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On Harman: Prefatory Note from Counsel

*David B. Fawcett**

A jury trial within our adversarial system is a noble if not ingenious way to resolve disputes in a civil way. Yet a civil action often requires much courage and many resources. At times, litigation may take on a Sisyphean specter, but litigation ends and, more often than not, the jury gets it right. Wrongs are righted; life goes on.

Before the Harman Mining Company was driven out of business by what a jury found to be unlawful conduct on the part of one of its competitors, my clients were told in no uncertain terms that substantial resources would be expended if they were to seek justice through the courts. For a commercial litigator like me, that means zealous advocacy—maybe hardball tactics and more unlawful conduct—but not something foreign to adversaries battling in high-stakes litigation and not something that poses a real threat to our system of justice. In the end, the day of reckoning comes. Evidence is presented to a jury subject to clear rules and procedures—a good system I trust and deeply respect.

After a verdict was rendered compensating my clients for the destruction of their business, and as the matter was headed for appeal, however, something happened that took our case out of the realm of “tactics” and beyond the bounds of what should be permitted in any legal system whose governing principle is the rule of law. What happened is something that, in my opinion, any ordinary American would view as the beginning of the end of our court system, the crumbling of our country’s pillars of justice.

Riding back to the hotel on the evening of the Supreme Court argument in the *Caperton* case, a news report played on the radio. To my surprise, the taxi driver turned up the volume so that the piece by NPR Legal Affairs Correspondent, Nina Totenberg, was fairly blasting. Totenberg provided a long, vibrant, singsong report of the argument—recapping the case, quoting the parrying lawyers and the oratorical questions of the Justices—articulating

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in shrill and dramatic terms the legal principles involved. At the conclusion of the report, the driver turned down the radio.

"I want to tell you something," he announced. "I came to this country eight years ago. I am from Nigeria. And I love this country."

He paused, then raised his voice: "But I have been following this case, and, you know, this kind of thing should not happen in America! If justice can be bought, there is no justice."

He repeated, "In America, this should not be!"

Thankfully, for the ordinary citizens of America, as well as for all those people who someday find they must turn to the courts for justice, we have learned that five of nine Justices agreed with that cabbie.

I am proud to have been part of the landmark case known as *Caperton*. We were not asking the Court to create a new or novel proposition of law. We were only asking the Court to recognize a bedrock right of our judicial system—the constitutional right to a fair trial before a neutral and detached judge—the right of a litigant to have his case heard by a judge who would not be perceived by the ordinary person to be biased by money.