Fox Rothschild Podcast

The Presumption of Innocence

Episode 34: A Conversation With Jesse Eisinger, Author of 'The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives'

Featuring Matt Adams of Fox Rothschild and journalist Jesse Eisinger

Adams: Hi, everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense & Regulatory Compliance Practice at Fox Rothschild. I'm your host, Matt Adams. I'm also a partner in the practice. And today I have the great fortune of being joined by Jesse Eisinger.

Jesse is a Pulitzer Prize-winning journalist and a member of the team at *ProPublica*, where he's a senior reporter and editor. His Pulitzer was awarded to him after his coverage of the 2009 financial collapse in a series of stories called "The Wall Street Money Machine." And in that series he revealed how Wall Street's morally questionable practices had led to the worst financial crisis since the Great Depression.

Today we're talking to Jesse about his book, "The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives." And Jesse, thanks for joining us. I really enjoyed your book and I know it's made its way around some of my partners because it was brought to my attention by one of my partners who told me it was a must-read.

I've gotta ask and you know where I must be going. What's with the title? How did you come to that one? I know, because it's in the first couple pages of the book, but why don't you tell the audience?

Eisinger: Sure. Well, thanks so much for having me and this very nice introduction, kind words about the book. So, the title comes from a speech that Jim Comey, your listeners will be familiar with him, but before he was at the DOJ and interacting with Trump, he was the U.S. Attorney for the Southern District of New York.

And many of your listeners will know that the Southern District is kind of the hot shots of the DOJ. They certainly think of themselves that way. And when he came in, he gave them a speech. And, he was praising them and of course, they don't need any more praise then they already give themselves.

And then he said, well, "How many of you have never lost a case?" And a bunch of hands shoot up because they're proud of their undefeated record. And he said, "Well, me and my buddies have a name for you guys. You're the chickenshit club." And, you know, the hands go down and they're feeling a little chastised.

The point was that their job is not to win, certainly not to win at all costs. But winning is a misplaced aspiration and that what their job is to do is to do justice as a federal prosecutor. And that's to seek righteous prosecutions and let the chips fall where they may after you've surfaced the evidence. Sometimes you'll lose, but you can't try to guarantee yourself a victory because you're just going to take on the easy cases, the low-hanging fruit, and you're not going to always take on the just cause.

And my argument in the book is that the DOJ, over the course of about 15 years, became the chickenshit club writ large. It became incapable of prosecuting. They lost the wheel and the ability to prosecute top corporate executives, really top white-collar criminals, and that was a very malign development for American society.

Adams: Yeah, I mean, your book starts really at -- many would say -- the high watermark of white-collar prosecutions, which was the early 2000s corporate scandals.

It seemed like every day you'd turn on the news and you'd hear about another company -- the Enrons, the WorldComs of the world -- getting themselves in hot water for some life-changing and potentially criminal conduct. And in fact, during that period of time, my takeaway from the book is that you believe that the government was trying to do the right thing in prosecuting the individuals that were the root cause of some of those scandals.

And, if I'm not mistaken from my read of the book and my understanding generally of history, there was a lot of individual accountability being had during that period of time. Would you agree with that assessment?

Eisinger: Yeah, there's no question there was. Almost all of the top executives from almost all of the very high-profile companies that were involved in major accounting fraud in the era were prosecuted. So, top executives from Enron, top executives from WorldCom, as you said, top executives from Tyco. That wasn't a federal prosecution, but that was here in Manhattan. And the list goes on: Global Crossing, et cetera. And, uh, the major difference in that era prosecutions -- and they were imperfect -- were that they were focused on individual accountability. Taking these, you know, often wealthy, usually white men, and focusing on their criminality and taking them to trial and seeking to put individuals into prison for their wrongdoing.

And after that era, there was a backlash that started with the prosecution of Arthur Anderson. And in the wake of that backlash, the Justice Department really changed its mentality and its ethos and its approach to white-collar crime. And it became more of a systemic approach, a corporate approach, an approach that sought settlements for money rather than prosecutions of individuals.

And that was a, a really catastrophic change in the approach. A giant mistake. And I don't think we fully recovered from it.

Adams: Yeah. And in true journalistic fashion, you take a deep dive in what I'll call the historical evolution of the department's principles of corporate prosecution. And I think one of the starting places from that whole ilk is the Thompson Memo. Why don't you tell the audience about what it was that you learned from your research about the Thompson Memo and then its ultimate demise?

Eisinger: Yeah, and I hope it's not too deep a dive. I hope it's a readable account. It is a journalistic account, and I'm trying to tell stories of people making decisions. And you're right.

So the first bit of the book dives into the Enron trial. And the point there is to say that there was a time when the DOJ took on infernally complex cases -- Enron was a very complex accounting scandal -- and they put a lot of resources into it and they focused on individuals. And they made a lot of mistakes. And they lost some cases and that was acceptable. But ultimately they prosecuted all of the top individuals. Of course, Ken Lay is the chairman, he died before he was sentenced.

In the wake of that -- and this is, you remember, this is the George W. Bush administration. So Republicans, who might be thought to want to go soft on white-collar crime. But really, what I found is that there were a bunch of appointees in the DOJ at the time, who really were stalwart capitalists and believed that the system needed to root out bad apples, wrongdoers, but that the system was sound in and of itself. And Democrats and liberals have often kind of thought that that was not the right approach and that the better approach was to institute systemic reform. So liberals were championing, at the time, Sarbanes-Oxley, a kind of more systemic approach to accounting wrongdoing that gave regulators more power and more authority.

Now the Thompson Memo, which you referred to, was named after Larry Thompson, who was the Deputy Attorney General. And I think he's one of the heroes of the book. He's got a very interesting personal backstory. But in that memo, they're trying to lay out the principles of corporate prosecution. And that was in the wake of the Arthur Anderson prosecution, which was a departure from what they were doing with the Enron prosecutions. They were focusing on the Enron executives, but they focused on Arthur Anderson, the company, to take the company to trial. Arthur Anderson was Enron's accounting firm and really was enmeshed in the Enron fraud. And not only that, but had been enmeshed in many other high-profile accounting frauds, including subsequently WorldCom.

And so, the DOJ at the time and Thompson et al, thought that Arthur Anderson was deeply corrupt and needed to be taken to trial as a company. And that was a death knell for the company when they were found guilty. Now, I argue that they were probably gonna go out of business anyway. But they did go out of business. The trial certainly accelerated it. I also argue that that was a righteous prosecution, but it became enormously controversial. And the Thompson Memo became controversial because it was seen as justifying it.

So there was a huge amount of backlash to the Thompson Memo, the Arthur Anderson prosecution, and even Democrats, even sort of Obama appointees, then absorbed the lesson a few years later that this was the wrong kind of approach. It was too punitive. That they could never take a large company to trial again and that there were systemic problems with it. That there were the fallout from the kind of trial companies where, if you put a company on trial and you found it guilty that people would lose their jobs if the company went out of business. That was seen as so bad for those people and the economy and the system that they couldn't do it again. And so that had this kind of cascading effect, which ironically, turned them away from prosecuting individuals.

Adams: And that was sort of a sea change, in fact. And one of the things as you talk about the decision making at the Department of Justice, which many of us who live and breathe this world every day are fully cognizant of it, but it was a point you made time and again in your book. There's really a difference between the political appointees at the department and sort of the career folks. And I think in your book you, in multiple occasions, recount your investigation, people telling you that they called the appointees "tourists." Right? Isn't that the phrase?

Eisinger: Yeah. Yeah, when they're feeling polite, yeah.

Adams: Yeah, and it was that --

Eisinger: One of the nicer phrases for them.

Adams: It was the idea that I took away from your book, at least, that these tourists, as they're known within the department to some of the career folks, are the ones responsible for some of the broader policy decisions. And there's an obvious political entanglement with those decisions. Would you agree?

Eisinger: There certainly can be, if you have political appointees who don't act independently enough. And both independently of the White House, but also independently of their former clients and their social circles and things like that.

And, in fact, George W. Bush, who was not a paragon, you know, of a perfect administration that was free of scandal. They were written by scandal. But the early appointees in his DOJ under John Ashcroft were... they were political appointees. They were lifetime Republicans. They were often career defense attorneys, white-collar defense attorneys, but they were righteous. And they did two things.

They one, they targeted individuals. Two, they did not tolerate, you know, crime and wrongdoing from companies. And then, you know, I'm like the old Monty Python skit, now. I've got a third, which is that they did not interfere with the prosecutions.

So, later, the Obama administration appointees did second-guess the staff attorneys and the line attorneys. And, they did meddle, and they were quite gutless. They were the classic chickenshits of the title. And so, surprisingly enough, you get a Democratic administration that is much worse about white collar-crime than the Republican administration.

Then you get the Trump administration, where, of course, the political appointees did meddle, not only in white-collar prosecutions, but really trying to kind of use the DOJ as a sword to attack enemies and the shield to protect friends.

And that's a certain different story, but obviously, a big development post-the Obama years.

Adams: Yeah, so we have this dichotomy that emerges around the Arthur Anderson prosecution and, refresh my recollection. That's like circa 2003, 4?

Eisinger: Yeah, now, now you're stretching my, uh, my memory. I think it was, uh, 2003 that they're prosecuted.

Adams: Right. So they're prosecuted without any individual accountability. And that sort of stands in stark contrast to the early 2000s where there were high-level corporate executives doing perp walks on TV every night.

Eisinger: Yep, you had the Jeff Skilling from Enron and Andrew Fastow from Enron, and Ken Lay was found guilty at trial. And then you had Bernie Ebbers at WorldCom and Dennis Kowalski at Tyco, and many, many others. And they, you know, as we discussed, there were individual prosecutions. Not all of them were successful, but many of them were.

And then you had this prosecution of this firm, this partnership, Arthur Anderson, a storied accounting firm that had really dramatically, inexcusably, lost its way. And so what happened in the wake of that was that, as I was saying, the people who rose up in the DOJ in the late Bush administration, in the early Obama administration, and it kind of lasted for a long time, they felt like, we cannot prosecute large companies anymore. So what we should do now is work on settlements. And they go by different names. I'm sure your listeners are gonna be familiar with them. There's the DPA, deferred prosecution agreement. There's a nonprosecution agreement. Sometimes in the later stages, they've pled guilty. But they're all settlements for money and, I think of them as basically the same thing. And they've just become a cost of doing business, and they're toothless, and you can see that it doesn't work, that it's a regime that's ineffective, because you see recidivist companies. Companies just break the law over and over again, have systemic problems, and get away with it.

And my argument in the book is that prosecuting individuals is something that concentrates the mind of the CEO. They see their colleagues and brethren go to prison, and they have a stake in society and they want to preserve their reputation. And it's a lesson that is taught very well with, just one or two well-placed prosecutions in a way that a settlement for money, they can just shrug off.

Adams: Would you agree with me that the prosecution of Arthur Anderson had a lot of unintended consequences though, in terms of narrowing the Big Four, so to speak? There were also people that worked at that firm that relied on that income for their living, and that of their family and their livelihood, that were taken out because of the feckless ability to go after the individuals that were responsible.

Eisinger: Yeah, I don't agree with that, but I certainly see the argument. But I believe that you should also prosecute companies, sometimes, as well. I think you should prioritize prosecuting individuals and you should prioritize prosecuting the highest-level individuals that you can. But occasionally, I think there is a corrupt institution and I think Arthur Anderson fits the bill. And that the prosecutor's job is not to worry about the collateral consequences, not to worry about the economic fallout, not to worry about supposedly innocent workers losing their jobs.

And I think you can divide the Arthur Anderson employees you know, into several buckets. There are the professionals who were complicit in creating a corrupt culture and even if they didn't directly

have involvement in Enron, that they were looking the other way or doing things that were ethically questionable. And, yeah, if you have a corrupt institution like that, and you're part of that in an enabler, then, I don't feel particularly sorry for you.

There were the professionals who upheld professional standards and ethics and fortunately, I think most of them landed pretty well. So, I'm sure that that was a very upsetting, traumatic experience for them, but also probably delivered a pretty good lesson that you should uphold your ethical culture and work hard to maintain it.

And then there were the really, truly innocent employees, you know, the assistants, secretaries, lower-level people, and I think that they were traumatized and that was a terrible experience for them. But again, that's not the prosecutor's job to think about that because there are larger, more dangerous effects to society writ large by looking the other way at crime because you're worried about the fallout. That's just not the job of a prosecutor. Of course, when you prosecute an individual, there are all sorts of collateral consequences to that person's family, to that person's circle of friends. The prosecutor can't really be preoccupied by that. Prosecutor has to seek justice.

Adams: Yeah. And that's a great segue into really the other central time period in contemporary history that you cover in the book, and that's the financial collapse of 08/09. And after setting the stage in the book about this event, the fall of Arthur Anderson at sort of the close of the -- I guess we'll call it the dot-com scandals of the early 2000s. I'm not sure what, what, what phrase have they fashioned for that early part of the 2000s these days? I know financial collapse, the Great Recession. Do we have a term for that period?

Eisinger: It was the dot-com bubble, although it was a, a bubble that affected more than just dot-com companies. But people usually refer to it as the dot-com bubble or the NASDAQ bubble. I think of it as the accounting pandemic and been calling that, since the early 2000s, accounting fraud pandemic, but yeah.

Adams: Yeah. We segued from that period in your book, you know, historic. And, and this is a space of, really less than 10 years at best. It's a decade. And a decade that really has reshaped not only the substantive law of white-collar crime in the United States, but the way that we treat these prosecutions. Because on the one hand, you talk about the early 2000s. You talk about the Enrons, the WorldComs, the perp walks of individual C-suite executives every night, evening news. We then have the Arthur Anderson collapse and everybody looking around at the fall of this once-great American company. And as that period in our contemporary history dies down, we enter the Great Recession. We enter the financial collapse in '08, '09.

In fact, your reporting in that period of time is, in many circles, has been somewhat said to have been a predictor of the fall of Bear Stearns and Lehman Brothers, when you wrote your cover story for your then-employer in November 2007 entitled, "Wall Street Requiem." And many would say you predicted the collapse of Bear Stearns and Lehman Brothers. So this problem in our financial markets didn't really go away. It just kind of remetastasized in another form.

And here we are, '07, '08, '09, and once again, these principles of corporate prosecutions are front and center because major financial institutions -- and you, talk about pretty much all of them in your book -- whether they're Wall Street firms or their insurance companies, or their really what we thought were bad bedrocks of our us economy, their integrity and their character are back in the headlines front and center as we face the greatest economic calamity in our country since the Great Depression.

And I'm fascinated at how you artfully juxtaposed those two periods of time, because you start with a deep dive into exactly what was going on. And I remember it well. Why these two periods? It wasn't a study of a century, but in the space of 10 years, you have these dramatically divergent, opposite, if you will, handling of corporate investigations. And was that just sort of handed to you because of the way that it played out or did you choose those two points in time for a reason?

Eisinger: Well, I started with the question that many people were asking in the wake of the financial crisis: why nobody was sent to prison. As you say, we had this enormous collapse. It was clear that there was a wide variety of wrongdoing and law breaking, but literally no top executive from any of the Wall Street banks or the major commercial banks went to prison.

And that was a puzzle that I was deeply confused about and upset about, and thought it was a miscarriage of justice. I was not alone in that, many people were observing that at the time. And so I set out to try to understand why it was. Could it be possible that no one committed a crime? I didn't think so. So, if people had committed a crime what had happened?

And in doing so, I kind of wanted to try to figure out what the approach was. And then the approach to corporate crime, it was clear had really changed because of that previous era. And because of the Arthur Anderson prosecution in particular, and the backlash to that, and the lessons learned, which I thought were the wrong lessons. The lessons that they learned were to be overly solicitous of, ideas around collateral consequences, and overly sensitive to concerns that prosecutions would hurt the markets, or hurt the economy. In a way that, of course they should be cognizant of and understand that that's a possibility, but that, that's not the right way to approach things. And, in fact, sends a much more dangerous message that is worse for the economy in the long run.

And so, the puzzle was, why did we not prosecute any top executives? And the answer was that they had mislearned the lessons and changed their approach. And in changing their approach to looking for settlements, they ended up settling with almost every major bank for what seemed like a lot of money. And banks didn't learn the lesson. Bankers didn't learn any lessons, hedge fund managers and investors didn't learn any lessons. They keep producing giant bubbles. They keep abusing the financial regulations, breaking the law in a serial way, and it's bad for the economy and bad for our markets.

Adams: Yeah, and the book tells a great story of what the investigative activity by the department after, in the fallout of the '08, '09 period. And that one, that one has a pretty clear, determined phrase. It's the Great Recession, I think we can call it. We don't have to search like we did for that other period.

When you think about the department's investigative activities, can you think of what any prominent individuals that were prosecuted as a byproduct of the Great Recession?

Eisinger: I mean, no. You know, I wrote a piece for the *New York Times Magazine* before I wrote the book about the one top banker who was actually prosecuted. He's not a household name. His name is Kareem Serageldin. He was a banker at Credit Suisse and he wasn't, you know, wasn't a C-suite level, wasn't even one of the really top, you know, people in heading up any major area of the bank. But he was the only guy who was prosecuted for activities related to what led to the collapse in 2008.

And so that was the problem. And then, when you ask the DOJ, they pointed to CEOs of sort of second- and third-tier mortgage banks. But even the CEOs of the first-tier mortgage banks, the prime example is Angelo Mozilo at Countrywide whose emails came out and he knew that they were selling garbage that was going to blow up to Wall Street. And despite all of that evidence, they never decided to prosecute.

So it was a real failure. And the failure ended up leading people to think that the banks were being bailed out and top executives were being coddled and protected, and not punished for their wrongdoing. And average Americans were being immiserated by collapsing housing prices. And millions of people were losing their jobs. And they felt like the government was protecting the wealthy and didn't care about working people and average people, and people whose home prices were falling underwater and who are being thrown out of their homes and foreclosed on.

And it was a catastrophic event for average Americans' faith in the institutions of our society. And I don't think we've recovered since then. I think people still today have a lack of faith in our political institutions and our justice system. Because I think it was laid bare that we have a two-tiered system that excessively punishes certain people and throws people in prison, primarily poor people, people of color, and excessively lets the rich and powerful off.

Adams: I want to pick up there, so put a bookmark there, but I want to just make one observation. Many of the chapters in your book mention Judge Rakoff. And I'm fascinated by his involvement in sort of bucking the trend that you've observed, his resistance to this. While observing the trend, you pepper many of your late chapters with anecdotes of Judge Rakoff trying to sort of rage against the machine, if you will, when it came to the department's insistence on taking it soft on individuals in the wake of Arthur Anderson.

Why did you choose to feature Judge Rakoff in such a way? And let our audience know who he is and why?

Eisinger: Sure, he's a district judge in the Southern District and the Southern District is the second most-important district after the DC District, you know, for the law, possibly the most important for Wall Street and securities law. And Rakoff is a long-standing veteran judge in that district. He'd also been a high-profile defense attorney, white-collar defense attorney, and a hotshot prosecutor in his younger days, so he'd seen it from all sides. And he becomes the most prominent legal world dissident of the current inability of the Justice Department to prosecute individuals. And he actually

turns down a settlement from the SEC with one of the major banks, two of the major banks actually, in time. Because he thinks that if the SEC is alleging what they're alleging then they shouldn't be settling for money, they should be prosecuting, particularly prosecuting individuals. And he thinks it's just completely unacceptable. And he rejects one of these settlements.

And these settlements have been sort of rubber stamped by judges who move them off their docket and get to the sexier, more exciting stuff. So he really pauses and he takes the opportunity to reject it and say, this is not right. And so it's a really courageous stance. He's an immensely thoughtful person. He's also incredibly colorful. You know, it's a perfect mix of somebody who's courageous and somebody who's a great character. And so naturally, I was very attracted to writing about him in the book.

And, you know, I do think that he's one of the heroes of the book. A lot of the heroes end up being pretty thwarted by the system. This is a book where the system wins. The individuals are not triumphant. It's kind of anti -Michael Lewis type of book because the system beats the individuals.

Adams: Yeah, and your book really hones in on the first decade of the 21st century. And, let's talk a little bit beyond that now.

The Department of Justice, beginning with the Yates Memorandum in 2015, really started to set itself back on a trajectory of individual accountability in its prosecutorial decisions. What have you observed from your vantage point as a journalist? Is the pendulum swung back yet? I mean, it seems like they're trying. The Yates Memo and its progeny save an intervening period of four years that all norms were sort of disrupted, I would argue. They seem to be trying to set the department back on that trajectory of individual accountability.

Would you agree with that? Or do you have a different observation from your vantage point?

Eisinger: No, I, I agree that they're trying. I mean, I think that there are three distinct kind of eras and developments. One is the late Obama DOJ. Then there's the Trump DOJ -- and you could kind of split it between the Sessions era and the Barr era, but I don't think that that's particularly meaningful when it comes to white-collar crime. And then you've got the Biden administration and the Garland era.

And so, yes, with the Yates Memo saying that they wanted to try to focus on individual accountability when they were doing corporate investigations, there was certainly a tacit admission that their earlier approach had been wrong and catastrophic under Eric Holder and the early Obama administration. They didn't produce much, but it was at least an acknowledgement of the problem.

But then you had this enormous, terrible setback under Trump, where what I was talking to you about earlier was that, you know, norms, as you just said, we're completely jettisoned. And I don't think we even know a hint of what really went down at the DOJ yet, even though there's been very good investigative reporting.

The New York Times wrote about how they quashed a tax investigation of Caterpillar abuses. So, I think when it comes to white-collar crime and the Trump administration and the Trump DOJ, we just don't know the full extent of how bad it was and how corporations had easy access to friendly, sympathetic seats.

Now, the Biden administration has made some changes in certainly, trying to clean up the DOJ. But the changes have been more, you've seen more in the antitrust realm where you've got Jonathan Cantor at the antitrust. They brought some high-profile cases and the FTC brought high-profile cases.

Those aren't cases, of course, against individual criminality, those are violations of the antitrust laws and they're brought against companies, they're brought against very big companies. So they're not afraid to go after big companies. They're not afraid to lose cases. I mean, in fact, Jonathan Cantor has cited the chickenshit club ethos as something that they want to avoid. They don't want to be chickenshit. So, that's a very important development.

I think Garland has been distracted by a wide variety of things, like the January 6 prosecution, and sort of cleaning up the DOJ and really trying to emphasize its independence from the White House. And in doing so, I think white-collar prosecutions have fallen by the wayside. And if you look at the actual numbers, white-collar prosecutions are even lower than they were in the Trump administration, if you can believe it. So they're talking a big game about prosecuting individuals in the Biden DOJ but they're not doing it. And in fact, it's really fallen off. So, it's a mixed picture at best with the Biden DOJ right now.

Adams: You know, as our time comes to an end, Jesse, I first want to thank you.

Every day, the Department of Justice's published Principles of Corporate Prosecution are a prime factor in my own personal practice, advising businesses that may fall within the crosshairs of the Department of Justice. This historical context that your book brings to really why they exist and how they were formulated and what the arguments are on all sides of each of the various multifactor analysis that goes into determining when and if a individual is prosecuted or the corporation, or both, it's a real fascinating historical mix.

I think, I think that history is still being written. I think you're right. We haven't yet had enough time elapsed from that early 2000s transition from individual accountability to the, I guess, the mid-decade shift to the Great Recession and some of the prosecutorial activity and the trends we saw then. When that pendulum does swing back I think we're going to have a fairly significant body of work on which we can draw and learn some serious lessons. And the question will be, I think, whether policymakers at the Department of Justice learn from those mistakes or those "tourists" as you point out in your book, the political appointees at the department, continue to impact policy in ways that are temporary and that pendulum continues to swing back and forth. And I think that will be the greatest test of time as we sort of draw on the experiences of this early century. Would you agree?

Eisinger: Yeah, I think you summed it up well.

Adams: All right. Well, Jesse, it's been great talking to you. It's all the time we have for this edition of "The Presumption of Innocence." And until next time, I'm Matt Adams, your host. We'll see ya, bye-bye.