Unbowed and Unquestioned Politically

Installment II

By Neil Thomas Proto

The United States Senate Banking Committee hearings conducted by Ferdinand Pecora yielded disclosures about more than the self-serving, unethical conduct of the nation's largest banks and most prominent bank officers. The hearings, perhaps with an intention not originally conceived, also disclosed conduct by Wall Street law firms in the precise business documentation and transactions that deceived existing and prospective stockholders, and the pubic generally, to the bankers' and the lawyers' benefit. That disclosure began with what Pecora characterized as "a subject collateral to what we are discussing." In a question posed to Mr. Charles Mitchell, Chairman of National City Bank and National City Company, Pecora asked: "Are you familiar with the opinion that was rendered to the Attorney General of the United States in November, 1911, by the Solicitor General of the United States? No? Let me read just the opening paragraph of the cover letter to that legal opinion." [1]

The 1911 opinion by Solicitor General Frederick Lehmann found illegal the relationship created between City Bank and City Company formed in the same year. The underlying reason for the Solicitor General's conclusion: City Bank's exercise of national political influence, primarily through its full control of the City Company, was

Ferdinand Pecora

never intended by Congress when it authorized the creation of national banks. Such "concentrated political power," the "power over public affairs," was, the Solicitor General concluded, the "evil to be avoided."[2]

The moment Pecora raised the opinion and its plainly worded reasoning, at stake was not just the discomfort it caused the Bank and the tone it set for the hearing, but the way it exposed the lawyers, who the Solicitor General, *with the concurrence of the Attorney General*, concluded had concocted an institutional scheme that violated the law. [3] Pecora later described it as "the suave legerdemain of the corporate lawyer in the service of high finance…."[4]

The 21st century already has a seriously disquieting history of crass misadventure by many Wall Street financial institutions through institutional schemes created by their lawyers. The 1911 opinion—its content and effect—resonates with chilling reminders of how wrongdoing can be rationalized for unseemly if not illegal financial gain to the severe detriment of stockholders, mortgage holders, taxpayers, and the public well being. "The temptation to the speculative use of the funds of the banks [by the affiliate companies] at opportune times will prove to be irresistible," the Solicitor General admonished.[5] "[T]he failure of one [bank] may involve all in a common disaster." Unfortunately, we've experienced—in a century just beginning—the temptation embraced and the widespread harm the Solicitor General anticipated and sought to stop. In the 1933 Senate hearings, it was Harry Covington of Washington, DC's Covington and Burling, who came to the lawyers' defense and not only "in the service of high finance…."

* * *

"I want to call attention to a pertinent fact in connection with that opinion," Harry Covington stated, no doubt standing to get attention. The Chairman, Senator Norbeck allowed him to speak.

"The Attorney General of the United States," Covington said, "is charged with the responsibility of enforcing the law. The Attorney General quite obviously must have differed with the opinion, for there has been no proceeding thereafter to undertake to charge the National City Bank with a violation of the law."

"I submit," Pecora replied, "that is a gratuitous assumption of the learned gentleman who made it. "

Covington. **"**Not so much a gratuitous assumption as some that you have made from time to time. "

The Chairman. **"**We want no more of that. "
Covington: "I want to call attention to the fact that, if I heard it right, the Solicitor General said to the Attorney General, it was his opinion."

Pecora: "He said that the Attorney General agreed with him, in an earlier opinion referred to in this opinion, dated August 1, 1911, and for the benefit of the learned gentleman who has just placed his observation on the record, Mr. Chairman, I will repeat—

Covington sought to interpose: "I heard that, Mr. Pecora."

Pecora continued without the deference that perhaps Covington was accustomed: **"**On August 1, 1911, I submitted to you an opinion in which you concurred that the agreements and arrangements in question were made to enable the bank to carry on business and exercise powers prohibited to it by the National Banking Act." Did you hear that, Judge Covington? And you still say that the Attorney General did not concur, do you?'"

Covington. **"**I did not say that he did not concur." Of course, he had said it.

Pecora: **"**Then I misunderstood you. Excuse me."

Covington. **"**I said the Attorney General was charged with the responsibility of enforcing the law and obviously came to that ultimate conclusion, because he did not undertake to proceed against the National City Bank in creating the organization with the National City Company**,** and the fair presumption is that Mr. Wickersham always obeyed the law."

Pecora explained that he had sought to subpoena former Attorney General George Wickersham, who was out of the country, and that he was prepared to test Covington's presumption before the Committee. He may also have wanted to elevate the prospect that Wickersham —himself a Wall Street lawyer—had deliberately suppressed the opinion. [6]

It was unnecessary. In the end, the lawyers had guided and placed their client Bank and its officers into the unsavory place they now stood. Exposed to the public and, finally, ridiculed by the famed print media that had once defended their skill and expressed public duty. Legislation to finally separate banking (savings deposits, and lending money – City Bank) from investment (buying and selling stocks and bonds in all their iterations - City Company) was pending in a form the Committee chairman hoped would become law. He brought the verbal exchange to a close.

The Chairman. "The interesting thing to me is the observation made by the Solicitor General as to what would be the effect of it if it were done. He seems to have been a prophet." [7]

He still is.

Harry Covington in corporate pose

Ferdinand Pecora in the hearing

[1]Pecora included the Solicitor General's opinion in the record. Senate Hearing Tr., 2030. The meaning of the Wall Street law firm has changed dramatically, in size, geographic reach, income, corporate character, and its clients' political influence. See endnote 7, Installment I.

[2] The opinion reads, in part: "The temptation to the speculative use of the funds of the banks at opportune times will prove to be irresistible. Examples are recent and significant of the peril to a bank, incident to the dual and diverse interests of its officers and directors. If many enterprises and many banks are brought and bound together in the

nexus of a great holding corporation, the failure of one may involve all in a common disaster. And if the plan should prosper, it would mean a union of power in the same hands over industry, commerce, and finance, with a resulting power over public affairs, which was the gravamen of objection to the United States Bank." Senate Hearing Tr 2030 .

[3] Michael Perino, *The Hellhound of Wall Street,* Penguin Press, 197. The opinion was written during the closing year of Republican President William Howard Taft's administration.

[4] Pecora, *Wall Street Under Oath*, 80.

[5] Hearing Transcript, 2027-2044; Pecora, *Wall Street Under Oath*, 77,80-81.

[6] In fact, when Pecora requested the opinion, it was found at the Justice Department only in carbon form. The existence and content of the Solicitor's opinion was originally raised by Senator Carter Glass(D.Va) during a Senate debate months before the Senate hearing, He claimed Wickersham had suppressed the opinion deliberately. As did subsequent attorney generals. Pecora shared a similar view, though he seemed more focused on Wickersham. Compare "In Turnabout, Former Top Regulators Assail Wall Street Watchdogs," *New York Times,* October 23, 2014, B9. Both men blamed the opinion's suppression and possible destruction in its original form on corporate influence. For Glass it was "the power and blandishments of inordinate wealth." Michael Perino, *The Hellhound of Wall Street,* Penguin Press, 209; Pecora, *Wall Street Under Oath*, 81; *Chicago Tribune*, May 10, 1932,2. Palm Beach Post, May 10,1932,1 "Banking Opinion Suppressed, Virginia Senator Says." Wickersham's firm, Cadwalader, Wickersham & Taft represented "financial institutions, private investment bankers,[and] large commercial banks" during this time period. See "1914" era. http://www.cadwalader.com/about/history. And still does.

[7] See, for example, Gretchen Morgenson, "At Big Banks, A Lesson Not Learned," *New York Times*, December 14,2014,1(Sunday Business) and "Kicking Dodd-Frank in the Teeth,"January 11.2014,1,(Sunday Business).

Senator Peter Norbeck,(R.S.D)Committee Chair until March 1934

Senator Carter Glass (D.Va)