

A man in a grey suit and tie stands in a room with large windows. The man is looking towards the camera with a serious expression. The room has dark wood paneling and a large window on the left side. The lighting is dramatic, with strong shadows.

CEOS ON TRIAL:
SHOULD
EXECUTIVES
FEAR PERSONAL
CRIMINAL
CHARGES
FOR CORPORATE
WRONGS?

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On December 3, 2015, Don Blankenship, the former CEO of Massey Energy Company, was convicted by a federal jury sitting in Charleston, West Virginia, of a misdemeanor charge of conspiring to violate mine safety laws. Although Blankenship faces up to a year in prison, the conviction could have been far more serious, as he was ultimately acquitted of felony charges of making false statements to the United States Securities and Exchange Commission ("SEC") and to investors – charges which, if proven, could have carried sentences of up to 30 years' imprisonment.

Blankenship's conviction – for which he will be sentenced in the Spring of 2016 and which he will likely appeal – is the latest turn in a saga which began with an explosion that killed 29 miners at Massey's Upper Big Branch ("UBB") coal mine in southern West Virginia. The subsequent investigation by the federal Mine Safety and Health Administration ("MSHA") con-

cluded that the explosion was caused in part by routine safety violations by Massey, for which MSHA issued 369 citations resulting in more than \$10 million in regulatory penalties.

Despite the \$209 million settlement of Massey's corporate criminal liabilities, the United States Department of Justice continued to pursue potential personal criminal charges against Massey employees and executives, including Blankenship. Those investigations resulted in the guilty plea of a former mine superintendent, Gary May, to conspiring to impede MSHA enforcement efforts, and the indictment of Blankenship in November 2014. Although many of the allegations in the indictment involved the UBB disaster, the formal charges were directed at Blankenship's oversight and management of UBB's safety and health practices and representations Massey made to the SEC and to investors regarding those practices.

At trial, the Government put on evidence that Blankenship promoted a culture that elevated production over safety by ignoring federal safety regulations and impeding MSHA investigations into violations of those regulations so that Massey and, by extension, Blankenship, could reap additional profits. Although the jury ultimately spared Blankenship from a lengthy prison sentence, his conviction on the conspiracy charge serves as a shot across the bow for others in Blankenship's position.

As this landmark conviction demonstrates, no longer are the effects of elevating production over safety constricted to civil, or even criminal, corporate liability. Rather, the DOJ has made clear that it will scrutinize company safety practices and, when warranted, pursue personal criminal liability – up to and including jail time – for the key decision makers. Indeed, the charges against Massey and Blankenship are not simply the result of an emotional call for accountability for the 29 deaths at UBB or the political stumping of the local United States Attorney. Rather, they signal a renewed focus by the Justice Department on the investigation and prosecution of key executives and their confidants who the DOJ believes are primarily responsible for perpetrating corporate crimes.

Although the focus is renewed, and freshly targeted at workplace safety violations, it is not altogether unprecedented. In the early 2000s, the Justice Department pursued criminal charges against top-ranking executives with resounding success in connection with the Enron and WorldCom scandals. In all, the Enron scandal resulted in a conviction or guilty plea for more than a dozen employees on various financial crimes such as bank fraud, securities fraud, wire fraud, money laundering, insider trading, and conspiracy. Federal charges levied against WorldCom CEO Bernard Ebbers similarly resulted in convictions for securities fraud, making false statements, and conspiracy.

Since those high profile cases, however, the Government has typically elected to cut individuals loose in favor of large corporate fines or imposed "corporate probation" by way of deferred prosecution agreements. These practices faced particular opposition in the wake of the 2008 financial crisis when the federal government levied hefty financial penalties against major financial institutions while the top executives of those institutions – viewed by many as the flesh-and-blood people through whom the corporations committed their crimes – escaped jail time. Perhaps in response to this opposition, Justice Department prosecutions are again taking aim at individual actors, this

time with far broader implications.

In September 2015, the Justice Department issued a policy statement known as the "Yates Memorandum" (named after its author, Deputy Attorney General Sally Quillian Yates) in which it articulated a renewed emphasis on holding individuals accountable for corporate wrongdoing. Recognizing that "one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing," the Yates Memorandum urges federal investigators and prosecutors to require cooperating corporations to disclose all relevant facts and witnesses before receiving credit for their cooperation; to focus on individuals from the outset of the investigation; to communicate regularly with counterparts in other agencies regarding parallel civil, criminal, and regulatory investigations; to decline to release culpable individuals from potential exposure even in the event of corporate cooperation; and to consider whether individual civil liability may be appropriate in conjunction with suits against corporations.

This new policy, especially when viewed through the lens of the Blankenship conviction, should serve as ample warning that executives who are implicated in corporate wrongdoing may face personal criminal exposure in addition to corporate exposure. There are two major takeaways from these recent developments. First, executives and other employees who are personally involved in corporate crime are unlikely to avoid prosecution by hiding behind the veil of their corporation. Second, the line between aggressive business practices and criminal misconduct is becoming blurred in the eyes of the Justice Department and the public. Before Blankenship, federal investigations and prosecutions of executives focused mainly on fraud and misrepresentations – falsifying financial numbers and misrepresenting those numbers to the SEC and to investors or fabricating government certifications. The allegations against Blankenship, while still sounding in fraud and conspiracy, are not as overt. Rather, the connection Blankenship's prosecutors attempted to draw is far more tenuous: that Blankenship demanded that production be elevated over safety to the extent that employees were encouraged to disregard MSHA regulations, then lied to the SEC and investors about Massey's commitment to safety.

For some, this is a slippery slope. At what point might a company's representations to the SEC and to investors regarding its commitment to safety (or quality, or the

environment, or profit, or anything else) be used as evidence of fraud against the company or its executives? Recent cases show that Justice Department attorneys are broadening their prosecutorial power into new fields including workplace safety, food and drug safety, and environmental protection.

In addition to the Blankenship conviction, the chief executive of Peanut Corporation of America, Stewart Parnell, was sentenced to 28 years in a federal prison for his role in covering up the presence of salmonella in his company's products. The resulting salmonella outbreak resulted in hundreds of illnesses and nine deaths. Parnell was convicted of more than 65 counts of conspiracy, mail and wire fraud, obstruction of justice, and other charges based on evidence that he and other key employees falsely certified that the company's products were free of food borne illnesses, making him the first executive to be convicted of a federal felony for a food-borne illness case.

More recently, in 2015, federal prosecutors convicted XS Platinum COO James Slade and two other mine managers of violations of the Clean Water Act based on evidence that the mines they oversaw discharged polluted wastewater into the Salmon River in Alaska. Slade has yet to be sentenced.

While it is unclear at this time the limits to which the Justice Department may stretch to root out corporate wrongdoing, it is not implausible that savvy prosecutors might find a creative charge for an egregious case where a CEO reaped exorbitant profits while employees or the public suffered extensive harm. To be sure, not every ill-advised corporate decision will summon the wrath of the Justice Department, and the vast majority of CEOs can run their businesses with a clean conscience. But for those facing difficult decisions or who feel pressured to elevate profit over scrupulous compliance with federal regulations, these cases should serve as fair warning that corporate risk-taking may not come without severe personal consequences.



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