The

CHICKENSHIT CLUB

WHY *the* JUSTICE DEPARTMENT FAILS *to* PROSECUTE EXECUTIVES

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INTRODUCTION

THE DEPARTMENT OF JUSTICE IS A LOOSE FEDERation of ninety-four offices around the country, each a realm unto itself, run by a US attorney who is almost untouchable by headquarters in faraway Washington, DC. Of all those offices, the Southern District of New York, located at the bottom tip of Manhattan, has the smartest and ablest prosecutors in the land. Any alum of the office will be happy to verify that.

The Southern District's founding, in 1789, predates that of the Department of Justice itself. The office held its first criminal trial in 1790, which lasted a day. The first US attorney convicted two men of conspiring to destroy a brigantine and murder its captain and a passenger. The second US attorney simultaneously served as mayor of New York City. Today the office specializes in the most complex and difficult criminal cases: corporate white-collar fraud, often securities law violations. Insiders relish its nickname: the "sovereign" district, for its penchant for claiming jurisdiction over any such case from any corner of the United States, the other ninety-three offices be damned.

Prosecutors in the Southern District have the strongest résumés from the best schools. They should inspire trust when they stand up in court to say, "I represent the government of the United States of America." But it takes something even more to get to the Southern District; something more personal. Someone somewhere—a top partner at a law firm, a respected judge or professor—had to send the signal. That sign indicated the candidate wasn't just special; he or she was a superstar in the making. The Manhattan US Attorney's Office launched the careers of judges and legal giants of every kind; politicians (New York City mayor Rudolph Giuliani and Representative Charles Rangel); cabinet secretaries (Henry Stimson, the US secretary of war under presidents William Howard Taft, Franklin Delano Roosevelt, and Harry Truman); a US attorney general (Michael Mukasey); FBI directors (Louis Freeh); and two Supreme Court justices (Felix Frankfurter and John M. Harlan II).

In January 2002, early in the George W. Bush presidency, the White House appointed James Comey the fifty-eighth US attorney for the Southern District of Manhattan. Comey was a Southern District alumnus with a record of serious prosecutions. He helped prosecute the Gambino Mafia family in the late 1980s and (after he'd left the Manhattan office for Richmond, Virginia) the 1996 Khobar Towers terrorist bombing in Saudi Arabia.[1] The staff, worried that the Bush administration would appoint a political operative, felt relieved. The prosecutors hadn't wanted to lose his predecessor, Mary Jo White, the first (and only) woman to have been US attorney for the Southern District of New York. She had served for almost nine years. She had been so loyal to her charges and such a stubborn guardian of the office's prerogatives that the attorneys in the office would have run through the Corinthian columns that held up the Foley Square courthouses for her.

When Comey arrived for his first day in 2002, he received a resounding ovation. Then he did something unusual. Comey took several months to feel out the office where he'd been a prosecutor a few years earlier, meeting new attorneys and learning what kinds of cases they were making.

After Jim Comey had finished his months-long listening tour, he decided to give a speech to the criminal division. He made his debut during a regularly scheduled meeting, held in the evening in what the assistants called the Old Courthouse in lower Manhattan. The staff gathered in a courtroom where trials took place. Assistant prosecutors piled into the spectator benches. These lawyers were the nation's elite, most of them in their twenties and early thirties. From youth, they had been the highest achievers and hardest workers. They had summered as associates at the most powerful law firms. They had clerked for the finest judges. In the coming years, many of the attendees became star prosecutors and top partners at major law firms. Members of the Southern District at that time included Preet Bharara and David Kelley, both successors to Comey and White as US attorneys for the Southern District; Ben Lawsky, who would become the top New York State financial regulator; Neil Barofsky, the future overseer of the federal bank bailout program in the wake of the 2008 crisis; and Ronnie Abrams and Richard Sullivan, future judges.

Usually held monthly, the meeting had a certain formula. First, supervisors rounded up office news. Then they'd go through the box score, where someone would read off who had a trial, what the trial concerned, and whether the office had won or lost. By tradition, whoever ran the meeting made special note of a prosecutor's first trial. Regardless of whether the rookie had won or lost, everyone would applaud. Prosecutors say that that inauguration gave them chills. They'd made it.

If there was anything Comey might be better at than Mary Jo White, it was giving a speech. Though her prosecutors worshipped her, White was so tiny, a fire hydrant could obscure her. She could not hold crowds rapt. Comey, by contrast, at six foot eight, towered, and he liked to perform. His delivery carried a humility practiced enough to suggest he knew he was good at it. He had used his talents so often to keep the jury's attention with jokes, knowing references, and pithy turns of phrase. Now he had to enthrall a courtroom of prosecutors. Overachievers all, the office's attorneys wanted to impress, to feel the chill, to know they had made it.

"Before we read off the box score, I have something to say," Comey said. "We have a saying around here: We do the right things for the right reasons in the right ways."

All the assembled prosecutors had heard that exhortation in some variation, from Comey in the hallways or in smaller meetings, and from other chiefs.

Then Comey asked the seated prosecutors a question: "Who here has never had an acquittal or a hung jury? Please raise your hand."

The go-getters and résumé builders in the office were ready. This group thought themselves the best trial lawyers in the country. Hands shot up.

"Me and my friends have a name for you guys," Comey said, looking around the room. Backs straightened in preparation for praise. Comey looked at his flock with approbation. "You are members of what we like to call the Chickenshit Club."

Hands went down faster than they had gone up. Some emitted sheepish laughter.

"If it's a good case and the evidence supports it, you must bring it," Comey told his troops. "I know it can get crazy in court. You feel stressed when the judge is pounding on you. When that happens, you can all take a deep breath. I don't want any of you to make an argument you don't believe in. I want you to believe that you are doing the right thing. Make the right decisions for the right reasons."

Comey had laid out how prosecutors should approach their jobs. Prosecuting wrongdoers is an awesome responsibility, to be undertaken carefully and judiciously. But prosecutors—unlike other lawyers—are not simply advocates for one side. They are required to bring justice. They need to be righteous, not careerist. They should seek to right the biggest injustices, not go after the easiest targets. Victory in the courtroom should be a secondary concern, meaning that government lawyers should neither seek to win at all costs nor duck a valid case out of fear of losing. Federal prosecutors should not be judged on their trial record, whether they are criticized, or what the political consequences might be of their

prosecutions. Comey wanted his prosecutors to be bold, to reach and to aspire to great cases, no matter their difficulty.

Ben Lawsky, a young prosecutor in the office when Comey gave his speech, recalls the inspiration from the meeting many years later. He had been waiting with trepidation for the box score because he had lost his first trial. Comey came to his case: "Ben Lawsky. First time out of the box and out of the Chickenshit Club!" Everyone applauded. Lawsky swelled with relief and pride.

BOOM, BUST, AND CRACKDOWN

America's economic history has unfolded in a series of booms followed by busts followed, crucially, by crackdowns. After the stock market crash of 1929, congressional hearings channeled public outrage and resulted in landmark laws regulating Wall Street and creating the Securities and Exchange Commission in 1934. A few years later, the new SEC helped put the head of the mighty New York Stock Exchange (NYSE) in prison. Though inconsistent, the SEC over the intervening decades emerged as one of the most respected government regulatory bodies. The SEC is the country's most important corporate regulator, overseeing publicly traded companies and the nation's capital markets. The agency has civil powers, and must team up with various offices of the Department of Justice when a securities law violation turns into a criminal investigation. After the go-go years of the late 1960s, the SEC worked closely with the Southern District to take on top law firms, top accounting firms, and top executives who had helped perpetrate corporate frauds. After the savings and loan scandals of the 1980s, when hundreds of small banks across the country failed due to reckless real estate loans, the Department of Justice prosecuted over a thousand people, including top executives at many of the largest failed banks. After the Michael Milken–run junk bond boom and blow-up of the late 1980s, prosecutors spent years digging up evidence of stock manipulation and insider trading at major investment banks and law firms, prosecuting some of the most powerful Wall Street figures of

the era. In the early 2000s, the burst Nasdaq bubble revealed a corporate book-cooking pandemic. Top officers from giants such as Enron, WorldCom, Qwest Communications, Adelphia, and Tyco International ended up in prison. Recklessness and stupidity fuel booms, but usually so do crimes.

By contrast, after the 2008 financial crisis, the government failed. In response to the worst calamity to hit capital markets and the global economy since the Great Depression, the government did not charge any top bankers. The public was furious. The bank bailouts and lack of consequences for bankers radicalized both ends of the political spectrum and gave rise to two of the most potent social movements of our time: the Tea Party and Occupy Wall Street. Anger about the lack of Wall Street accountability seeded disenchantment with Obama. The 2016 insurgency of Vermont senator Bernie Sanders, who challenged front-runner Hillary Clinton almost up to the doors of the Democratic Convention, demonstrated the anger that remained on the left years after the apex of the crisis, undergirding mistrust about Clinton. She had given friendly, fateful, and highly compenstated speeches to investment banks. While a Republican president had presided over the crisis and a Democratic one had saved the financial system, Hillary Clinton, Obama, and the Democrats could not claim to be the protectors of the working class and the scourges of investment bankers. That was due, in large measure, to the lack of corporate prosecutions. According to a *Wall Street Journal* analysis of 156 criminal and civil cases brought by the Justice Department, the Securities and Exchange Commission, and the Commodity Futures Trading Commission against ten of the largest Wall Street banks since 2009, in 81 percent of the cases, the government neither charged nor even identified individual employees. In the remainder, the government only charged forty-seven low and midlevel employees. Merely one was a boardroom-level executive, whom the SEC charged civilly.[2]

In his own incoherent and superficial way, Donald Trump rode anger about Wall Street throughout his campaign, railing at bank power. He closed his campaign by hinting poisonously about a cabal of global

bankers rigging the system. He assailed politicians who were "owned" by Goldman Sachs: first Ted Cruz in the primary and then Hillary Clinton in the general. The Republican platform called for breaking up the big banks by returning to the Glass-Steagall Act, the Depression-era law that split commercial banking from investment banking, a reflection of resentment about the government bailout of the financial system as bankers wriggled free. (No sooner had Trump taken office then he rushed to stuff members of that cabal into his White House and cabinet. He and the Goldman alumni who advised him moved within days of taking office to unravel Dodd-Frank and loosen restrictions on corporations generally.)

It's commonplace to observe that no top bankers from the top financial firms went to prison for the widespread malfeasance that led to the 2008 financial crisis. It's such a socially acceptable opinion that no less than an inside-the-Beltway figure than the former chairman of the Federal Reserve, Ben Bernanke, said (after he was safely out of office) that more bankers should have gone to prison. But the problem is worse than that.

Today's Department of Justice has lost the will and indeed the ability to go after the highest-ranking corporate wrongdoers. The problem did not begin in the aftermath of the 2008 crash—and it has not ended. Prosecutors don't simply struggle to put executives for "Too Big to Fail" banks in prison. They also cannot hold accountable wrongdoing executives from a gamut of large corporations: from pharmaceuticals, to technology, to large industrial operations, to retail giants.

James Comey's exhortation came at the beginning of a dramatic and little-understood shift in how the government prosecutes white-collar corporate crime. After the post-Nasdaq-bubble prosecutions of the early 2000s, the Justice Department began to suffer fiascos, losses in court, damning acts of prosecutorial abuse, and years of intense lobbying and pressure from corporations and the defense bar to ease up. Prosecutors lost potent investigative tools and softened their practices, changes that have made it harder to gather evidence and conduct even the most basic investigations. Compounding this issue, the Justice Department has been

hurt by budget constraints. The FBI, which usually conducts investigations for the department, shifted resources to antiterrorism efforts in the wake of 9/11. The Justice Department has kept track of white-collar cases only since the early 1990s. In the four years from 1992 through 1995, white-collar cases averaged 19 percent of overall cases. In the four years from 2012 to 2015, that number had fallen to just under 9.9 percent. The Department of Justice wasn't just going after fewer cases, but easier cases, contrary to Comey's admonition. In that same period, the conviction rate was slightly higher: 91 percent in the 2012–15 period, compared with 87 percent in the early 1990s.[3]

Meanwhile, judges all over the country embarked on newly generous interpretations of the law, broadening corporate and executive rights and privileges, narrowing white-collar criminal statutes, and repeatedly overturning federal prosecutors in notable white-collar cases. The Supreme Court has expanded the rights of corporations in the most potent, visible fashion, but lower courts have contributed to the trend. Over the last decade, while draconian when it came to street criminals, the courts have repeatedly read the US Constitution expansively when the government tried to charge corporations or their top executives. Congress sat by, failing to recognize the problem, much less propose legislative solutions.

To compensate for these changes, the Department of Justice shifted from targeting individual corporate executives with trial and imprisonment. Instead, prosecutors switched to a regime of almost exclusively settling with corporations for money. In these negotiations with corporations, prosecutors discovered they had great leverage.

Since 2001, more than 250 federal prosecutions have involved large corporations. These include some of the biggest names in corporate America: AIG, Google, JPMorgan Chase, and Pfizer among them.[4] The majority of these have been negotiated deals, not indictments. From 2002 through the fall of 2016, the Justice Department entered into 419 such settlements, called deferred prosecutions and nonprosecution agreements, with corporations. There had been just 18 in the preceding ten years.[5] Meanwhile, corporate prosecutions fell. The Justice Department

prosecuted 237 companies in 2014, 29 percent below the number in 2004.[6] These prosecutions tended to be of tiny, inconsequential companies.

Large and powerful corporations, under the advice of their expensive defense lawyers, were eager to appear cooperative and wrap up investigations quickly, before prosecutors uncovered more damning information. They could pay settlements with other people's money: that of their shareholders. Since the early 2000s, changes in the business of law accelerated. Big Law corporatized white-collar criminal defense, working more often in symbiosis with prosecutors than as adversaries. These lawyers, not the government, conducted extensive and lucrative investigations, delivering their findings to the government and moving on to the next. Prosecutors, for their part, could generate headlines with eye-popping dollar amounts and set themselves up for lucrative careers in the private sector. And they hadn't had to go to court to prove their case. The bigger the penalties, the more headlines they grabbed, and the more appealing they became to the prosecutors who could name their price.

These settlements did little to deter corporations from breaking the law. "Over 50 percent of the most serious fraud and larceny culprits were recidivists," writes University of Virginia law professor Brandon Garrett, a rate "about the same as robbery and firearms offenders and far higher than drug traffickers." Five years before the BP Deepwater Horizon explosion in 2010, the British oil and gas company had the Texas City refinery disaster.[7] ExxonMobil has been convicted four times since 2001 of environmental crimes. In recent years, Pfizer, the pharmaceutical behemoth, has suffered every form of government crackdown that prosecutors can imagine, short of the ultimate sanction of being put out of business. Pfizer and subsidiaries have had two convictions, two deferred prosecution agreements, and a nonprosecution agreement.

Corporate settlements were easier to reach than indictments of individuals, particularly top executives. The Justice Department shifted away from white-collar prosecutions. In 2016 the Department of Justice brought the lowest number of white-collar cases against individuals in twenty years, on track for just 6,200 cases, down more than 40 percent

from 1996—despite population and economic growth.[8] Though companies pledged cooperation with follow-on investigations of individuals, usually no one from a company that signed a deferred prosecution went to prison. In two-thirds of cases involving deferred prosecutions or non-prosecutions of public corporations between 2001 and 2012, according to Garrett, the company was punished, but no employees were prosecuted.

Of the thirty-one publicly listed firms convicted in the same period (thus not including those who reached a settlement), Garrett counted the leaders of those companies who went to prison: four CEOs, one chairman, one president, and one CFO.

Investigations and prosecutions of people are much more difficult than going after corporations. Prosecutors began to see probes of single human beings, one by one by one, as a slog; nasty trench warfare that carries a risk of humiliation if they lose. Investigations of individuals consume more time. Investigators must work slowly, first going after lower-level employees and then flipping them against their bosses. To their bosses at the Department of Justice, prosecutors who pursue individuals appear less productive. Investigating top executives at large corporations is more difficult because they insulate themselves from day-to-day decision making. Prosecutors find it harder to accumulate the evidence necessary to prove their cases beyond a reasonable doubt. And individuals have greater incentive to fight prosecutors.

Defaulting to a settlement with a corporation without prosecuting individuals corrodes the rule of law. Settlement culture validates the critiques of both sides. Companies argue that the government has extorted them into forking over money for unproven crimes. They say they cannot contest allegations because regulators hold the power of life or death over them. The public, meanwhile, sees corporations writing checks to make charges disappear.

Settlements have another downside: they weaken prosecutorial skills. Over time, prosecutorial aversion turns into lost knowledge. Settlement culture breeds investigative laziness and erodes trial skills.

Corporate power is at a zenith in America, and business has privileges

not seen since the Gilded Age. Executives make more money than ever. Corporate profits are at record highs. The courts are expanding corporate rights, as companies exert great political power and dominate our policy discourse. But the most valuable perquisite corporate officers possess is the ability to commit crimes with impunity. Such injustice threatens American democracy.

Today the justice system is broken. Over the decade after Jim Comey's speech, his words failed. The Justice Department succumbed. The department avoided the biggest cases. It became fearful of losing and lost sight of its fundamental mission to make this country a just place. James Comey would have no way of knowing it at the time, but his sermon to the Southern District prosecutors could have easily been a eulogy for the courage he hoped to muster. The Chickenshit Club's ranks in the years ahead would only grow.