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Correspondence

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CORRESPONDENCE

To the editors of *Constitutional Commentary*:

The last issue of *Constitutional Commentary* contains a review by Patrick Schiltz of Chief Justice Rehnquist's book, "The Supreme Court: How it was, How it is." Schiltz rightly emphasizes the Chief's revelation that the Court has a "practice of not discussing the merits of cases at conference." The Review continues by quoting the Chief Justice: . . . "there is usually no 'real prospect that extended discussion would bring about crucial changes in position on the part of one or more members of the Court.' Shades of Thurman Arnold!" Schiltz cites in a footnote Arnold's article on *Professor Hart's Theology* at 73 HARV. L. REV. 1298, 1313 (1960). I recall when Thurman was writing that article and how much fun he had talking about the article while his law firm partners visited him in his office. In fact, Arnold wrote by dictating to his secretary directly to the typewriter (no shorthand) draft after draft after draft until he was satisfied.

Readers of your journal may be interested in reading the passage in which Arnold anticipated the Chief's remarkable conclusion thirty years later. Here it is:

To suggest that judges who hold differing views with absolute convictions and who have the power to dissent are going to surrender those views, moved solely by logic and debate, is to betray a lack of knowledge of the history of the Court. I have no doubt that longer periods of argument and deliberation, and more time to dissent, would only result in the proliferation of opinions, of which we already have too many. Professor Hart's idea of nine men sitting around in hours of "fully focused and functioning intellectual effort," finally coming to the conclusion that Professor Hart wants them to come to, shows an ignorance of the rules of elementary psychology.

The only kind of court that could successfully follow Professor Hart's prescription would be a court composed of men without deep-seated convictions about current national problems, a court whose members have not had enough previous experience with the controversial ideas which the Court must eventually express as law to have ever taken sides in the struggle; such a court might be found in a Trappist monastery. The reason for the proliferation of concurring opinions and dissents on the present Court is that the Court is made up of men of deep-seated convictions in times of revolutionary change when an old order is giving place to a new. It is just that simple.

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