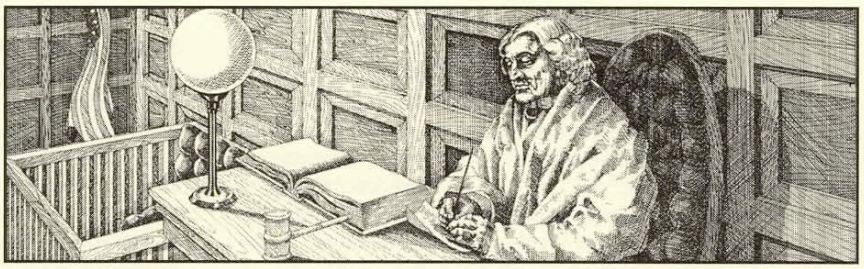

From the Bench

Private Judicial Seminars:
A Reply to Abner Mikva

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It is well known that education is good for lawyers. It is less well known that education is also good for judges. Nonetheless, Abner J. Mikva, visiting law professor and former circuit judge, detects appearances of impropriety in judges attending non-government educational seminars. As a solution, he proposes appointing a government agency to act as censor. Mikva, *Judges, Junkets, and Seminars*, LITIGATION, Summer 2002. I think Judge Mikva misdiagnoses a problem that does not exist and prescribes a solution that is, in a word, awful. This is not all. His worst failing is his inability to see—or, if he sees, to admit—that his real objection is not about ethics. He simply does not like what he perceives as the seminars' contents and viewpoints.

I encountered the subject of judicial seminars first as a member, and then as chairman, of the U.S. Judicial Conference's Codes of Conduct Committee in the 1990s. I do not particularly relish writing about it again. But my former colleague's latest contribution is so rife with errors of fact and judgment that it should not be allowed to stand uncorrected.

First, some background. Privately funded judicial seminars have existed for more than 50 years. When the question of the propriety of judges attending seminars came up decades ago, the Codes of Conduct Committee published Advisory Opinion No. 67 to provide guidance to the federal judiciary. The opinion, interpreting the Code of Conduct for United States Judges, permitted judges to attend private seminars and to be reimbursed for expenses, on certain conditions. This should have settled the matter, but there are always those who want to kindle controversy.

The latest round began when Douglas Kendall, founder of the newly formed Community Rights Counsel, delivered a paper charging federal judges with acting unethically in attending some private seminars and being reimbursed for their expenses. Judge Mikva wrote the foreword. He complained that "private interests" were "allowed to wine and dine judges at fancy resorts under the pretext of 'educating' them about complicated issues." The word "pretext" deserves a comment; I will give one in a moment. *The Washington Post* huffed and puffed, "me-too" editorials appeared elsewhere, and Kendall wound up with some good publicity. Senators Kerry and Feingold introduced a bill to outlaw private seminars without the prior approval of a government board. The Chief Justice and the Judicial Conference of the United States voiced strong opposition, as did the Federal Judges Association. The Federal Bar Association, whose 15,000 members appear regularly in federal courts across the country, also criticized the bill and vigorously defended the practice of judges going to educational programs. For many good reasons, only a few of which Judge Mikva mentions, the bill went nowhere. (Later a House subcommittee held a hearing in which Kendall and Judge William L. Osteen, current Chairman of the Codes of Conduct Committee, testified. No legislation resulted.)

Last year, the television program *20/20* ran an "exposé" on judges attending a mid-winter educational program in Tucson, Arizona, run by George Mason University's Law and Economics Center—and the supposed deep ethical implications of such judicial behavior. (I am a member of the Law and Economics Center's judicial advisory board.) Snippets of interviews with Judge Mikva and Kendall were played. The program was short on ethics and long on distortions. One example particularly attracted my attention, not because it was so noteworthy but because it so nicely captured the essence of *20/20*'s slant. While showing footage of a few judges playing golf, the voice-over reported that this activity was "part of an educational program" run by George Mason. That was false and *20/20* knew it. Golf was no part of the educational program. The TV crew filmed the judges in mid-afternoon. Classes were over for the day. The judges paid their own greens fees. I have always believed that in any academic setting what students do and what student-judges do (at their own expense) with their free time is their business. Those who think that golf

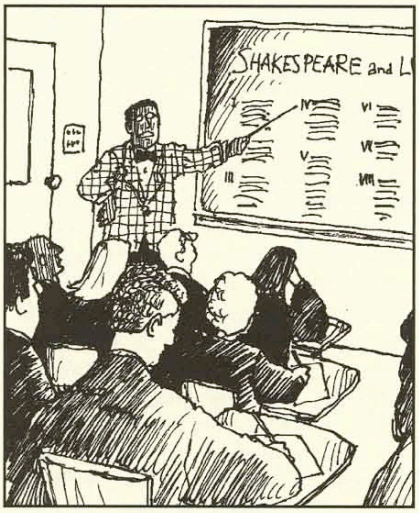
was part of the Law and Economics Center's educational program must also think that bar hopping in Georgetown on Saturday night is part of Georgetown University's curriculum.

I gave a couple speeches about the *20/20* production and the subject of judicial seminars (see 2 *Engage: The Journal of the Federalist Society's Practice Groups* 146 (Nov. 2001)). Judge Mikva now says that he regrets taking part in the program. But he persists in claiming that federal judges at the Tucson seminar (he mistakenly names Phoenix as the venue)—or, indeed, any seminar put on by George Mason—create an "appearance of impropriety." (He also perpetuates *20/20*'s false reporting that golf was part of the George Mason program.)

Judge Mikva has made a serious charge in his "Junkets" piece, and I want to examine it carefully. A good way to begin is to analyze the principle he applies. But we cannot start there. Judge Mikva never shares with his readers his standard for judging whether there is an appearance of impropriety. Instead, he offers the threadbare clichés of "junkets," and "wining and dining," and "fancy surroundings." It is odd enough that he gives no standard. But it is stranger still that he neglects to mention *In re Aguinda*, 241 F.3d 194 (2d Cir. 2001). The Second Circuit's careful opinion decides the very question Judge Mikva raises. It holds that there was no appearance of impropriety in a district judge's attending a conference held by the Foundation for Research on Economics and the Environment (FREE) in Bozeman, Montana, although FREE receives corporate donations for its general operations and had received a "minor" contribution from Texaco, one of the parties in *Aguinda*. No "reasonable observer," wrote the court, would believe that such a minor contribution would influence a "seminar-attending judge" in litigation before him. Judge Mikva must disagree with the Second Circuit. In "Junkets," he gives his verdict that judges going to FREE seminars, like judges going to seminars of George Mason's Law and Economics Center, create an appearance of impropriety. But we cannot tell what aspect of the Second Circuit's reasoning he deems incorrect, or why.

The *Aguinda* court did enunciate a principle—namely, that "with regard to the appearance of partiality, the appearance must have an objective basis beyond the fact that claims of partiality have been well publicized." The commentary to Canon 2 of the Code of Conduct for United States Judges explains: "The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

In other words, it is a good idea to gather the evidence before coming to a conclusion about appearances, which is the point of the Supreme Court's decision last term in *Sao Paulo State v. American Tobacco Co.*, 122 S. Ct. 1290 (2002). Here, too, Judge Mikva disappoints. In discussing the judicial seminars of FREE and George Mason's Law



and Economics Center, he writes broadly about "groups" or "private interests" having "an interest in litigation" that are "funding" or "sponsoring" the programs. Precious few details are forthcoming, and those that make it into print are wrong. It is time for some facts.

George Mason University is a state institution. The Law and Economics Center is part of the university's law school. *See www.lawecon.org*. Faculty members at the law school design the seminars. (As this article was going to print, one member of the law school faculty, Vernon Smith, was awarded the 2002 Nobel Prize in Economics.) According to Judge Mikva, the Law and Economics Center "set up a separate foundation to fund" its seminars and receive donations from corporations. Mikva, *supra* at 6. There is no truth in this. The Center never set up any separate foundation for any purpose. There is a George Mason University Foundation; it is the foundation for the entire university, of which the law school is a small part; and it was established long before the law and economics program began. Corporate contributions amount to only 14 percent of the Law and Economics Center's annual budget. The average corporate contribution comes to one-half of one percent of the Law and Economics Center's receipts. So an attending judge, computer in hand, could calculate that some corporation had provided the iced tea he was sipping while a learned scholar lectured on regression analysis. Does any of this give rise to an appearance of impropriety in the mind of any person who cares about truth? I don't think so, and neither did the Second Circuit in *Aguinda*.

FREE, as the Second Circuit recognized (241 F.3d at 199 n.4), presents a somewhat different situation. It is a private non-profit organization. It receives no money from corporations to reimburse judges for attending its seminars (which are now co-sponsored by Montana State University). The seminar money comes from so-called dead-man foundations not involved in federal litigation. *See www.free-eco.org*. So what is Judge Mikva talking about when he writes of judges being reimbursed for expenses at FREE's seminars "by groups having an interest in litigation"? Mikva, *supra* at 5. Pay close attention to the words "interest in litigation." You probably thought FREE's seminar contributors were parties in federal court cases. If so, you were misled.

Judge Mikva has something different in mind, although he does not disclose it. He is visualizing foundations that contribute not only to FREE but also to public interest law firms, against whom Kendall occasionally litigates property and environmental cases. (Kendall is explicit on this point. *See tripsforjudges.org/crc.pdf*, at p. 79.) Judge Mikva's theory that there is an appearance of impropriety thus rests on at least four unstated premises, unstated because when exposed to the light, they disintegrate. Here is the chain: (1) the foundation providing funds to FREE for seminars has some control over the point of view conveyed there; (2) the viewpoint conveyed represents a litigat-

ing position of the foundation because (3) the foundation provides funds to public interest law firms representing third parties, and the foundation has some control over the law firms' position in court; and (4) judges attending the seminar know not only that the foundation has contributed funds to FREE and to a public interest law firm appearing in their court, but also that the foundation controls the positions of both. Since when do foundations have litigating positions in cases they are not litigating? When did foundations begin instructing attorneys how to represent their clients, and who are these attorneys so we can report them to the bar's ethics counsel? And which judges knew all this and how did they know? I could go on, but I think you get the picture.

Judge Mikva has another difficulty with the Law and Economics Center—it does not supply judicial invitees with a list of the contributing corporations. According to him, Advisory Opinion No. 67, which I mentioned earlier, "specifically requires judges attending such seminars to make inquiry as to who the funders are." Mikva, *supra* at 5. Opinion No. 67 says no such thing. Here is the relevant portion, with my italics:

> The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them.
>
> It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation. *If there is a reasonable question concerning the propriety of participation, the judge should take such measures as may be necessary to satisfy himself or herself that there is no impropriety.* To the extent that this involves obtaining further information from the sponsors of the seminar, the judge should make clear an intent to make the information public if any question should arise concerning the propriety of the judge's attendance.

The first paragraph should be enshrined in the hall of wisdom, but I am concerned here with the second. Judge Mikva seems to have missed the "If" in the italicized sentence. For reasons I have already given, as has the Second Circuit, no reasonable person would question the propriety of a judge attending a Law and Economics Center seminar. Hence no further inquiry is required.

Advisory Opinion No. 67 makes good sense. Judge Mikva's misreading of the opinion does not. For instance, when judges are invited to attend programs at law schools across the country—and the law schools offer to pay for transportation and put the judges up in fancy hotels and wine and dine them—what are the judges supposed to do, according to the Mikva theory? Ask the university to please supply a list of all its corporate and individual and institutional donors? And, after the judge gets the list, what is he or she to do with it? I can assure you no judge in his right mind would say—"Well, the XYZ Corp. contributes to your university and it sometimes has cases in my court. Therefore, I must refuse your kind invitation to attend your seminar on Judge Jeffreys and the Bloody Assizes." If that were the rule, no judge could ever be reimbursed for his expenses in attending any program in any institution of higher learning in America. If the Mikva rule prevailed, it would also threaten the common and time-honored practice of judges teaching at law schools, something the Code of Conduct encourages. Law schools receive contributions from corporations; judges are paid for teaching; part of their pay therefore can be traced to corporations; and so, on the Mikva theory, there is an appearance of impropriety.

Dozens of organizations regularly invite federal judges to educational seminars and offer to pay for their transportation, food, and lodging. NYU, Stanford, Princeton, the University of Virginia, and other universities are involved, as are bar associations (including the ABA), the Ford Foundation, the Einstein Institute, the Aspen Institute, and many others. Why is it that my former colleague attacks only seminars run by George Mason and FREE?

Judge Mikva admits going to seminars run by the Aspen Institute while he was on our court. Justice Harry Blackmun also was a regular attendee at these programs for many years. Aspen seminars are okay and not "junkets," Judge Mikva thinks, even though the Aspen Institute solicits and accepts corporate contributions (www.aspeninst.org/support/giving.html), even though judges are reimbursed for expenses, even though the seminars are held in very fancy places, and even though the Aspen Institute advertises extracurricular activities such as skiing and golf (www.aspeninst.org/about/about_campuses.html). His rationale? The Aspen Institute seminars he attended as a judge were "mostly"—which means, not always—devoted to "the great books," not economics. Well, some people believe *The Wealth of Nations* is a great book. The Nobel Prize-winning economists who teach at George Mason's Law and Economics Center seminars probably do. Besides, not all of George Mason's programs deal with economics. Many concern science, or statistics, or history, or the classics, or other subjects of interest to any judge who wants to broaden his or her learning, which one would hope is every judge.

I attended two George Mason seminars in 2002. The first was entitled "Shakespeare and Liberty: The Roman Plays," run by one of the country's leading Shakespeare scholars. I suppose this seminar would fail Judge Mikva's test. Julius Caesar, Antony and Cleopatra, and Coriolanus were just great plays, not great books. The second George Mason seminar was on the Founders, presented by historians from Brown, MIT, Yale, Mt. Holyoke, and other institutions of renown. I suppose this program would not qualify either, even though some of the historians were Pulitzer Prize winners. After all, Washington and Jefferson and Hamilton and Madison were just great men. They did not write books. (Jefferson's "Notes on the State of Virginia" doesn't count; he didn't want it published.)

Of course, I am being facetious. But I am doing so to make a point: The objection to judges attending seminars is driven by the perception, actually the misperception, that the programs are somehow biased.

I said I would comment on Judge Mikva's other assertion that "private interests" are "allowed to wine and dine judges at fancy resorts under the pretext of 'educating' them about complicated issues" (tripsforjudges.org/crc.pdf, at p. iii). Never mind the cant. Notice the massive contradiction. On the one hand, there is just eating and drinking and golf

and no real education; on the other hand, judges are being indoctrinated. As to the "pretext" claim, he has never backed up this preposterous—and injudicious—accusation, and he cannot do so. It is an insult not just to the federal judges, Republican and Democratic appointees alike, who have invested considerable time and effort reading and thinking and learning about the worthwhile subjects presented at these seminars. It is also an affront to the outstanding scholars from leading universities across the nation, recognized experts in law, economics, science, history, and literature, holders of endowed chairs, authors of prize-winning books, recipients of prestigious awards, who regularly take part in the seminars. Is it any wonder, then, that federal judges left and right are upset with Judge Mikva, as he acknowledges in his "Junkets" article? He has unjustly attacked their honor and integrity. "Rightly to be great," said Hamlet,

> Is not to stir without great argument,
> But greatly to find quarrel in a straw,
> When honour's at the stake.

Kendall is more overt about his desire to silence the views he fears. He too gives his blessing to judges attending Aspen Institute programs, even on such matters as international human rights. These Aspen Institute seminars, and its seminars on "Justice and Society" and on freedom of speech, are fine for judges because Kendall's "research ... revealed no overwhelming biases." *See* tripsforjudges.org/crc.pdf, at p. 18. The nature of his research? Kendall examined the politics of Aspen's board of trustees. *Id.* And what is his idea of "bias"? His remarks on the *20/20* program provide some measure. At one point, Kendall informs the *20/20* audience that George Mason is guilty of "bias" for allowing judges to learn about a particular economic concept at its Tucson seminar. Apparently unknown to Kendall, the concept he described was the Coase Theorem, named after Ronald Coase and for which he won the Nobel Prize in Economics.

Kendall's real complaint, and those of his persuasion, is thus not with ethics. It is with the content and viewpoint of the seminars. Judge Mikva in "Junkets" assures us that there are views on takings other than those of Professor Richard Epstein and views on economics other than those of Milton Freidman (both have taught at George Mason Law and Economics Center seminars). Mikva, *supra* at 5. Fine. But whatever happened to Justice Holmes' marketplace of ideas? Rather than try to counter ideas with ideas of his own, the tactic of Kendall and those who have joined hands with him is to try to silence what they see as the opposition. They disguise their true objective by proclaiming that they are really trying to root out bias, or that they just want objectivity. But who decides what is objective? Hamlet again: "ay, there's the rub."

Judge Mikva's proposed remedy is to put a government agency in charge of approving and disapproving private seminars for judges (by what standards he does not say). This proves the adage: "The main cause of problems is solutions." Chief Justice Rehnquist, in his speech in May 2002 to the American Law Institute, gave all the answer that is needed: "The notion that judges should not attend private seminars unless they have been vetted and approved by a government board is a bad idea. It is contrary to the public interest in encouraging an informed and educated Judiciary, and contrary to the American belief in unfettered access to ideas."

A few final thoughts. Advisory Opinion No. 67 provides guidance to judges with respect to the three important variables: whether the seminar's sponsor is involved (or likely to be involved) in litigation before the judge; whether the source of funding is involved (or likely to be involved) in litigation before the judge; and whether the subject matter of the seminar relates to the litigation in which the sponsor or funding source is involved. These factors address the major ethical concerns that can arise when judges attend private seminars. If one asks whether a judge should refuse to attend seminars dealing with matters that may come up in his or her court, there is no absolute answer. Nor should there be. Our court hears many cases from federal agencies. Should we therefore decline to attend all programs on administrative law? Of course not. But if a party to a pending case is providing the money for the program, we, of course, should decline, and would. On the other hand, suppose a party to a case in our court puts on a program about the "great books" and offers to reimburse all attendees. Should we go? Of course not, regardless whether the seminar is held in Aspen, Colorado, or some less hospitable venue.

The experience of the Codes of Conduct Committee confirms that the factors mentioned above may vary from seminar to seminar, from organization to organization, and—because the focus is on improperly influencing the judge in a lawsuit (or appearing to)—from court to court. Finding the ethical path calls for good judgment. Good judgment is what federal judges are appointed to exercise. The federal judiciary is governed by the strictest of ethical codes, and the judges of this country take their ethical responsibilities very seriously indeed. The Code of Conduct has served the judiciary, and the public, well. I hope you will agree with me that the objections to non-governmental educational seminars like those of George Mason's Law and Economics Center and FREE are unfounded and offer no good reason for devising a different Code.