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## COMMENTARY: FROM THE BENCH TO THE PODIUM

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In ways large and small, the idealized expectation that the Supreme Court will stay outside the political arena continues to diminish in a country with polarized partisanship and fragmented cultural values. One reason is that those on opposite sides of the divide increasingly seek to use the Court to advance their own agendas – and, increasingly, succeed at it.

Another reason, though, is that the Justices are moving regularly into the public realm, and taking their deep divisions with them. In short, they frequently move from the bench to the podium, and use public platforms to defend their judicial records – at times, to settle old scores or to stir up old wounds.

In some ways, this may be a welcome new form of transparency for an institution long known for its capacity to keep its own secrets. But it also may be an unhealthy turn toward public self-justification, a reluctance to let the judicial record speak for itself.

It is in this context that another breakthrough in public advocacy has come: retired Justice John Paul Stevens took the witness chair on Wednesday before the Senate Rules Committee – his first appearance before a Senate committee since his nomination hearings thirty-nine years ago, he noted. He was there to promote reform of campaign finance law.

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There are many issues before the Court that are deeply controversial, but none is more vigorously debated in America's politics than the role that money plays in election campaigns. One side is certain that the Court is destroying democracy with recent rulings on that subject; the other side is equally certain that the Court is making democracy more open to all who want to participate.

The Court already had been drawn into that debate four years ago, when President Obama, in a State of the Union address, famously criticized the Court – to its face – for its ruling in the *Citizens United* case. And Justice Samuel A. Alito, Jr., in the audience, was offended enough to famously mutter a denial, and shake his head in disapproval.

But Justice Stevens is retired. Does that make a difference? The reality is that it probably does not. He is still very much identified with the Court; he clearly was not invited to testify merely as a revered elder statesman. He was a key part of the majority on the Court that for years prevailed in upholding sometimes rigorous campaign finance regulation – a majority that, in fact, no longer exists, replaced by a new majority deeply skeptical of restraints on campaign funding.

Stevens has not just stepped aside quietly into private life. He is, even at age ninety-four, an energetic public speaker and, notably, many of his speeches have been built on re-arguing positions he took on the Court, frequently on issues on which he had been on the losing end. He now has turned those thoughts into a book, *Six Amendments: How and Why We Should Change the Constitution*. It is no surprise that the amendments would, for the most part, rectify errors that he perceived when he was on the Court.

His prepared testimony before the Senate panel was distributed for him by the Court's staff. He no doubt had at least some help with it from a government-salaried law clerk. And they very likely did some work on it in the judicial chambers he still occupies. The remarks are clearly his own, but they have the patina of the high judicial office he held for nearly thirty-five years.

He crossed the street to become a part of a legislative hearing, dealing not with a safe topic such as the need to preserve judicial

independence or a review of the Court's annual budget, but rather focusing on a truly divisive policy issue that itself contributes importantly to continuing partisan division.

He opened his remarks by insisting that "campaign finance is not a partisan issue." But his proposal for the language of a constitutional amendment would overturn Court rulings that the Republican Party definitely has found do work to its advantage and the Democratic Party to its woe.

But, it could be said that, if a retired Justice needed some cover for taking his personal preferences out in public, he could find it in the recent podium appearances of some of the sitting Justices. Just last week, for example, Justices Ruth Bader Ginsburg and Antonin Scalia were together in Washington for a televised discussion at which they talked about cases before the Court this Term, and went over some of the differences in their approaches to the law.

There is hardly a popular broadcast talk show that has not had a sitting Justice, alone or on a panel, making the case for their own performance on the bench.

Within the Court building itself, some of this political theater now appears with some regularity as individual Justices increasingly announce orally their dissents, sometimes in impassioned tones. It is not enough, it seems, to dissent in writing; there is now a greater perceived need to let a public audience know how strongly the disappointment of losing can be felt.

There are other signs that the divisions inside the Court are apparently being taken personally, at least some of the time. Two years ago, there was a leak – almost certainly coming from inside the Court itself – about the switch in positions that Chief Justice John G. Roberts, Jr., had supposedly made in the health care decision. The leak was hardly an attempt at praise.

And one can find, with regularity, dissenting and concurring opinions that are as pointed in denunciation of the other side as an attack ad in a political campaign.

The press, of course, has some role in highlighting the perception that the Court has gone political. Seldom does a divided opinion emerge that a prominent news organization does not say what

the partisan line-up of the Justices was – that is, the political party responsible for putting each of them on the bench.

Some of these atmospherics perhaps can be exaggerated, but as they accumulate, they very likely contribute to the cynical notion that jurisprudence is deeply infused with politics of a decidedly partisan flavor. //