

Chapter 23

Conventional and Unconventional Warfare: The Increasing Criminalization of Both Clearly Wrong and Seemingly Ordinary Activities in the Mineral Industries

Robert G. McLusky
Michael M. Fisher
Douglas J. Crouse
Jackson Kelly PLLC
Charleston, West Virginia

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§ 23.01. Introduction.

High profile incidents such as multiple fatalities in coal mines or widely publicized environmental releases can impose enormous pressure not only on those directly involved, but also on regulators and prosecutors. The pressures on regulators may include demands to: 1) control an on-going environmental event; 2) determine the “cause” of an event; and/or 3) punish those responsible. The pressure on prosecutors may include one or more of the same demands. Several highly publicized events in central Appalachia have resulted in pressure by union and safety advocates and by consumers on regulators and prosecutors to hold someone accountable. Failure or inability to influence or deflect public perception can result in your client becoming the primary target of a prosecutor. When that happens, practitioners need to understand that the tools available to federal prosecutors to advance charges — whether for crimes directly connected to the high-profile event or not — may only be limited by a prosecutor’s imagination. There are many federal statutes that were adopted to address a particular problem that do not necessarily include principles limiting their use to the type of problem that gave them

birth. As a result, counsel representing targets of federal investigations need to understand that the investigator and a prosecutor may target activity *other* than that which garnered public attention in the first place.

For example, in April 2010, 29 coal miners died in the non-union Upper Big Branch (UBB) Mine in West Virginia. Under pressure from the United Mine Workers of America and others, federal prosecutors slowly built a case against Massey Energy's former Chairman, Don Blankenship, after indicting a number of employees on charges unrelated to the UBB fatalities. In November 2014, federal charges were brought against Blankenship. As with the other indicted Massey employees, the charges against Blankenship were not directly related to the UBB explosion. Rather, Blankenship was charged with more general violations of federal mine safety regulations. Blankenship was also charged with making false statements in certain Securities Exchange Commission (SEC) filings. The securities charges, which implicated otherwise normal business activities, notably carried much more severe penalties than the misdemeanor MSHA (Mine Safety and Health Administration) charges.

In another high-profile incident, a material used in the coal preparation process leaked from a storage tank into a river used for supplying public water in Charleston, West Virginia in January 2014 — during the legislative session annually convened in the city. Suddenly, every resident and outsider alike armed with a Facebook or Twitter account and access to the Internet became an expert on leak prevention, water treatment and blame assessment.¹ Federal prosecutors ultimately secured guilty pleas under conventional environmental laws that have low burdens of proof, but only after advancing novel theories under the Clean Water Act and accusing a defendant of bankruptcy fraud based on a brief filed by his lawyer. Whether the defendants could have prevailed at trial is unknown. But each of them was subjected to dauntingly

¹ See, e.g., Emily Corio and Maryanne Reed, *How Social Media Changed the Equation on the West Virginia Chemical Leak Story*, mediashift.org (Mar. 31, 2014), <http://mediashift.org/2014/03/how-social-media-changed-the-equation-on-the-west-virginia-chemical-leak-story/>.

expensive defenses and a list of charges that presented the risk of substantial jail time — strong incentives to plead guilty.

§ 23.02. Power to Prosecutors: Proliferation of Federal Criminal Statutes and Effect of Sentencing Guidelines.

[1] — Expansion of Federal Laws.

Others have written of the simultaneous growth of federal criminal statutes and the decline in the threshold of guilt.² As a consequence, they claim, many acts undertaken with no “criminal intent” are criminally chargeable³ — a fact which vests prosecutors with formidable coercive power.

[2] — *Yates v. United States*.

In 2001, the massive accounting fraud scheme perpetrated by the Enron Corporation and its outside auditor, Arthur Andersen LLP, was exposed. The subsequent investigation revealed that Arthur Andersen had shredded many possibly incriminating documents in order to cover up the scheme.⁴ Congress responded by promulgating the Sarbanes-Oxley Act, which was specifically designed “to protect investors and restore trust in financial markets” in the

² Gary Fields and John R. Emshwiller, “As Criminal Laws Proliferate, More Are Ensnared,” *Wall Street Journal* (July 23, 2011), <http://www.wsj.com/articles/SB10001424052748703749504576172714184601654>. The Heritage Foundation has reviewed the growth of federal crimes. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>. A report it issued in 2008 cited a 1998 ABA report as stating that more than 40 percent of federal criminal provisions enacted since the Civil War were enacted between 1970 and 1998. *Id.* (citing Task Force on Federalization of Criminal Law, American Bar Association, *The Federalization of Criminal Law*, at 7 (1998)).

³ Gary Fields and John R. Emshwiller, “As Criminal Laws Proliferate, More Are Ensnared,” *Wall Street Journal* (July 23, 2011), <http://www.wsj.com/articles/SB10001424052748703749504576172714184601654>.

⁴ *Yates v. United States*, 134 S. Ct. 1074, 2015 WL 773330, No. 13-7451 at *6 (Feb. 25, 2015).