

# CAPITOL HILL CITIZEN

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"Democracy  
dies in  
broad daylight"

## Corporate crime cases hit new low under Biden

### Where are the Congressional hearings?

By Russell Mokhiber

Corporate crime enforcement is down under the Biden Justice Department, with fewer major corporate crime cases being brought in the first two years of the Biden administration than during the first two years of the Trump administration.

Major corporate crime cases settled with deferred prosecution agreements, non prosecution agreements and declinations with disgorgement were down from 56 under President Trump to 31 under President Biden.

Major corporate crime cases that resulted in guilty pleas or verdicts were down from 33 under Trump to 24 under Biden.

That's according to a new analysis of the Violation Tracker corporate crime database for the *Capitol Hill Citizen*. Violation Tracker is a project of Good Jobs First.

Other groups that track corporate crime concurred with the *Capitol Hill Citizen's* analysis that corporate crime prosecutions are down under Biden.

Last year Public Citizen put out a report titled *Enforcement Abyss* that crunched U.S. Sentencing Commission numbers. That report found that only 90 corporate crime cases were brought in 2021 under the Biden Department of Justice, less than half of the average annual number of corporate crime prosecutions brought in the previous 25 years (181).

(The Sentencing Commission database includes corporations of all sizes and the Justice Department is historically harsher on crime committed by smaller corporations than crime committed by large powerful corporations represented by the major corporate crime defense law firms. The Violation Tracker database analysis focuses more on larger corporations.)

And earlier this year, the Transactional Records Access Clearinghouse (TRAC) put out a report finding that the prosecution of white-collar offenders last year reached a new all-time



### Cornel West tackles the corporate duopoly

- Cornel West announced in June that he's running for the Green Party nomination for President in 2024. – See Page 26
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low since tracking began during the Reagan administration.

During the last fiscal year which ended September 2022, only 4,180 white-collar defendants were prosecuted. White-collar prosecutions last year were lower than in any year during the Trump administration – even lower than during

2020 when due to the pandemic and federal partial shutdowns, federal criminal enforcement activities of all kinds were sharply curtailed.

"In general, prosecutions of white-collar offenders have been steadily declining," the report found.

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## Citizens confront Schumer Manchin dirty duopoly debt deal

By Citizen Staff

At a citizen gathering in Berkeley Springs, West Virginia last month, a West Virginia Democratic Party activist was complaining about Senator Joe Manchin (D-West Virginia) siding with Republicans to slip into the debt deal a provision greenlighting the Mountain Valley Pipeline, bypassing the normal judicial and administrative review process every other energy project has to go through.

"It wasn't just Manchin," a second activist who is fond of sticking it to the Democrats shot back. "The Majority Leader in the Senate, Charles Schumer (D-New York) took the lead. He took more money than Manchin from the pipeline company."

"Where did you hear that?" the first activist said with a touch of anger in her voice.

"Google it," said the second. It's true.

No doubt, Manchin is the top Senate recipient of fossil fuel campaign donations. Next-Era Energy, one of the compa-

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## OSHA enforcement suspended

By Steven H. Wodka

What if the police in your town announced that they could no longer put anyone in jail because there were no judges to hear the cases? How long would you tolerate such a situation? Probably not very long, if at all.

Yet for American workers whose workplace contains a



hazard that can maim, kill or cause cancer, full enforcement of the Occupational Safety and Health Act (OSHA) ceased as

of April 28, 2023.

On that day, a little known and tiny federal agency called the Occupational Safety and Health Review Commission (OSHRC), lost its quorum and can no longer conduct any official business.

The OSHRC issues orders that enforce OSHA citations that have been contested. The cases handled by the OSHRC typically involve the most im-

portant enforcement actions undertaken by OSHA.

Under the OSHA statute, enforcement of OSHA health and safety standards begins in the Department of Labor. OSHA employs compliance officers who inspect workplaces. When OSHA finds a violation, a citation and penalty is issued against the employer with a deadline for the hazard to be

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abated.

However, the employer has the right to contest the citation, penalty, and the abatement order. If it does so, the contested case leaves the jurisdiction of OSHA in the Department of Labor, and goes to a separate, independent agency, the OSHRC, for adjudication. Until the OSHRC issues a final order that affirms the citation or the abatement order, the employer is not required to correct the hazard.

Even if the hazard has already killed or injured workers, or has exposed them to a cancer causing chemical, the hazard can go legally uncorrected and the workers' exposure continues until the OSHRC issues a final order adjudicating the case.

When the Review Commission lacks the statutory minimum quorum of two Commissioners, as is the case today, no cases can be decided, although one Commissioner can direct a case for review.

This year is not the first time that the OSHRC has lost its quorum. The membership of OSHRC is set at three members who are appointed by the President with the advice and consent of the Senate. Members serve staggered six-year terms, meaning that a vacancy occurs every two years.

"For over two thirds of its existence, the Commission has been so paralyzed by frequent vacancies that it has been unable to do its job," said Arthur Sapper, a former deputy general counsel of the OSHRC in 2003 testimony before a House committee.

In a 2005 report, the House Committee on Education and the Workforce found that the "lack of a working quorum means that OSHRC is unable to perform the critical functions it was designated by Congress to perform, rendering the entire regulatory scheme devised by Congress for the resolution of disputes between OSHA and employers nonfunctional."

Aside from a lack of a working quorum, a more frequent occurrence is when one seat remains vacant on the Commission for a prolonged period. Because the OSHA statute dictates that action may only be taken by the affirmative vote of two members of the Commission, any disagreement on any point renders a two-member OSHRC incapable of taking action, resulting in a stalemate.

Under President Biden, OSHA head Doug Parker has been attempting to arouse an agency that was laid dormant and rudderless by the Trump Administration. OSHA enforcement activity has increased under Parker, and the number of contested cases be-



No quorum at the Occupational Safety and Health Review Commission

## No judges, no enforcement

fore the OSHRC has increased.

From 2021 to 2022, there was a 15 percent increase in contested cases filed with the OSHRC. The number of newly filed contests rose from 1,368 in 2021 to 1,579 in 2022. These new cases are in addition to the existing back log of approximately 1,200 cases each year.

Cases before the Commission are also taking longer to resolve. When OSHA emphasizes inspections of more serious workplace hazards, it results in higher proposed penalties. The Review Commission agrees that "this translates into more complicated cases involving difficult technical issues and longer trials."

While the workload has increased at the administrative law judge (ALJ) level, the number of ALJs has remained the same from 2021 to 2023 at 12 judges, down from 15 throughout much of 1996 and 1997. Each judge is handling more than 200 cases at a time.

The OSHRC has a total of about 60 employees and an annual budget of around \$15.4 million. The OSHRC does not publish any data as to how long it takes the average case to get to a final order.

The ALJ can decide to affirm or vacate the OSHA citation. If a member of the Review Commission exercises their discretion to direct an ALJ decision for review, the citation must await a final order of the Review Commission before it be-

**What if the police in your town announced that they could no longer put anyone in jail because there were no judges to hear the cases? How long would you tolerate such a situation?**

comes enforceable. Fourteen significant cases, already decided by an ALJ, are currently pending review by the Commission.

The failure of both the Biden Administration and the Congress to fully staff and adequately fund the Review Commission has real life consequences. Currently pending before the Review Commission is the case of Midvale Paper Box which operates a plant in Plains Township, Pennsylvania, where it manufactures paper boxes for retail use.

In 2017, an OSHA inspector went to Midvale's plant on nine separate occasions to conduct an inspection which resulted in the issuance of three citations—one serious, one willful, and one repeat—with proposed penalties totaling \$201,212.

In the years before the inspection, four employees had suffered hand injuries while working on the box making machines because they were not locked out. Midvale contested the citations to the Review Commission. In 2019, the Review Commission ALJ conducted a four-day evidentiary hearing.

The ALJ found that Midvale both consciously disregarded OSHA requirements and was plainly indifferent to employee safety, justifying a willful classification. Midvale had twice been cited previously for violating the same cited standard.

The ALJ found that the hazards could result in crushing or amputation, laceration, or fractures.

However, in 2021, the Review Commission directed review of the ALJ's opinion on the issues of whether the violations were properly characterized as willful and whether there was sufficient evidence of worker exposure to the hazards.

This case, which began six years ago, remains undecided by the Commission, and thus without an enforceable order

to protect the Midvale workers.

Another pending case at the Review Commission level concerns the Fuller psychiatric hospital in South Attleboro, Massachusetts operated by Universal Health Services (UHS). The Fuller hospital is an in-patient facility with a maximum capacity of 102 patients.

In just the first six months of 2019, there were over 600 incidents of violent assaults by patients on the hospital workers, with approximately 46 resulting in injuries that required medical attention.

After receiving a worker complaint, OSHA began an on-site inspection on June 12, 2019. Incidents of workplace violence occurred during the pendency of OSHA's investigation. From June to December 2019, there were over 500 incidents of violent assaults.

Employees were injured in direct attacks by patients, when breaking up fights between patients, during safety checks, and while working with patients. Employees were punched in the head, kicked, slapped, bitten, had their hair ripped out, and were scratched by patients with bloodborne diseases.

In one incident, multiple staff members were injured on July 18, 2019. Starting around 11:00 pm, two patients began peeling paint from the walls and forming it into balls. One patient started throwing the balls toward nearby staff. Then, the patient escalated his behavior by getting up and pulling down a ceiling tile. Two other patients attempted to do the same. Additional patients joined in the commotion. Four patients began assaulting the staff. One patient repeatedly hit a hospital worker in the head and grabbed her hair near the scalp. She was forced to the floor as the patient maintained

her grasp on her. For several minutes, the staff could not stop the assault. The staff member was on the ground with her hair grasped by the roots and her head twisted for five minutes. Finally, the Attleboro police arrived at the hospital in response to calls about assaultive patients. To compound the matter, the employer failed to preserve video footage of this incident even though it had been specifically requested by the OSHA inspector.

During OSHA's investigation, multiple videos of workplace violence incidents were deleted by UHS, which resulted in sanctions against UHS. The hospital had no staff dedicated to security.

OSHA issued a serious citation under an important component of the OSHA statute called the "general duty clause." It provides that every employer has an obligation to provide a workplace free from recognized hazards that could cause death or serious injury. OSHA proposed that the employer protect its workers with a "trained security staff without patient care responsibilities on all three shifts." The ALJ affirmed the citation and assessed a \$13,494 penalty.

In March 2023, the Review Commission directed review of the ALJ's decision on grounds including whether the proposed abatement measure of hiring trained security staff would be both effective and "economically feasible." Four years after the worker complaint was filed, the situation at the Fuller hospital remains unresolved.

In March 2021, two months after the Biden Administration took office, Commissioner James Sullivan resigned and rejoined the law firm of Cozen O'Connor in order to represent employers "on high stakes matters before all three branches of government." Sullivan left behind Commissioner Amanda Wood Laihow and Chairman Cynthia Attwood. Before becoming a commissioner, Laihow had served as Sullivan's chief counsel and came to the OSHRC from the National Association of Manufacturers where she served as director of labor and employment policy.

Laihow's term expired on April 27, 2023, leaving only Chairman Attwood, who was first appointed to the Commission by President Barack Obama, after having spent 30 years in the federal government as a lawyer and judge.

To fill Sullivan's seat, in September 2021, President Biden nominated Susan Harthill, who represented employers with the law firm of Morgan, Lewis & Bockius.

According to *The Legal Intelligencer*, Harthill reported



earning nearly \$735,000 in the prior 20 months by representing Amazon, Boeing, McDonald's, and other employers. Harthill made it through the Senate Labor Committee. But then her nomination stalled out in the Senate and was ultimately withdrawn.

President Biden has proclaimed that "I intend to be the most pro-union President leading the most pro-union administration in American history." Even though two of the three seats remain vacant, President Biden has yet to nominate either a worker representative or a lawyer with a union background to the Review Commission. Even Richard Nixon, from the first day of the Review Commission's existence in 1971, made sure that at least one of the three commissioners came from the labor movement.

How and why has this sad state of affairs descended on the federal government's responsibility to protect American workers?

Much of the blame can be placed at the feet of Congress and the American labor movement.

Historically, Congress has been non-responsive to the needs of the American worker unless pushed by organized labor. In 1970 the labor movement's top priority was the passage of the Occupational Safety and Health Act.

Jack Sheehan of the United Steel Workers, Frank Wallick of the United Auto Workers, and Tony Mazzocchi of the Oil, Chemical and Atomic Workers worked to get the law passed as Congress originally intended.

Today, no one in the labor movement fills this role.

When Harthill, a corporate lawyer whose firm of Morgan, Lewis & Bockius had been representing UHS in the Fuller hospital case, was nominated by President Biden to what had been the "labor" seat on the Review Commission, no one in the labor movement voiced any disagreement.

The cases before the Occupational Safety and Health Review Commission involve real people in the most dire of situations.

Unless the American labor movement wakes up, the owners of business and capital in the United States will continue, as Jamelle Bouie recently wrote in the *New York Times*, "to weaken labor and take advantage of workers as they see fit." **CHC**

**Steven Wodka** is a lawyer in Little Silver, New Jersey and was formerly on the staff of the Oil, Chemical and Atomic Workers International Union.

# Swiss billionaire convicted of manslaughter in Italy

## Why so few corporate manslaughter charges in USA?

By Russell Mokhiber

On June 7, 2023, an Italian court convicted Swiss billionaire Stephan Schmidheiny of aggravated manslaughter in connection with the asbestos-related deaths of 147 workers and others. He was sentenced to twelve years in prison. Schmidheiny says he will appeal the verdict.

Schmidheiny was CEO of Eternit, a global asbestos company, which owned a large asbestos sheet and pipe manufacturing plant in Casale Monferrato in northern Italy.

An estimated 3,000 people in the region have died from asbestos related diseases – mesothelioma and asbestosis.

Barry Castleman, a public health expert who has followed the Schmidheiny cases closely and was at the trial in Italy when the verdict came down, says that workers at the Eternit plants in Italy were not warned about the lethality of asbestos and given little protection from the dust.

"The Italians prosecute death on the job as a criminal matter in some cases," Castleman told the *Capitol Hill Citizen*. "And they have put plant managers, company doctors in other cases in jail."

In an earlier prosecution in Italy, Schmidheiny was convicted of creating an environmental disaster with his asbestos plants, but that conviction was thrown out on appeal on statute of limitation grounds in 2014.

"The courts in Italy then decided there would be criminal trials for murder or manslaughter in each of the four regions where Eternit had asbestos factories," Castleman said.

The first of those trials was completed in 2019. Schmidheiny was convicted and sentenced to four years in jail, which was later reduced to 18 months. That case is still on appeal.

The second case concluded in 2022. Schmidheiny was also found guilty of manslaughter and sentenced to three years in jail. That case is on appeal.

Castleman is concerned that the verdicts will be overturned on statute of limitations grounds.

"Only murder has no statute of limitations and prosecutors could not convict him of that," Castleman said.

"This man has been convicted in three trials of manslaughter and it would be quite shocking to the victims and the people of Italy if the appeals courts throw out these convictions on statute of limitation grounds," Castleman said.

In the United States, there are corporate criminal prosecutions for workplace deaths and injuries. But they are rare.

In 2005, the Justice Department indicted W.R. Grace and seven then current and former Grace executives for knowingly endangering residents of Libby, Montana,

and concealing information about the health effects of its asbestos mining operations. In 2009, a federal jury acquitted the defendants on all counts.

BP Exploration and Production plead guilty to felony manslaughter, environmental crimes and obstruction of Congress and paid \$4 million for its conduct leading to the 2010 Deepwater Horizon disaster that killed 11 people and caused the largest environmental disaster in U.S. history,

When Ira Reiner was the District Attorney for Los Angeles County thirty-five years ago, he had a policy of opening a criminal investigation every time a worker died on the job.

Not that he would prosecute every case. But he would investigate every case as a corporate crime.

And sometimes he would bring criminal charges against the corporation for the death of a worker.

Today, you rarely see a prosecutor in the United States bring criminal charges

rate homicide law for the United States.

In a law review article titled – *Corporate Criminal Liability for Homicide: A Statutory Framework* – Harlow argues that "in situations of systemic internal misconduct or corporate recidivism, civil regulatory penalties and private lawsuits are insufficient to vindicate society's interest in punishing the entity responsible for these deaths."

"Current homicide schemes are ill equipped to accommodate corporate defendants. Historically, there have been few significant corporate prosecutions for homicide. Those that have occurred have tended to be against small companies in which ownership and management were united in the same individuals, who were also charged individually."

"The paucity of successful prosecutions suggests that current law does not provide prosecutors with the power to bring corporate homicide charges or, that if the power exists, its lack of clarity discourages prosecutors from bringing cases."

Harlow's draft law would impose a maximum \$10 million fine per death on the corporation. But perhaps more important, he would impose a maximum five years of corporate probation.

And he believes that the federal government should create a corporate crime unit within the probation office.

"There are enough federal corporate crime cases that it would be worthwhile to see whether there should be some centralized unit that represents the U.S. government's interest in terms of corporate probation," Harlow says. "It's worthy of study and debate. It might be preferable to the present system of corporate monitorships."

Even without a corporate homicide statute, federal prosecutors could and should bring murder charges against major corporations and their executives.

In November 2022, two trial lawyers representing Boeing victims in the civil tort law cases that grew out of the two Boeing 737 Max crashes that killed 346 people posted an article on the Stanford Law School website titled – *It's Time for a Criminal Prosecution of Boeing's CEOs*.

The Boeing case "represents an unusual instance where civil justice is insufficient," Shanin Specter and Robert Clifford wrote.

"More needs to be done to adequately address the breadth and depth of the wrongs involved. At issue are the actions of Boeing and its CEOs. Their behavior reveals a deliberate pattern of covering up a dangerously flawed aircraft design, particularly after the first 737 MAX 8 crash on October 29, 2018 that killed all 189 persons on board."

Schmidheiny was criminally prosecuted in Italy for manslaughter.

Boeing, current CEO David Calhoun and former Boeing CEO Dennis Muilenburg should be criminally prosecuted in the United States for manslaughter.

By effectively taking corporate criminal prosecutions off the table, the Justice Department and Congress are allowing the corporate crime wave to sweep the nation – with devastating consequences. **CHC**



A former worker of the Eternit plant in Casale Monferrato shows placards reading, in Italian: "Eternit: how many times will we be killed again?" and an Italian flag with the writing: "Eternit: Justice!", during a protest in Casale Monferrato, Northern Italy, Thursday, Nov. 20, 2014. (AP Photo/Massimo Pinca)

against a corporation for the death or injury of a worker. Instead, the Occupational Safety and Health Administration (OSHA) imposes minimal civil fines on companies for worker deaths. One reason – criminal violations OSHA can only be misdemeanors – not felonies.

In 2007, after a few high profile worker death cases, the UK passed a corporate homicide law.

The law allows prosecutors to bring homicide charges against the corporation for the death of workers or consumers.

In 2007, the year the law was passed, 247 workers died on the job in the UK – a worker death rate of 0.84 per 100,000.

In 2021, 123 workers died – a rate of 0.38 per 100,000 workers.

In 2012, James Harlow, then a law student at Duke University, drafted a corpo-