them twenty meetings to get it over with. But as I recall, it was a call from Jerry Ford that "I am going to sign a labor bill on Labor Day," and I brought a letter from the White House where the administration had previously wanted to sign something sooner, but that Labor Day was the appropriate thing and the appropriate day to show the nation that Washington was working.

**Damon Silvers:** Both this panel and the last panel have talked a lot about the political process details and the like. There are two things that come to my mind in listening to this, and I have to confess, in 1973 when this was going on, I was three blocks from here at the Powell Elementary School in third grade. It's ironic, isn't it, that that's true. Malcolm X once said that "African Americans didn't land on Plymouth Rock, Plymouth Rock landed on them." I feel like in something of an analogous position with respect to ERISA. I had nothing to do with the creation of ERISA, but I've lived my entire professional career in it.

I would like the panel to reflect on two things about the aftermath of this in relation to the issues you've just been discussing, in particular, the conversation about how many people had actually lost their benefits pre-ERISA and the question of how important private pensions were at that time, against the background of two facts. One of them is just a personal one, which is that my career in the labor movement has significantly been about, in different legal contexts, in the situation of large companies, dealing with the vaporization of pension benefits.

What does it mean that it's possible for someone to have a career like that under ERISA? What I'm talking about when I say the vaporization of pension benefits, I'm talking about those tens of thousands of people who had their pensions terminated and invested in Executive Life annuities<sup>36</sup> in the 1980s, and I'm talking about those tens of thousands of people at Enron and WorldCom who had defined contribution plans under ERISA put in employer stock and ended up with nothing. That's my personal history, is representing those people in a post-ERISA environment.

Now, what does it mean that that's possible (a), and (b) what does it mean that, contrary I think to what Jack [Sheehan] may have implied, the pension coverage in the 1970s in the private sector workforce was in the forties, percentage-wise? At least in the late '70s it was in the forties. That retirement benefit coverage today is in the forties, but it's not pensions. What do those two facts mean and could something different have been done in your view?

**Russell Mueller:** Yes. [Laughter] Let me take this first, if you don't mind. In the House we had two bills, H.R. 2,<sup>37</sup> with the minimum standards, and H.R. 462,<sup>38</sup> which contained portability and plan termination insurance. I won't associate myself with Richard Nixon, but I will with his comment, there's a moral hazard there. It was well known, it was understood, not just among actuaries, these esoteric people, but there were articulate members of Congress who understood this as well, but who also were under tremendous political pressure. And as I say, all the parties eventually came together so that opposition faded, but the staff of our pension task force knew what these problems were.

We tried to do something about it. However, Jack can maybe relate more personally, but I'll never forget the day that my counterpart, Vance Anderson, came out of John Dent's office kind of red-faced and so on, suggesting that maybe he might not be employed there long because we had two bills, plan termination insurance being separate from the other. Well, that October plan termination in-

---

36. During the 1980s many terminating pension plans contracted with Executive Life Insurance Company to provide annuities to their participants. Executive Life's failure in 1991 "resulted in defaults that imposed losses on pension plan participants." JOHN H. LANGBEIN, DAVID A. PRATT & SUSAN J. STABILE, *PENSION AND EMPLOYEE BENEFIT LAW* 272-73 (5th ed. 2010).

37. H.R. 2, 93d Cong. (1973), reprinted in 1 *ERISA LEGISLATIVE HISTORY*, at 3.

38. H.R. 462, 93d Cong. (1973), reprinted in 2 *ERISA LEGISLATIVE HISTORY*, at 67.

insurance was in the bill that was reported by the [House Labor] Committee.<sup>39</sup>

But the alternative that was proposed by John Erlenborn, was to deal with some of the things that were discussed on the first panel. That is, let's make asset allocations more fair, let's make funding adequate. Folks, this is a funding problem. It was a funding problem then. It's a funding problem today. Part of the problem is the step up in benefits of hourly folks. But in H.R. 2 there were the following provisions that served as an alternative, if you will, but because of jurisdictional things got watered down or eliminated, except for some of them, and on the funding panel, I can discuss the —

**Jack Sheehan:** Russ, Russ, would you mind if I modified your observation just a little bit?

**Russell Mueller:** Sure.

**Jack Sheehan:** When Vance Anderson showed up with red face, and I guess you were there, it happened on a Friday evening, it happened because of Phil Burton.<sup>40</sup> It happened because you and the staff prepared the bill for Monday morning with regard to termination plan and that had been devised that the operation of the insurance was to be handed over to the private-sector insurance companies. And the bill had been prepared for presentation on Monday morning. When Phil Burton found out about that, he called Vance Anderson to his office that evening and had the bill completely rewritten.

There were some of us who were supposed to make sure that the bill was written that way, so the question was primarily whether the role of the insurance companies would be predominant. I could go further with that, but I should not. But I thought in today's episode with the Obamacare<sup>41</sup> and the effort I think to try to compromise at all forces, the Obamacare is based upon private sector insurance companies' role in what may be eventually unfolding. Here was another effort that could have handed this over to the private-sector insurance companies, and that would be a great benefit for them. That was the issue that got Vance.

---

39. H.R. 2, 93d Cong. §§ 401–06 (as reported by the Educ. and Labor Comm., Oct. 7, 1973), reprinted in 2 ERISA LEGISLATIVE HISTORY, at 2320–28.

40. Phillip Burton (D-Cal.) was a member of the House Committee on Education and Labor.

41. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

**Russell Mueller:** I had to draft both of those. This was the last gasp of the administration. When Treasury tried to engage, certain insurance officials came into our office to try and say, “This is the way it should go,” but frankly I knew that wouldn’t work as well.

**James Wooten:** We’re actually well over, so maybe we can come back and discuss the issues of funding and stuff in the Panel 5.

**Damon Silvers:** The problem is the panel didn’t address my question. [Laughter] So I’m going to ask it again.

In the last panel, there was a conversation all too telling that political processes address the problems of the time.<sup>42</sup> The problems people perceive to be critical. Clearly, at the time, the questions of funding and default were seen as the critical problems. In retrospect, it seems to me, as just a participant in the system you all built, that two things are true. One is you didn’t fix the funding problem because in various ways employers were able—and I don’t mean to suggest that employers are uniformly at fault for this, it’s just my own experience—employers are able to evade the funding requirements and not pay the benefits. And two, the real problem turned out to be coverage. The question I wanted to ask you all is, thinking back on this from the position where 55% of Americans fear retirement financially, as opposed to 33% in the early ‘80s, could something different have been done?

**Robert Nagle:** Something different could have been done, but I go back to Frank Cummings’s comments earlier.<sup>43</sup> As you alluded to, with ERISA, Congress attempted to fix the problems that it saw then. It did not attempt to anticipate what would happen in the future, and if it had, it probably would have been woefully wrong. In so many respects, the ground was starting to shift after ERISA was passed. We did not foresee the decline of manufacturing, which was where most of those large defined benefits plans were. We did not see the decline of the union movement, which had driven many of the defined benefit pension plans that existed, and whose efforts had resulted in employers adopting salaried defined benefit plans to match those given to collectively-bargained employees.

We did not see the loss of manufacturing jobs, the shift of those jobs overseas, the rise of the service industry, and short-term employment. We did not really foresee the rise of the 401(k) system at

---

42. See Cummings, *Setting the Stage*, *supra* note 7, at 278.

43. *Id.*

all, which, as you know, has become so pervasive and will never provide adequate retirement income. Well, I guess if we had thought of all those things, we could have and should have done something about them, but we did not. We attempted to address the problems as we saw them then. They are certainly not the problems that we see today.

**William Kilberg:** I agree with everything that Bob said. If I were to do it all over today, I would have been more supportive of those who were on the more conservative position within the administration, as Russ was suggesting, with regard to funding. They saw it as a problem. They saw the moral hazard. They came late to funding, initially, and then late to termination insurance, but when they got there I think they had a point of view that should have been taken more seriously.

The other reality is 1978. You start down the 401(k) route. It picks up steam in 1981.<sup>44</sup> And the legislation of the 1980s, I mean we took away incentives for companies to have defined benefit plans, and that has been a great tragedy. I think all of us recognize that.

**Jack Sheehan:** I'm going to make one comment. Congress usually responds to problems with a legislative response after the problem is gradually rolling away, and I agree with what Bob was talking about and the advent of the 401(k) and moving the focus therefore. But I remember an actuary by the name of Murray Latimer,<sup>45</sup> who to me, who is so obtuse I didn't know what he's talking about—I used to go to some staff and I'd see Phyllis [Borzi] up here and I said, "What did he mean?" so more or less try to explain it to me. But Murray was maintaining, and that's a basic question I think today, workers' retirement security, whose responsibility is that? Is that the responsibility of the company?

Well, of course at that time we said, "Yes, it's the responsibility of the company," but the responsibility of the company can be expressed only through a collective bargaining operation. Poorer unions could not get much of the pension plans. But Murray Latimer would say eventually he felt that we would have to enhance Social

---

44. "Although there were some cash or deferred profit-sharing plans in effect before ERISA, for practical purposes these plans entered the [defined contribution] plan universe in the early 1980s, after the Revenue Act of 1978 added IRC § 401(k) and proposed regulations issued in November 1981 effected the present regime of tax deferral." LANGBEIN, PRATT & STABILE, *supra* note 36, at 53.

45. Murray W. Latimer was the actuary for the United Steelworkers union.



Security. Social Security is a minimum level of social responsibility. But is social responsibility always to be expressed at the minimum level? Should it not be accelerated and have a more comprehensive retirement plan through Social Security? So how do you handle that situation today? Here we have the Obamacare.<sup>46</sup> One interesting thing about the Obamacare is the expression of social responsibility. And there's a mandate upon employers to provide coverage and funding of those plans. We did not put a mandate on employers to have pension plans for employees.

**Russell Mueller:** Let me add to that please. Phyllis is here. She and I monitored the Carter Commission, which did have a MUPS [Minimum Universal Pension System].<sup>47</sup> That didn't go anywhere, but might have been a good idea. If it had, people might have had more adequate retirement income.

One last footnote. You ask, "Well, what about the demise of DB [defined benefit] plans?" Some people did see what was going to happen when you add inadequate funding, plan termination insurance, and a moral hazard, allowing plan benefits to continue to be increased up to the day of termination and then guaranteed.

There was an alternative, and it was in the House bill.<sup>48</sup> All of that was kind of set aside during the conference, and we got a much, much less stable and more risky system as a result. I talked specifically about the death spiral of defined benefit pension plans in 1973, and it's in the congressional record and I can supply it, maybe you ought to put that in the record here or add it to your book as a footnote because we did foresee that—at least some of us did foresee the risks.<sup>49</sup>

**Jack Sheehan:** What are you talking about?

**Russell Mueller:** Then we had 200,000 defined benefit plans. Now ERISA didn't initially get rid of all those plans except some of the smaller plans that didn't like vesting, et cetera.<sup>50</sup> But when PBGC

---

46. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

47. See *Report of the President's Commission on Pension Policy: Executive Summary*, SOC. SECURITY BULL. 14 (May 1981), <http://www.ssa.gov/policy/docs/ssb/v44n5/v44n5p14.pdf>.

48. See Remarks of Russell Mueller, in Panel Discussion, *Some New Ideas and Some New Bottles: Tax and Minimum Standards in ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 385, 386-87 (2014).

49. See 119 CONG. REC. E7, 354-55 (daily ed. Nov. 15, 1973) (statement of Rep. Erlenborn).

50. A large number of small defined benefit plans terminated in 1974-75, apparently to avoid having to comply with ERISA's minimum standards. See Exchange between Henry

premiums and so forth started getting too great, companies like IBM and other companies that had well and well-funded defined benefit plans said, "Uh-uh. No more." So today we have less than 25,000 defined benefit plans; a third of those have frozen their benefits. Another third are in some kind of other situation, which aren't going to provide the full benefit that they should have.

So you have a third of the 25,000 providing the kind of defined benefits that folks might have expected back when ERISA was passed. And between the tax provisions, which clamped down on plans, the revenue raising, the PBGC, the moral hazard, if I'm an employer I'd be crazy to go into a defined benefit plan and pay for the underfunded plans of other less responsible employers or other situations. So was it foreseen? Yes, sir.

**Damon Silvers:** Can I suggest that it's really not fair to allow that particularly factually unfounded diatribe to close the panel? It's just totally wrong what you said, other than it might have been foreseeable what was going to happen. But everything you said in terms of causality is just totally wrong.

**James Wooten:** Okay, so we'll have plenty to talk about on Panel 5 today. [Laughter]