

out battle with the Justice Department. But he is likely to find that instead of declaring victory and going home, Justice will pursue him into the next arena, Microsoft Network.

Microsoft's foes argue that the company would have an unfair advantage in on-line services if it is allowed to bundle Microsoft Network with Windows 95. As an alternative, they want Justice to force Microsoft to unbundle the two products or offer other on-line services alongside Network on the operating system.

A central issue in the debate is whether Microsoft's dominance of the PC operating system should prevent it from moving into new markets or from adding functionality to the OS. Those who argue that Microsoft should be restrained, a view championed by Gary Reback's White Paper, claim to be taking a dynamic view of the computer market based on leverage and future change. In fact, they are taking a very static view that projects the present into the future.

Microsoft's opponents believe a fixed line can be drawn between the operating system and other applications, but it is natural and preferable for the OS to absorb new features as they become standard. Technology is not static.

Microsoft opponents also say that the company's dominance of operating systems gives it leverage to move into adjacent markets, such as on-line services, and dominate those as well. Again this is a static view of the industry. On-line services such as CompuServe and America Online may indeed go down in flames, but if they do it is more likely to be because of the growing popularity of the World Wide Web than because of Microsoft bundling Network and Windows 95. In fact, Microsoft Network may be dead on arrival because of the growing popularity of the WWW.

If Microsoft's foes succeed, other companies had better watch out. Intel may be told that it cannot push native signal processing because of its dominance of microprocessors. Novell may be told it cannot offer networking enhancements to its applications suite because of its dominance of LAN OSes. And Netscape may be told to drop its home page because of its dominance of WWW browsers. Let's put our trust in the market, not in illogical, artificial constraints.

[From PC Week, June 5, 1995]

DESPITE APPEARANCES, IS THE DOJ ALL WET?  
(By Stan Gibson)

Watching big, bad Microsoft "lose one" and the Clinton administration "win one" has got to make all those who favor the underdog happy. But it is not clear whether there is more competition today than there was two weeks ago. Further, the Justice Department may have created a precedent of involvement in the computer industry and electronic commerce that will be difficult to sustain.

Wasn't Intuit, with more than 80 percent market share among personal-finance software makers, the real monopolist?

Why wasn't Justice going after it years before Microsoft showed any interest?

Now that Justice has discovered Intuit is dominant in its market and had previously acquired National Payment Clearinghouse Inc., will Anne Bingaman's hordes seek to break it up? Perhaps they should. Microsoft's—almost Novell's—Money has never needed more help competing than it does now.

What about other software makers that gain, for a few years, a stranglehold on a given market? Lotus' 1-2-3 at one time was a near-monopoly. Should Ashton-Tate have been broken up in 1986?

Notes had the groupware arena all to itself until recently. Meantime, Lotus was at-

tempting to leverage one of its monopoly products, Notes, with the E-mail market leader, cc:Mail, which it acquired without complaint.

Now that Lotus has had an embarrassing quarterly loss, does it deserve federal help in restraining its Redmond rival?

Maybe this means it is all right to have a monopoly, as long as you are small, incompetent, or both.

If Intuit is not to be broken up, who could buy it? Could Novell? Would Novell be judged sufficiently incompetent that it could not cobble together any meaningful synergy between its NetWare, WordPerfect, TCP/IP, Unix, and network-management wares?

The big question is whether the Justice Department can practically regulate the software industry, an industry that is vastly different from the big oil, railroads, or even the IBM of the 1970s, that it once grappled with.

The single most apparent fact of the computer industry is that today's market-share leader is tomorrow's loser.

Trying to level the playing field through legal maneuvering is too cumbersome a procedure for today's markets, where innovation and risk-taking can bring about surprising reversals.

Maybe the fact that Microsoft will not own Intuit is for the best. But where will the Justice Department act in the future? It is highly speculative to say that, because a company has been successful in the past, it is likely to dominate a market such as electronic commerce that has barely come into being.

We can't help but think that the Justice Department is trying to create legal order that, like sand castles built near the water's edge, will be gone in the next tide.

#### PUBLIC SERVICE AND THE RULE OF LAW—GRADUATION ADDRESS BY BILL GOULD

Mr. KENNEDY. Mr. President, last month, Bill Gould, chairman of the National Labor Relations Board, addressed the graduating class of the Ohio State University College of Law. In his address, Chairman Gould speaks eloquently of the important role that public service has played in the Nation's history, from President Franklin Roosevelt's creation of the Civilian Conservation Corps through President Kennedy's creation of the Peace Corps and President Clinton's establishment last year of the National and Community Service Trust.

It is gratifying that so many young men and women in all parts of the country are considering careers in public service. Chairman Gould's address is an excellent contribution to that high purpose and I ask unanimous consent that his address, entitled "Serving the Public Interest through the Rule of Law: A Trilogy of Values," may be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

#### SERVING THE PUBLIC INTEREST THROUGH THE RULE OF LAW: A TRILOGY OF VALUES

(Address by William B. Gould IV, Chairman, National Labor Relations Board, Charles A. Beardsley, Professor of Law, Stanford Law School (On Leave); delivered at the Ohio State University College of Law graduation ceremony, May 14, 1995, Mershon Auditorium, the Ohio State University, Columbus, OH)

Ladies and gentlemen. Members of the faculty. Honored guests. I am indeed honored to be with you here today in Columbus and to have the opportunity to address the graduates of this distinguished College of Law School as well as their parents, relatives, and friends on this most significant rite of passage. Looking backward 34 years to June 1961, my own law school graduation day was certainly one of the most important and memorable in my life. It was the beginning of a long involvement in labor and employment law as well as civil rights and international human rights.

But I confess that today I am hardly able to recall any of the wise words of advice that the graduation speaker imparted to us that shining day at Cornell Law School in Ithaca, New York. So, as I address you today I don't have any illusions that what I say is likely to change the course of your lives. But my hope is that my story will provide some context relevant to the professional pathways upon which your are about to embark.

Both governmental service and the furtherance of the rule of law by the legal profession have possessed a centrality and thus constituted abiding themes in my professional life. I hope that my remarks to you here today will induce some of you to consider government as an option at some point in your careers, notwithstanding the anti-government tenor of these times.

The tragedy of Oklahoma City has dramatized the contemporary vulnerability of these values to sustained attack, both verbal and violent. As the New York Times said last month, we must "confront the reality that over the past few years the language of politics has become infected with violent words and a mindset of animosity toward the institutions of government." The columnist Mark Shields has noted that this phenomenon has been fueled by the idea that the "red scare" should give way to the "fed scare."

My own view is that government does best when it intervenes to help those in genuine need of assistance—but I am aware that those point does not enjoy much popularity in Congress these days. Again Shields, in discussing recent comments of Senator Robert Kerrey of Nebraska, put it well when he characterized the conservative view of the nation's problem: "The problem with the Poor is that they have too much money; the problem with the Rich is that they have too little."

Although I cannot recall the Great Depression and its desperate circumstances, a trilogy of values have always made up my inner core. The first of these is the idea that I heard in Long Branch, New Jersey's St. James' Episcopal Church every Sunday, i.e., that it is our duty to live by the Comfortable Words and to help those who "travail and are heavy laden." Fused together with this was a belief, inculcated by my parents, that the average person needs some measure of protection against both the powerful and unexpected adversity. The third was based upon personal exposure to the indignity of racial discrimination which consigned my parents' generation to a most fundamental denial of equal opportunity. It is this trilogy of values which fostered my philosophical allegiance to the New Deal, the New Frontier and the Great Society.

Simply put, I came to the law and Cornell Law School because of my view that law and lawyers can reduce arbitrary inequities and the fact that Chief Justice Earl Warren's May 17, 1954, opinion for a unanimous Supreme Court in *Brown v. Board of Education* represented an accurate illustration of that point. As you know, the holding was that separate but equal was unconstitutional in public education.

A unanimous Court rendered that historic decision—in some sense a corollary to President Harry Truman's desegregation of the Armed Forces—which possessed sweeping implications for all aspects of American society. The High Court's ruling prompted a new focus upon fair treatment in general and discrimination based upon such arbitrary considerations as sex, age, religion, sexual orientation and disabilities in particular.

As a high school senior reading of NAACP Counsel Thurgood Marshall's courageous efforts throughout the South—and one who was heavily influenced by the Democratic Party's commitment to civil rights platforms in 1948 and 1952, as well as President Truman's insistence upon comprehensive medical insurance—I thought that the legal profession was one in which the moral order of human rights was relevant. The prominence of lawyers in political life, like Adlai Stevenson who "talked sense" to the American people, was also a factor in my choice of the law as a career.

More than anything else, though, the struggle in South Africa made me see the connection between the development of the rule of law and dealing with injustice. I watched the United Nations focus its attention upon that country when a young lawyer named Nelson Mandela and so many other brave activists were imprisoned, or, worse yet, tortured or killed for political reasons. My very first publication was a review of Alan Paton's "Hope for South Africa" in "The New Republic" in September 1959. In the early 1990s I had the privilege to meet Mr. Mandela twice in South Africa—and then to attend President Mandela's inauguration just a year ago in Pretoria.

The *Brown* ruling, its judicial and legislative progeny and the inspiration of lawyers dedicated to principles and practicality—lawyers like Marshall, Mandela, Stevenson and President Lincoln in the fiery storm of our own Civil War—promoted my belief in the rule of law. And the fact is that my faith in the law as a vehicle for change has been reinforced and realized over these many years through the opportunities that I have had to work in private practice, teaching and government service.

My sense is that there is a great opportunity for lawyers to serve the public good through the public service today—even in this period of government bashing by the 104th Congress. More than three decades ago President John F. Kennedy called upon the sense of a "greater purpose" in a speech at the University of Michigan when he advocated the creation of the Peace Corps during the 1960 campaign. President Bill Clinton's National and Community Service Trust Act (*AmeriCorps*), designed to allow young people tuition reimbursements for community service, echoes the same spirit of commitment set forth by President Kennedy—and at an earlier point by President Franklin D. Roosevelt through the Civilian Conservation Corps.

This sense of idealism and purpose was at work in the New Deal which brought so many bright, public spirited young people to Washington committed and dedicated to the reform of our social, economic and political institutions. The same spirit has been rekindled by both President Kennedy as well as President Bill Clinton since the arrival of

this Administration in Washington almost two-and-one-half-years ago.

In a sense, this has come about by virtue of the Clinton Administration's commitment—not only to child immunization initiatives and helping the less financially able to use available education opportunities and to provide a higher minimum wage to those who are in economic distress—but also, most particularly, through the National Service.

You have an unparalleled opportunity in the '90s to serve the public good. Your course offering which includes Social and Environmental Litigation, Right of Privacy, Society, Deviance and the Law, Foreign Relations Law, Employment Discrimination Law and Law of Politics, to mention a few, reflect our times and provide you with a framework that my contemporaries never possessed.

Though most of my words today are focused upon government or public service as a career or part of a career, the fact is that your commitment to the public interest and the rule of law can be realized in a number of forms. It is vital to the public interest that those committed to it are involved in a wide variety of legal, business and social careers—representing, for instance, corporations, unions, as well as public interest organizations.

But our commitment to law and the public interest is made more difficult given the fact that our legal profession is in the midst of a tumultuous and confusing environment. On the one hand, lawyer bashing, sometimes justified and sometimes not, seems to be moving full steam ahead. Part of this phenomenon seems to be attributable to the fear that the production of so many law students will soon result in too many lawyers for a society's own good.

Only two years ago a "National Law Journal" poll showed that only five percent of parents, given the choice of several professions, wanted their children to be attorneys. Undoubtedly, this unpopularity is what has fueled a number of the legal initiatives undertaken by the Republican Congress to the effect, for instance, that the loser in litigation should pay all costs, that caps be devised for punitive damages, etc.

A 1993 ABA poll comparing public attitudes toward nine professions ranked lawyers third from the bottom, ranking higher than only stockbrokers and politicians in popularity. In attempting to discover the reasons for the low public opinion of lawyers the poll asked what percentage of lawyers and of five other occupations lack the ethical standards and honesty to serve the public.

The results revealed an appalling ethical image of lawyers. Lawyer ranked well below accountants, doctors and bankers and barely above auto mechanics. According to the ABA poll half of the public thinks one-third or more of lawyers are dishonest, including one in four Americans who believe that a majority of lawyers are dishonest. The pollster concluded that "the legal profession must do some soul searching about the status quo, resolve to make some sacrifices to ensure a positive future, and, above all, clean up its own house."

One way for the profession to clean its own house is to find new substitutes for lengthy litigation, frequently both wasteful and unnecessarily acrimonious, such as alternative dispute resolution—particularly in my own area of employment law. More than a decade ago I chaired a Committee of the California State Bar which recommended that new methods be devised for many employment cases, and that where employees could have access to economical and expeditious procedures, it was appropriate to limit or cap damages. But the difficult balance involved is to avoid limitation of the basic rights of ordinary people to sue for the enforcement of

consumer and employment related legislation.

Attitudes towards lawyers are inevitably affected by one's view of the law and the legal process. I hope that you will look very seriously at government service as you seek to use your newly acquired skills to better the position of your fellow human being. This is the most basic contribution that lawyers can make to society—and it is obvious that an increased commitment to government or, if you choose private practice or some other area of activity, pro bono work is central to this effort.

I am particularly proud to head an agency which is celebrating its 60th anniversary this summer and which, from the very beginning of its origins in the Great Depression of the 1930s, has contributed to the public good through adherence to a statute which encourages the practice and procedure of collective bargaining—as well as in other portions of our law. Since its inception, the National Labor Relations Board has possessed a culture of commitment to hard work, excellence, and to the promotion of a rule of law which is designed to allow both workers and business to peaceably resolve their difficulties through their own procedures.

Illustrative of this process was the NLRB's prominent role in the baseball dispute. It was not the Board's job to take sides between the players and the owners or to determine whose economic position ought to prevail. Consistent with this approach, it was our job to decide whether there was sufficient merit, as reflected by the facts and law, to proceed into federal district court to obtain an injunction against certain unilateral changes in conditions of employment made by the owners. The Board handled the baseball case as it does any other case.

Nor is it our job to take into account policy arguments arising out of the peculiarities of this industry, the income or status or notoriety of particular individuals on either side. The statute applies—properly in my judgment—to the unskilled and the skilled, to those who make the minimum wage and those who are financially secure.

In the baseball case, the public was able to obtain a brief glimpse of the Board's day-by-day commitment to the rule of law in the workplace. Where parties are involved in an established collective bargaining arrangement, our mandate under the statute is to act in a manner consistent with the fostering of the bargaining process—and I believe that we discharged our duty in baseball in a manner consistent with that objective.

What may have been overlooked in the public view was the fact that the Board was able to proceed through a fast track approach and make the promise of spontaneous and free collective bargaining in the workplace a reality. I hope that the players and owners will now do their part and bargain a new agreement forthwith!

Our March 26 decision to seek an injunction seems to have facilitated the resumption of baseball and thus was a great victory for the public in renewing its contact with the game which, like the Constitution, the Flag, and straight-ahead jazz is so central to the essence of the country. Hopefully, it will have the effect of promoting the collective bargaining process sooner rather than later.

Frequently, the public gains its impressions of lawyers and law from such high visibility cases and from exposure through television rather than books. I can tell you that another factor stimulating my interest in the law was watching the McCarthy-Army hearings in the spring of 1954, that fateful spring when Brown was decided. The hearings focused upon the Wisconsin Senator's investigation of alleged Communist infiltration of Ft. Monmouth, New Jersey, where my

father worked. Because of ideological hysteria, "guilt" by association and rank anti-Semitism, many of our closest friends were dismissed—and, indeed, I feared that this would be my father's fate, particularly because of his announced sympathy for Paul Robeson, a hero to so many black people of his generation.

Later I had the opportunity to attend the so-called Watkins Hearings in the following September in Washington which ultimately led to McCarthy's censure. Ft. Monmouth and the McCarthy-Army hearings demonstrated how excessive government authority can trample upon individual civil liberties—and the aftermath of the Watkins Hearings redeemed our country's constitutional protection of individual rights of belief and association.

Since then, I think that televised Congressional hearings, the Watergate hearings for instance, have contributed to the public understanding about the rule of law and its relationship to the preservation of this Republic's principles. Though, regrettably less conclusive, it may be that the Iran-Contra hearings of 1988 and the Hill-Thomas hearings of October 1991 performed a similar function in that the assumption underlying both proceedings was that government, like private individuals, must adhere unwaveringly to the rule of law.

Again, this is to be contrasted with the spectacle of law as show business on television. In my state of California, the O.J. Simpson trial has treated the nation to an episodic soap opera which appears to be more about the business of the money chase than the real substance of law and the legal profession. As Attorney General Janet Reno said about the trial:

"I'm just amazed at the number of people who are watching it. If we put as much energy into watching the O.J. Simpson trial in America . . . into other issues as Americans seem to have done in watching the trial, we might be further down the road."

A recent Los Angeles Times Mirror poll reported by Peter Jennings last month revealed that only 45 percent of adults surveyed said that they had read a newspaper the previous day, and a quarter of those responding said they spent so much time watching the Simpson trial that they did not have time for the rest of the news. At best, the siren song of sensationalism is a distraction—and, at worst, it reinforces excessively negative perceptions of law and lawyers.

My hope is that many of you will dedicate yourselves as lawyers or in other careers to a concern for the public good. Now, when Oklahoma City has made it clear that the idea of government itself as well as the law is under attack, it is useful to reflect back upon what government, frequently in conjunction with lawyers, has done for us in this century alone in moving toward a more civilized society.

Justice Holmes said, "Taxes are what we pay for civilized society,"—an axiom often forgotten in the politics of the mid-'90's. What would our society look like without the trust busters of Theodore Roosevelt's era and the Federal Reserve System created by Woodrow Wilson? Regulatory approaches to food and drug administration, the securities market, the licensing of radio and television stations, labor-management relations (with which my agency is concerned) and trade practices are all part of the Roosevelt New Deal legacy which few would disavow in toto.

It should not be forgotten that all three branches of federal government took the lead in the fight against racial discrimination and other forms of arbitrary treatment. And as Judge (now Counsel to the President) Abner Mikva has noted: "The history of the growth of the franchise is a shining example of why we needed . . . the federal approach."

Today, the challenge of public service in Washington has never been more exciting or inspirational. As I have indicated, President Clinton's National Public Service echoes anew the similar initiatives undertaken by both Roosevelt and Kennedy.

I urge you to think of the government as a career in which you can use your legal experience in pursuit of the public interest. That does not mean that you have to be a Washington or "inside the Beltway" careerist, although that is another way in which to make a contribution. Many of you may choose to serve in your communities throughout the country and, at a point where your career is well-developed, elect to serve through an appointment such as mine.

In particular, if you accept such an appointment consisting of a limited term (in the case of the Board five years), I hope that you will keep in mind President (then-Senator) Kennedy's characterization of eight law makers who were the subject of his book, "Profiles in Courage." Said the junior Senator from Massachusetts:

"His desire to win or maintain a reputation for integrity and courage were stronger than his desire to maintain his office . . . his conscience, his personal standards of ethics, his integrity or morality . . . were stronger than the pressures of public disapproval."

This is a particularly vexatious problem for those who are appointed and not elected because of the inevitable and appropriate subordination of appointees—even in the arena of independent regulation—to the people's elected representatives. My own view on serving in Washington is to do the very best you can to implement the public interest in the time allocated in your term, with the expectation that you will return to your community, reestablish your roots and feel satisfied that you have—to paraphrase President Kennedy—done your duty notwithstanding some of the immediate "pressures of public disapproval."

While I consider the term limits issue to be an entirely different proposition—the people ought always to be able to freely choose their elected leaders amongst the widest possible number of candidates—my view is that the proper standard for those who are subordinate to such leaders is that attributed to Cincinnatus, the Roman general and statesman of the fifth century, who upon discharging his public duty, returned to his community rather than taking the opportunity to seize power and perpetuate himself in office.

The independence of administrative agencies might be enhanced by legislation limiting Board Members or Commissioners to one term of service. The temptation to please elected superiors might decline accordingly.

Of course, all of us cannot win victories within 15 days, like Cincinnatus, and be back on our farms or in our communities so quickly. But true public service involves a self-sacrifice which rises above the immediate pressures. Do the best that you can to serve the public good.

This does not assure success or complete effectiveness. But it allows you to make use of your acquired expertise for the best possible reasons. And this, in turn, puts you in the best position to see it through to the end with a measure of serenity that comes when you have expended your very best effort despite setbacks and criticisms you may endure in the process.

As President Lincoln said:

"If I were to try to read, much less answer, all the attacks made on me, this shop might as well be closed for any other business. I do the very best I know how—the very best I can and I mean to keep doing so until the

end. If the end brings me out all right, what is said against me won't amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference."

You graduate from a distinguished institution in the most exciting political period since the reforms undertaken by the Administration of the 1960s. I hope that some of you will be attracted to public service and help advance our society through the rule of law.

As you embark upon the excitement of a new career and challenges in the days ahead, I wish you all good luck and success on whatever path you choose.

Mr. GORTON. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

## MORNING BUSINESS

### MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Thomas, one of his secretaries.

### EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

### REPORT OF THE DISTRICT OF COLUMBIA'S PROPOSED FISCAL YEAR 1996 BUDGET—MESSAGE FROM THE PRESIDENT—PM 59

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Governmental Affairs.

*To the Congress of the United States:*

In accordance with section 446 of the District of Columbia Self-Government and Governmental Reorganization Act, I am transmitting the District of Columbia's Proposed FY 1995 Second Supplemental Budget and Recissions of Authority Request Act and the Proposed FY 1996 Budget Request Act.

The Proposed FY 1996 Budget has not been reviewed or approved by the District of Columbia Financial Responsibility and Management Assistance Authority, created by Public Law 104-8, the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (the "Act"). It will be subject to such review and approval pursuant to section 208 of the Act.

WILLIAM J. CLINTON.

THE WHITE HOUSE, June 29, 1995.