Prejudice Affecting Medical Causation

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Toxic Torts in 2004
New Orleans, LA
May 14, 2004

Prejudice Exposed

- Big Business Attacks on the Tort System
- Public Relations
- Playing Field is Tilted Against Plaintiffs
- Junket Science
- Judicial Misunderstanding of Science
- Industry Experts Distort Scientific Methodology
- Bush Administration Distorts and Suppresses Science
- Result Orientation

Harm Number One

Big Business Attacks on the Tort System

Harm Number 1: Big Business Attacks on the Tort System

- ATRA claims lawsuit abuse while "Learjet Lawyers" get rich off litigation
- ATRA website lists "Loony Lawsuits" [www.atra.org]
- ATRA published *Bringing Justice to Judicial Hellholes 2003*
- ATRA's "survey" is anonymous

Harm Number 1: Big Business Attacks on the Tort System

- Big Business promotes articles about frivolous lawsuits
- Big Business ghostwrites articles about junk science
- Big Business forms astroturf organizations against lawsuit abuse

Harm Number 1: Big Business Attacks on the Tort System

American Tort Reform Association (ATRA)

" Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. "

Amicus Curiae Brief, State Farm Mutual Automobile Insurance Co., v. Curtis Campbell and Inez Campbell, U.S. Supreme Court, No. 01-1289.

Harm Number 1: Big Business Attacks on the Tort System

American Tort Reform Association (ATRA)

" For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the limits imposed by the Constitution on punitive damages awards. ATRA's members have a substantial interest in the development of sound legal principles governing the power of juries to mete out punishment in civil litigation. "

Amicus Curiae Brief, State Farm Mutual Automobile Insurance Co., v. Curtis Campbell and Inez Campbell, U.S. Supreme Court, No. 01-1289.

Source: *US Chamber Institute for Legal Reform* National Ad, 2004

Harm Number 1: Big Business Attacks on the Tort System

"You claim lawsuit excess costs every American $809 a year. Your claim is patently untrue. First you include in that figure the standard overhead costs of insurance companies: executive salaries, office rent and utilities, agent commissions and advertising, for example. Then you throw in the cost of claims by auto owners involved in fender-bender accidents that never reach the desk of a lawyer, much less the bench of a courtroom."

Dennis Archer, President ABA
Letter to US Chamber of Commerce (March 2004)

Harm Number 1: Big Business Attacks on the Tort System

"According to Americans for Insurance Reform, you even include expenses from no-fault insurance cases, where litigation is prohibited, and the cost of claims under uninsured motorist coverage, none of which has anything to do with tort law and the legal system. Is a sophist victory so important that truth and honor do not matter in the argument."

Dennis Archer, President ABA
Letter to US Chamber of Commerce (March 2004)

Harm Number 1: Big Business Attacks on the Tort System

"It's almost like fighting the war on terrorists…I call the plaintiff's bar terrorists.

"You know you're going to get raped..when you appear there."

Maurice Greenberg, Chairman AIG
Speech to Boston College Chief Executives' Club
February 24, 2004

Harm Number Two

Public Relations

Harm Number 2: Public Relations

- Big Business directs tens of millions of dollars each year to sway public opinion

- Big Business creates front organizations, consisting of polluters, with benevolent, independent-sounding names which reassure us with "scientific" rhetoric

- Big Business uses third parties to hide the vested interest that lurks behind a message

Harm Number 2: Public Relations

- Big Business third parties encourage conformity to a vested interest, while pretending to encourage independence

- Big Business third parties replace fact based discourse with emotion-laden symbolism

- Without propaganda, pollution would be impossible

Source: *Toxic Sludge is Good for You* (1995), p.11

Source: *Toxic Sludge is Good for You* (1995), p.137

Harm Number Three

Playing Field is Tilted Against Plaintiffs

Harm Number 3: Playing Field is Tilted Against Plaintiffs

"The funding effect from industry continues to compromise the role of scientists on federal advisory boards, institutional review boards, journal authorship and court-appointed experts."

Dr. Sheldon Krimsky, Professor
Tufts University Medical School
October 20, 2003

Harm Number 3: Playing Field is Tilted Against Plaintiffs

Industry funded research and development:

1970	10.4 Billion
1997	133.3 Billion

Today nearly one-half of industry-produced articles contain a university academic research author

Harm Number 3: Playing Field is Tilted Against Plaintiffs

Industry's funding research compromises scientific independence:

- Research Bias
- Trade Secrecy
- Data Restrictions
- Withholding Data

Harm Number Four

Junket Science

Harm Number 4: Junket Science

- Big Business funds lavish retreat seminars for federal judges.

"The seminar, organized by George Mason University's (GMU) Law and Economics Center, is one of several elite programs bankrolled by private groups that have strong interests in judicial rulings. For now, the seminars are funded by conservative, free-market interests, but as their popularity spreads - - GMU has attracted nearly 500 judges - - others may jump into the game."

USA Today, May 1, 2001

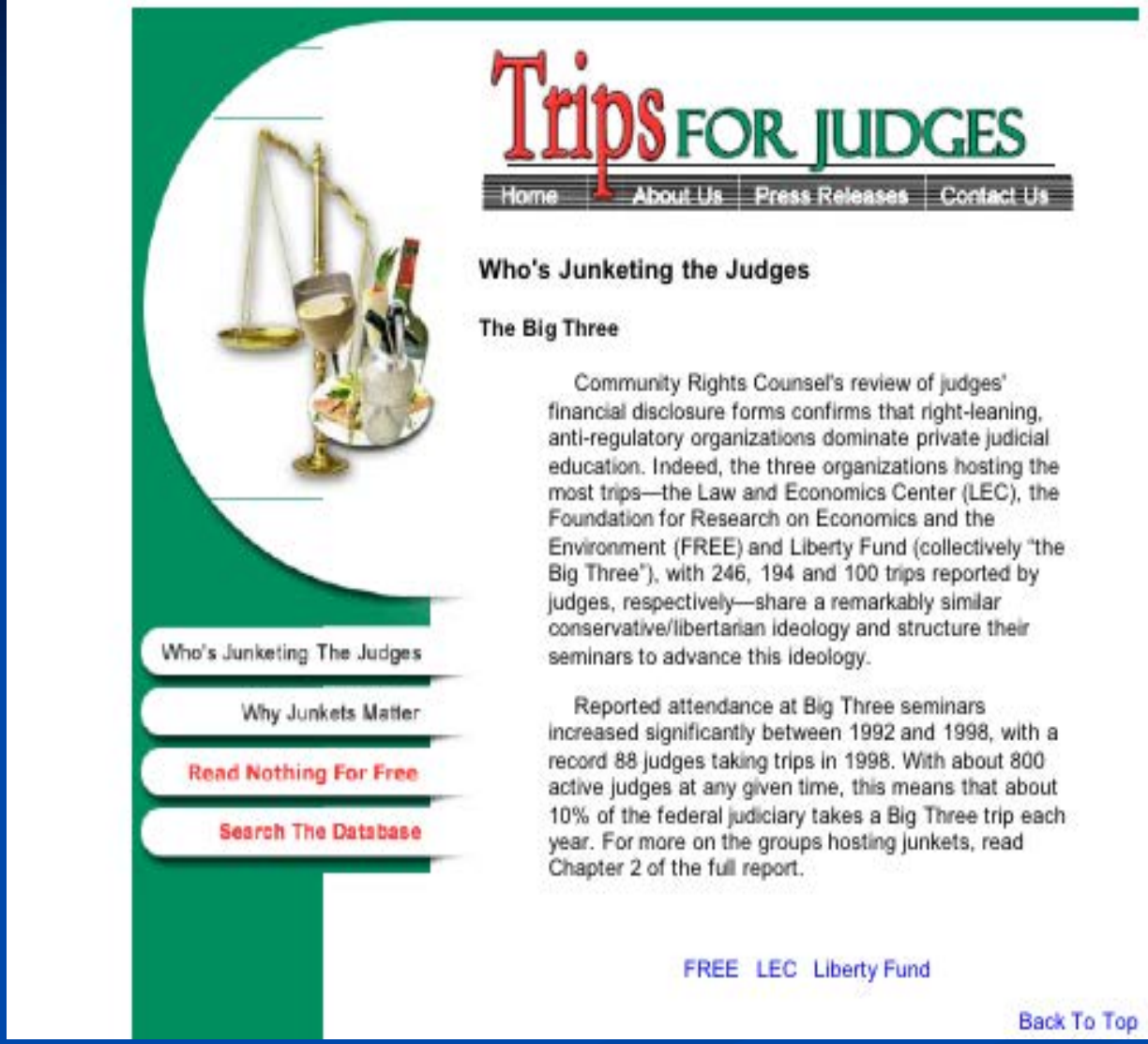
Harm Number 4: Junket Science

"Chief Justice William H. Rehnquist lashed out at critics of expenses-paid, out-of-town conferences for federal judges, saying the trips provide valuable education for people who work hard.

Businesses and various lobbying interests sponsor conferences for federal judges, paying air fare, hotel and other expenses. . . .

Rhenquist said proposed regulation of judicial conferences unnecessarily restrains free speech."

Los Angeles Times, May 15, 2001



Source: *Community Rights Counsel,* www.tripsforjudges.org, 2004

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- Who's Junketing The Judges
- Why Junkets Matter
- Read Nothing For Free
- Search The Database

Who's Junketing the Judges

Top Ten Junketing Judges

From 1992-1998, 237 federal judges reported attending 539 Big Three seminars. The majority of attendees (51%) reported going to a Big Three seminar only once during the study period. A few judges, however, attended seminar after seminar, year after year. One begins to wonder just how much education these judges need in law and economics and libertarian thought. The judges attending the most seminars—all appointed by Presidents Reagan or Bush—are:

1.	Douglas H. Ginsburg	D.C. Court of Appeals	12 trips
2.	Loren A. Smith	U.S. Court of Federal Claims	11 trips
3.	Gregory W. Carman	U.S. Court of International Trade	11 trips
4.	D. Brooks Smith	District Court of Western Pennsylvania	10 trips
5.	Suzanne B. Conlon	District Court of Northern Illinois	10 trips
6.	Kenneth L. Ryskamp	District Court of Southern Florida	9 trips
7.	Danny J. Boggs	Sixth Circuit Court of Appeals	8 trips
8.	Rodolfo Lozano	District Court of Northern Indiana	8 trips
9.	Eugene E. Siler	Sixth Circuit Court of Appeals	7 trips
10.	Pauline Newman	Federal Court of Appeals	7 trips

Source: *Community Rights Counsel,* www.tripsforjudges.org, 2004

Harm Number 4: Junket Science

"Judge Ginsberg's membership [Board of Directors, FREE] is improper, and it compromises the public's view of the impartiality of panels on which he sits in every case of interest to FREE's members. The consequences of this are much broader."

Stephen Gillers, Professor
New York University Law School
Source: *Washington Post* March 23, 2004

Harm Number Five

Judicial Misunderstanding of Science

Harm Number 5: Judicial Misunderstanding of Science

DIFFERENTIAL DIAGNOSIS

Siharath v. Sandoz Pharmaceuticals Corp., 131 F.Supp. 2d 1347, 1366 March 1, 2001

Differential diagnosis is a patient-specific process of elimination that medical practitioners use in an attempt to identify the "most likely" cause of a set of signs and symptoms from a list of possible causes. Differential diagnosis, however, does not by itself **unequivocally** prove the cause, even for the particular patient. Nor can the process establish **general causation.** And, of course, expert opinion on this issue of "general causation" must be derived from scientifically valid methodology.

With respect to general causation, the relevant scientific field is **epidemiology** or toxicology and not clinical medicine.

McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2nd Cir. 1995); **Zuchowicz v. United States,** 140 F.3d 381 (2nd Cir. 1998); **Benedi v. McNeil-P.P.C., Inc.,** 66 F.3d 1378 (4th Cir. 1995); **In Re Paoli R.R. Yard PCB Litigation,** 35 F.3d 717 (3rd Cir. 1994); **Westberry v. Gislaved Gummi AB,** 98-1540 (4th Cir. 1999)

It is sufficient for admission of a causation opinion that a medical expert use the methodologies by which doctors treat and diagnose their patients.

Harm Number 5: Judicial Misunderstanding of Science

ANIMAL STUDIES

Siharath v. Sandoz Pharmaceuticals Corp., 131 F.Supp. 2d 1347, 1366 March 1, 2001

The use of animal studies to prove causation in human beings has two distinct disadvantages. Reference Manual at 346. First, extrapolating from animals to humans is difficult because "differences in absorption, metabolism, and other factors may result in interspecies variation in responses." Id. . . .

Second, "the high doses customarily used in animal studies requires consideration of the dose-response relationship and whether a threshold no-effect dose exists." Reference Manual, at 346.

Reference Manual On Scientific Evidence, Second Edition 2000

Reference Guide on Toxicology Page 403

There are three central tenets of toxicology. . . .

Third, the toxic responses in laboratory animals are useful predictors of toxic responses in humans.

Harm Number 5: Judicial Misunderstanding of Science

"A number of courts have required standards for expert testimony that exceed those that physicians use in ordinary clinical decision making. . . . Courts with especially demanding standards are misled if they believe that they are fairly representing medical practice."

Jerome P. Kassirer, MD and Joe S. Cecil, PhD, JD, *Inconsistency in Evidentiary Standards for Medical Testimony, Disorder in the Courts*, JAMA, September 18, 2002 - Vol. 288, No. 11, p. 1382

Harm Number Six

Industry Experts Distort Scientific Methodology

Harm Number 6: Industry Experts Distort Scientific Methodology

"Drug Companies withheld information showing anti-depressants were ineffective and could be harmful to children …

Scientists who conducted a review of six published and six unpublished trials … say companies had been aware of problems but did not reveal them.

In a memo from GlaxoSmithKline, leaked last month and published in a Canadian medical journal, the company said negative trial results could not be released because it would damage the profile of the drug."

Drug Firms Withheld Negative Data: Lancet Study

Harm Number 6: Industry Experts Distort Scientific Methodology

Industry expert reports and depositions many times claim to define sound science. These definitions require more data collection and apply a higher scientific standard than clinical medicine or real science does. In these experts' opinion, no plaintiff's case meets their requirements.

Harm Number 6: Industry Experts Distort Scientific Methodology

Industry experts frequently assess the association between a chemical and disease by mixing epidemiology and toxicology into their causation analysis. This is most often done by reference to criteria articulated by Sir Austin Bradford Hill - strength of association, consistency, specificity, temporality, biological gradient, plausibility, coherence, experimental evidence, and analogy.

Harm Number 6: Industry Experts Distort Scientific Methodology

Hill's nine criteria, considered scientific classics, were designed and published as a means to help evaluate the quality of population-based (epidemiologic) medical studies, not to determine the clinical etiology for a medical diagnosis in an individual patient.

Harm Number 6: Industry Experts Distort Scientific Methodology

One Industry Expert's Statement of Essential Steps by any Physician in Order to Diagnose a Toxic Medical Illness:

Every Case Requires these Methodologies of Medical Toxicology Causation Analysis

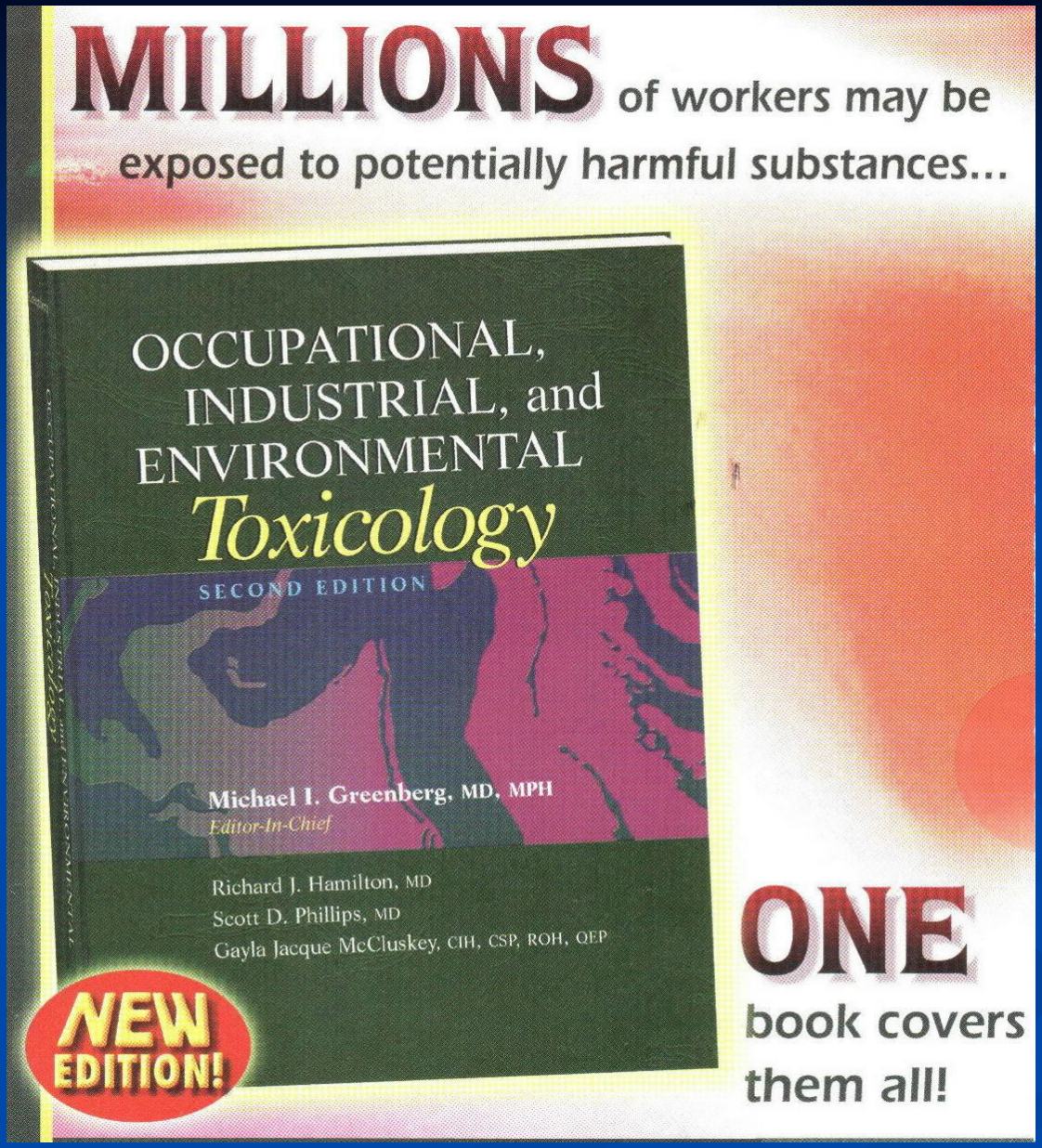
- Exposure versus Dose
- Dose-Response Relationship
- Target Organ Specificity
- Cause and Effect Relationship

Harm Number 6: Industry Experts Distort Scientific Methodology

Needed To Determine a Medical Cause and Effect Relationship:

- Exposure/Dose Assessment
- Exposure Sources
- Exposure Pathway
- Concentration
- Exposure Route(s)
- Intake
- Uptake
- Potential Dose
- Applied Dose
- Absorbed Dose
- Delivered Dose
- Target Organ Dose
- Biological Effect
- Adverse Effect

Each of these critical factors is cited as necessary to perform a proper 'Toxicological Causation Analysis' for any patient



Mosby Medical Publishers Book Brochure, 2003

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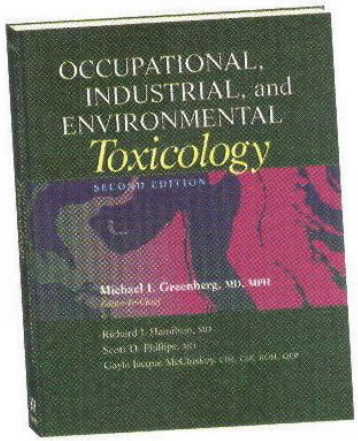
Confidently **diagnose, treat,** and **refer patients who have been exposed to toxic substances**—with the expert guidance found in **Occupational, Industrial, and Environmental Toxicology, 2nd Edition!** Completely revised and updated, this resource features a unique format that...

- organizes content three ways: by **occupation, industry,** *and* **environment**
- covers **what agents** are plausible for **exposure, systemic effects,** and **suggested treatments**
- makes it easy to **diagnose** and **treat** your patients—whether they know the substance of exposure or not

Mosby Medical Publishers Book Brochure, 2003

Occupational, Industrial, and Environmental Toxicology, 2nd Edition



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Mosby Medical Publishers Book Brochure, 2003

Harm Number 6: Industry Experts Distort Scientific Methodology

Dr. Scott Phillips, Medical Toxicologist expert, charged $90,000 to evaluate and non-diagnose one worker's occupational illness in Louisiana during 2002-2003

The Second Edition of his book, which claims that no exposure substance knowledge is needed to expertly diagnose an occupational illness, sells for $99.95 plus shipping in 2003

Harm Number Seven

Bush Administration Distorts and Suppresses Science

Harm Number 7: Administration Distorts and Suppresses Science

"Science, like any field of endeavor, relies on freedom of inquiry; and one of the hallmarks of that freedom is objectivity. Now more than ever, on issues ranging from climate change to AIDS research to genetic engineering to food additives, government relies on the impartial perspective of science for guidance."

President George Herbert Walker Bush
Remarks to the National Academy of Sciences, April 1990.

Harm Number 7: Administration Distorts and Suppresses Science

Findings of the Investigation

#1 There is a well-established pattern of suppression and distortion of scientific findings by high-ranking Bush Administration political appointees across numerous federal agencies. These actions have consequences for human health, public safety, and community well-being."

Scientific Integrity in Policymaking,
Report of the Union of Concerned Scientists, 2004.

Harm Number 7: Administration Distorts and Suppresses Science

Findings of the Investigation

#2 There is strong documentation of a wide-ranging effort to manipulate the government's scientific advisory system to prevent the appearance of advice that might run counter to the administration's political agenda."

Scientific Integrity in Policymaking,
Report of the Union of Concerned Scientists, 2004.

Harm Number 7: Administration Distorts and Suppresses Science

Findings of the Investigation

#3 There is evidence that the administration often imposes restrictions on what government scientists can say or write about "sensitive" topics."

Scientific Integrity in Policymaking,
Report of the Union of Concerned Scientists, 2004.

Harm Number 7: Administration Distorts and Suppresses Science

Findings of the Investigation

#4 There is significant evidence that the scope and scale of the manipulation, suppression, and misrepresentation of science by the Bush administration are unprecedented."

Scientific Integrity in Policymaking,
Report of the Union of Concerned Scientists, 2004.

Harm Number 7: Administration Distorts and Suppresses Science

The Administration's political interference with science has led to misleading statements by the President, inaccurate responses to Congress, altered web sites, suppressed agency reports, erroneous international communications, and the gagging of scientists.

Politics and Science in the Bush Administration, Committee on Government Reform, Rep. Henry A. Waxman, August 2003.

Harm Number 7: Administration Distorts and Suppresses Science

- Appointing Unqualified Persons with Industry Ties
- Appointing Unqualified Persons with Ideological Agendas
- Stacking Advisory Committees
- Opposing Qualified Experts
- Including Misleading Information in Presidential Communications
- Presenting Incomplete and Inaccurate Information to Congress

Harm Number 7: Administration Distorts and Suppresses Science

- Altering Web Sites
- Suppressing Agency Reports
- Scrutinizing Ongoing Research
- Obstructing Agency Analyses
- Undermining Outcome Assessment
- Blocking Scientific Publication

Harm Number Eight

Result Orientation

Harm Number 8: Result Orientation

"Judges should act in ways that inspire public trust and confidence…

The activist rulings of certain Reagan/Bush judges in striking down environmental laws are quite controversial…

By combining these opinions with the acceptance of seminars in resort locations funded by the beneficiaries of this activism, however, the judges and the judiciary fail to uphold their end of the bargain.

Special interests should not be permitted to fund, and thus shape, continuing legal education for our nation's judges."

Community Rights Counsel, www.tripsforjudges.org.

Conclusion

What Are We To Do?

> "I know of no safe depository of the ultimate power of the working society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."
>
> – Thomas Jefferson