

The Breach 203: Why the DOJ Is Afraid to Prosecute White-Collar Criminals

Lindsay B.: Welcome to The Breach, your deep dive into authoritarianism and corruption in the era of Trump. I'm your host, Lindsay Beyerstein. If you're enjoying the show, please take a moment to rate and review us on iTunes, it really makes a difference.

My guest today is Pulitzer Prize-winning author Jesse Eisinger of ProPublica. He's the author of the new book "The Chickenshit Club." Thanks, Jesse, for blowing this episode's "G" rating right out of the gate.

Let me tell you, this book is obscene – not because of the title but because of the depravity it lays bare at the highest levels of capitalism. It's the story of Enron, Arthur Anderson, and KPMG, companies whose names have become synonymous with brazen white-collar crime. It's also the story of the Justice Department's faltering and ineffectual attempts to bring these serial offenders to heel.

Jesse, welcome to the program.

Jesse Eisinger: Thanks, thanks for having me.

Lindsay B.: You write that today's Department of Justice has lost the ability and the will to go after the top-level corporate criminals facing our society. What went wrong?

Jesse Eisinger: A lot went wrong. Basically, there's ... This is sort of the flip side of inequality in this country, where we prosecute the poor disproportionately, disproportionately people of color, too aggressively, and then we give impunity, essentially, to corporate criminals, the rich and the powerful, and it's unjust. And what went wrong was that the Department of Justice used to do this a little bit better, and in the last high water mark era for this, after the Enron prosecutions, there was a decade and a half of fiascos and losses, and corporate lobbying, and it stripped the Department of Justice of the skillset to do these kind of investigations and prosecutions.

Lindsay B.: The title's called The Chickenshit Club. Who named this exclusive club, and why?

Jesse Eisinger: It's not a club that they want to belong to, but it comes from a Jim Comey speech, and listeners know Jim Comey probably from being fired as FBI director by President Trump, but before that, 15 years ago, he became the Southern District of New York's US Attorney. You have to understand, the Southern District is the prestigious office in the Department of Justice, especially for securities fraud and corporate fraud, and he gathered all the criminal prosecutors together, and he ... These guys are the hotshots, they're the best of the best, they think of themselves as the best trial lawyers, they've gone to the best law schools, had the best clerkships, and he said, "Well, how many of you guys have never lost a case?" And a bunch of hands shoot up, because they're full of pride for their undefeated record, and he says, "Well, me and my buddies have a name for you guys. You guys are the

Chickenshit Club."

And the hands go down quickly, and backs are straightened up, and they're trying to figure out what Comey was trying to say, and he goes on to say, "Look, you aren't about winning. You're about doing justice. You're not trying to preserve an undefeated record like a sports team; you're not supposed to just get the low-hanging fruit and beat up on people you can beat up on. You're supposed to do justice by going after the most powerful wrongdoers in society. You have to take ambitious cases. And if you lose on occasion, that's okay, because you've made a point." Unfortunately, I think the Department of Justice writ large becomes the Chickenshit Club when it comes to corporate executives.

Lindsay B.: Comey's been in the news a lot this summer. What have you learned about him through the course of doing this book, and how does it color your view of his testimony and recent events?

Jesse Eisinger: Well, I think that Comey always thought of himself as an incredibly principled guy, the most honest guy in the room, and I think he was an able and serious US Attorney in the Southern District, and did a lot of very good things. But he's also a creature of these institutions, and when he gets to DC, he becomes the Deputy Attorney General in the Bush administration, the first term of George W. Bush's presidency, and he actually becomes a member of the Chickenshit Club, because they're trying to prosecute an accounting firm called KPMG, and they're very skittish about this prosecution because of an earlier prosecution for Arthur Andersen, a story I can get into in a moment. But the prosecutors in the Southern District want to try to indict this company or have them plead guilty, and eventually, he cuts the legs out of the prosecutors and they have to settle, and it's a very important prosecution that ends up teaching prosecutors that prosecuting executives is a much more difficult thing than it should be.

So he's compromised. The events of the summer were sort of bad judgment, in the Hillary Clinton investigation, based on his sense of himself as the most honest guy in the room.

Lindsay B.: The US economy has had a number of cycles of boom, bust, and then criminal prosecution to clean up the mess, and somehow that didn't happen after the financial crisis of 2008. Can you elaborate on the reasons for that?

Jesse Eisinger: Yeah, so that was the puzzle that I was trying to solve. You know, we've never done this perfectly in American society — the rich and powerful have always been rich and powerful — but we've had Silver Ages, and after the junk bond boom in the '80s, we prosecuted some of the most powerful people on Wall Street, and after the savings and loan crisis, we prosecuted some of the top executives, and after the NASDAQ bubble burst, we prosecuted people from Enron, WorldCom, Adelphia, et cetera. And so we used to do this a little bit better, and really what happened was there was a backlash to those Enron-era prosecutions, especially the prosecution of this firm, the accounting firm Arthur Andersen, which was the handmaiden to Enron's fraud.

And there's a corporate backlash, and there's a change in the courts, and the Department of Justice started losing some cases. They got very skittish about this, they lost tools, and they were kind of stripped of the will and ability, as I argue, to really bring individual investigations. So instead, they switched to settling with corporations for money, and when you settle for corporations for money, you kind of lose. They didn't realize this, but the unintended consequence was that they lost the skillset to investigate individual executives.

Lindsay B.: It's interesting, because right now, there's a real backlash against criminalization in the sort of blue-collar, no-collar type of crimes. People are really cynical about the power of prison and that kind of criminal justice to change people or make society better. Do you have any similar reservations about jailing people for corporate crime?

Jesse Eisinger: I don't. I think that we do put too many people in prison of a certain group, a certain class, nonviolent criminals, poor, disproportionately poor, disproportionately people of color, but we don't put enough rich and powerful in prison, and the ... I worry much less about government abuse in this area, and prosecutorial excesses, because the executives have such good defense attorneys that they're going to really guard against the abuses. And I think that deterrence in this area works, because executives have big stakes in society, they have a lot of wealth and reputation to protect, and they're well informed, so you can ... They read the newspaper, which means that you can get a lot of bang for your buck through a few select prosecutions if you're prosecuting the right people. Also, they learn a lot of lessons from who you prosecute, and if you only prosecute mid-level, low-level people, or people for ancillary crimes, they understand that they have impunity to commit crimes. So I think deterrence works here, and I think we've neglected it.

Lindsay B.: How do authorities go about figuring out whether to charge a corporation criminally, or the people within that corporation, for crimes that they think have been committed?

Jesse Eisinger: Well, it's not a very carefully, well-thought-out thing at the Department of Justice, because there's a lot of entrepreneurialism from prosecutors and from prosecutorial offices. So there are a set of principles about whether to prosecute a corporation, but effectively, they've taken indictment of big corporations off the table. They won't indict a big corporation anymore, and that really has left them without this big threat, this big tool. Nobody takes it seriously that they're going to try to prosecute a large corporation, because they're so scared about the collateral consequences. They're scared about throwing the employees out of work, and they're scared about having a disruption to the capital markets.

So instead, they settle with corporations for money. Now, my argument is, prosecuting corporations is inadequate, it's not a very satisfying solution. The settlements are even worse, they don't work, and what you should do is refocus away from those to investigations and prosecutions of individuals.

Lindsay B.: How did the War on Terror change the Justice Department's priorities vis-à-vis white-collar crime?

Jesse Eisinger: You know, this was a significant part of this, so, you know, I talk ... My book, obviously, is titled *The Chickenshit Club*, but part of this is that they're stripped of resources. So after 9/11, there's a big shift at the FBI away from these kind of investigations and toward becoming a domestic and international terrorism investigatory body, and that really stripped them of this kind of white-collar expertise, which ends up hurting the prosecutors, because prosecutors are dependent on the FBI to do these investigations. So that's a significant part of it.

Lindsay B.: I think some people have trouble visualizing how white-collar crime affects their day-to-day lives, and think of it as just half of the one percent bilking the other half of the one percent. Can you elaborate on how these kinds of crimes are actually affecting people in their day-to-day lives?

Jesse Eisinger: Yeah, sure. Well, I mean, some of it is that way, but it has a cascading effect. So the financial crisis, of course, immiserates millions of people. People are thrown out of their homes, the value of their homes collapses, and many people lost jobs. The employees of Lehman Brothers lost jobs; the employees of Countrywide lost jobs. And so, what really happened there? Well, there was a lot of stupidity and reckless behavior, and some of the reckless behavior wasn't criminal, but I think that a lot of it was fraudulent and should've been prosecuted. So when you have these kind of crises, companies often go out of business, they collapse, and they hurt people in the process.

Lindsay B.: What is the right balance to strike regarding collateral consequences? Because on the one hand, you don't want to put an entire company out of business if you don't have to, and have all their people laid off for something that the CEO did, but on the other hand, you don't want the CEOs to be above the law.

Jesse Eisinger: It's a very good question. I think that the first thing is to prioritize investigations of individuals, not to try to reform corporations' culture through settlements or indictments of corporations. So I would prosecute individual CEOs and CFOs, and people like that. That's the first thing. The second thing is sometimes you do need to confront a really corrupt entity. I think Arthur Andersen, the auditor for Enron, was a recidivist, corrupt institution, and needed to be prosecuted.

And I think you should take that very seriously and be very careful when you look to see whether it's a recidivist company that has run into serial problems with the regulators, and if it has, and if it's not willing to take serious remedial efforts, then occasionally, you have to indict a large corporation, and not worry that much about the collateral consequences, for two reasons. One is they're overblown. Very often, companies engage in big scare tactics about what kinds of disruptions there'll be to the capital markets if so-and-so bank goes under, but I think that that's overblown. And the second thing is sometimes, employees have to lose their jobs if they work for a corrupt institution, that it's better for society to get rid of that institution than

it is to preserve those jobs.

That obviously ... You know, there's a lot of pain involved, and that's a difficult decision, but we don't make collateral consequence decisions in other areas of the law, like street crime. If a murderer's family is going to have difficulty putting food on the table because the breadwinner is going to prison, that sometimes that has to happen, because society needs people to go to prison sometimes.

Lindsay B.: One thing I noticed in your book that I was really surprised about was the name "white-collar crime" only goes back to the 1930s. Why did it take so long to put a name to a phenomenon that must be as old as capitalism?

Jesse Eisinger: It's funny, I mean, it sort of has to be invented. I mean, there are certain things that are obvious white-collar crimes, like embezzlement, and that's always existed, but other things really have to kind of be defined, and a lot of it is defined after the crash of 1929, where things like securities fraud and accounting fraud, and what you can and can't say to your lenders and to the public about your company, we have to codify all those rules and laws, and we do that in the New Deal, as part of the 1933 act and the 1934 act, Securities Act. And then the law is sort of formed through a lot of definitions in the intervening decades, but it is a conceptual thing. And part of the problem here is that we have to prove intent when we prosecute these individuals, and proving intent for things like complicated accounting fraud, it's very difficult often.

Lindsay B.: And what are some of the investigative techniques that good prosecutors use to prove intent for these kinds of really complicated cases?

Jesse Eisinger: What you really need to do is flip lower-level executives so that they will admit, "I did something wrong" on the stand, and then they point to the defendant and say, "That person did something wrong too, and I know it. I was there, I understand that they were doing something wrong." And that's the kind of painstaking work that it takes to develop these cases, and this is kind of the lost art. This is what they don't do anymore, because it takes so much time and so much effort, and you have to prosecute these white-collar corporate frauds the way they prosecute mob organizations or drug organizations. Instead, today, they're kind of hoping for a really stupid incriminating email that the people have sent, and what happens is, the people who send those are kind of the low-level employees, the 20-somethings, or hotheads, but the CEOs are smart enough not to do that, and so they don't get that kind of evidence, and so they feel like they can't make those cases.

Lindsay B.: And what kind of specific arts are being lost that people can't do anymore? I mean, it seems like this is stuff that people, if you are in the DOJ prosecuting drug dealers or what have you, you should know how to flip lower-level people, right? Like, what specific part of it is going away?

Jesse Eisinger: Well, one of the things is flipping them, and the other is trial experience. The average US attorney today does .29 trials a year, one trial every three years,

roughly. In the 1970s, they did eight trials a year on average. So one of the things is trial experience, and if you have less trial experience, you're less willing to go to trial. If you're less willing to go to trial, you have a weaker position when you're negotiating with a low-level executive to try to flip that person, so it has a cascading effect. So they don't flip well because they don't have trial experience, they're worried about it, they can't negotiate with a very strong hand, and defense lawyers know all this.

Lindsay B.: Can you talk about the PR campaigns that the financial industry has waged to get itself out of regulation?

Jesse Eisinger: Yeah, so, regulation and enforcement are two different things, and there is PR campaigns, and then there are the more potent lobbying campaigns that take place out of the public view with regulators and lawmakers over very arcane, complicated issues. But in the book, what I try to detail is the PR campaign that switched people's minds about Arthur Andersen, which was, as I say, the auditor for Enron. And the government prosecuted Arthur Andersen, and it went out of business, and Arthur Andersen had been the handmaiden to not just Enron's fraud, but WorldCom's, and lots of accounting fraud.

And what the PR campaign did was change people's minds about Arthur Anderson. From an argument about accounting fraud, they switched it to an argument about employees losing their jobs, innocent employees losing their jobs. It was a great PR victory, and it was so resounding, the victory, that even Democratic appointees from the Obama administration — like Mary Jo White, the head of his SEC, and Lanny Breuer, the head of the Criminal Division — ended up absorbing the lesson and deciding that prosecuting a company was something they should never do.

Lindsay B.: President Hoover expressed skepticism about whether the government could regulate the markets constitutionally. Are there still lingering constitutional questions that are affecting our ability to enforce white-collar crime laws?

Jesse Eisinger: Absolutely, and not just constitutional questions, but regular legal questions. There's been a rise in a kind of skepticism in the courts about white-collar crime, and it makes it much, much harder. So, you know, of course, my book is called *The Chickenshit Club*, but it's not a question just of them being afraid, it's a question of this becoming much more difficult, because the courts are increasingly skeptical. And just today, the Second Circuit threw out some charges against some Dutch bankers for manipulating interests, because they said that they were coerced into giving information to the regulators abroad, and the prosecutors used that information, that coerced testimony, in violation of their Fifth Amendment rights.

So the courts look at corporate white-collar defendants and have enormous sympathy for their constitutional rights. They interpret their constitutional rights expansively. They sometimes invent new rights for them. The courts in my book invented the right to, essentially, the best lawyer money can buy, if the company's paying. So they have a lot of leeway when it comes to ... It's good to be a rich defendant in the Second Circuit of New York.

Lindsay B.: Donald Trump rode to power in part by exploiting people's angers about the financial crisis. Since coming to office, what has he done for regulation?

Jesse Eisinger: He's rolling back regulation, so, you know, everybody may remember that he ran against Goldman Sachs, that he said that Goldman Sachs controlled politicians like Ted Cruz in the primary, and then Hillary Clinton. Hillary Clinton's arguments for tougher white-collar enforcement were undermined by having given secret speeches to Wall Street, and Trump really exploited that, and really ran against Wall Street. His closing argument was a series of almost anti-Semitic tropes about how bankers were secretly controlling and manipulating the world, and then, of course, he turned around and installed a bunch of Goldman Sachs bankers into his administration, as Treasury Secretary, as his head economics advisor, on and on and on, and those people have started to roll back regulation. Not just environmental regulation and labor regulation, but financial regulation. So they're easing up on the Dodd-Frank reforms, and telling regulators to give a lot of leeway to the new rules. It's completely breaking with everything that Trump pretended to stand for on the election, if we can say that he stands for anything.

Lindsay B.: Do you think, on the whole, that the Justice Department has the laws it needs to keep cracking down on white-collar crime in the current business environment, or do you think Congress needs to step up and pass more laws?

Jesse Eisinger: I think they ... Yes and no. I think that one is that they don't use the laws that they have today, so they're very reluctant to charge white-collar criminals with conspiracy, they're very reluctant to charge white-collar criminals with willful blindness. They don't use the statutes as creatively as they should, or as aggressively as they should. But there have been lost tools and lost useful criminal statutes, and I think that they need to have some kind of policy apparatus and do some serious thinking about it, and then address that with some lobbying of Congress for an expansion of the roles.

Lindsay B.: What kind of legal changes would you like to see happen?

Jesse Eisinger: Well, one change I would like to see happen is that something ... Expanding responsible corporate officer doctrine. So today, in the health and safety arena, if you are an executive in charge of a peanut factory, and your peanuts have salmonella and go out and poison people, let's say that you knew that they had salmonella, and you've told the underling, the foreman of the plant, "You'd better clean this up, because this could kill people." If you didn't make sure that the foreman actually did succeed in cleaning that up, and the peanuts go out, and the peanuts kill people, you can be held criminally liable, because you're the responsible corporate officer. It's a misdemeanor, but you can be held criminally liable. I believe we should expand that to the financial arena, so that responsible corporate officers can be held criminally liable when they do things that are so reckless that their underlings engage in fraud. That's one thing. The other thing is just to expand, as I say, willful blindness to try to explore some charges based on that statute.

Lindsay B.: Preet Bharara, the former US Attorney of the Southern District, did some things to crack down on financial crime, but he didn't go after the really big players. Can you talk about that?

Jesse Eisinger: Yeah, I think he sort of performed some kind of Jedi mind trick on the press, because he got a reputation for being this sheriff of Wall Street, but he wasn't really prosecuting people on Wall Street, he wasn't prosecuting people at the top banks or investment banks, and he certainly wasn't prosecuting them for any systemic wrongdoing related to manipulation of currencies, or in interest rates, or in any kind of significant thing that was corrosive and pervasive at the banks. What he did, mainly, was prosecute insider trading cases, and insider trading cases are two-bit kind of crimes. They're crimes that hedge fund managers commit, and the victims are often the wealthy or the banks themselves. It is not the kind of thing that roots out systemic fraud.

Lindsay B.: Do you have any insights into why Bharara lost his job after Trump initially told him he could stay on as US Attorney?

Jesse Eisinger: It's a big mystery, and it's a question that I'm hoping the press will continue to ask. What we have reported ... You know, we broke the story that Trump's personal lawyer, Marc Kasowitz, was bragging that he advised Trump to fire him. Now, the question is whether that is actually true, or whether Kasowitz was just a braggart, we don't really know. And the second thing is that Kasowitz has been saying that he went around saying that Preet was going to get him, and Preet was a ... I'm very critical of Preet about Wall Street prosecutions, but he was a very aggressive prosecutor when it came to crooked politicians, so Trump may have sort of ... It dawned on him that Preet might have been a threat, and Kasowitz has been bragging that he told Trump that Preet was going to get him.

Now, separately, my other colleague, Robert Faturechi, has broken that the Southern District of New York, Preet's old office, is investigating Tom Price, the Health and Human Services Secretary, for insider trading. So whether that was connected, we don't know, but it bears a lot of scrutiny.

Lindsay B.: Trump has left a lot of AUSA positions, including Preet's old job, vacant. What does that mean for law enforcement on a day-to-day basis?

Jesse Eisinger: Well, on a day-to-day basis, it means that there are acting US attorneys, people who are holdovers from the Obama administration. Some of them will be strong-willed and go forward with their investigations, but others will probably not want to stick their heads up, because they'll be worried about being controversial. So I think it sort of weakens the institution, but not terribly. I mean, it's not going to weaken it as much as if Trump actually gets to appoint all the people that he would like to appoint for those positions, because those people will probably be much worse than the previous administration. And I am a big critic of Eric Holder, but I think the Jeff Sessions DOJ is going to be orders of magnitude worse.

Lindsay B.: What has Trump shown of his hand in terms of the AUSAs he's appointed so far?

Jesse Eisinger: Not much; we can't really tell. They're mostly sort of ... He hasn't appointed that many, for one, and the others have been sort of career people in the kind of Republican firmament. But Jeff Session is the US Attorney General, of course, and he says a lot. Sessions is returning us to an era where we're going to prosecute nonviolent drug offenders in a very aggressive way, which is a terrible mistake. They're already gutting the Civil Rights Division of the Department of Justice, also a miscarriage of justice there. And I think that there's going to be a lot of loosening of corporate law enforcement, and it's going to be a kind of orgy of corporate crime, probably.

Lindsay B.: Jesse, that's all the time we have for today. Thanks so much for coming on the show.

Jesse Eisinger: Well, thank you for having me. I really appreciate it.

Lindsay B.: And now it's time for recommended reading. This week's handpicked selection to deepen your understanding of the current political moment comes from law professor Andy Wright of the Just Security blog. Ominously, President Trump has been asking his lawyers whether he can pardon himself. Never one to play it close to the vest, Trump took to Twitter to assert that the president has complete power to pardon. So what does the Constitution say about whether the president can pardon himself? Find out in Wright's "Possible Presidential Pardon Scenarios."

The Constitution doesn't say he can't, but a presidential self-pardon would be an affront to the basic legal principle that nobody can be the judge of their own case. Even Richard Nixon's legal team concluded that the president can't pardon himself. So far, the Republic has been coasting on the democratic norm that presidents don't pardon themselves, because nobody has been craven enough to try. If Trump tries to pardon his way out of legal trouble, it will provoke a constitutional crisis. No one knows what would happen next. That's it for recommended reading.

The Breach is produced by Nora Hurley for Rewire Radio. Our executive producer is Marc Faletti. Our theme music is "Dark Alliance," performed by Darcy James Argue's Secret Society, and I'm your host, Lindsay Beyerstein. Tweet your suggestions, comments, and questions to @beyerstein, B-E-Y-E-R-S-T-E-I-N, on Twitter. See you next week.