The Law Professor Behind ASH, SOUP, PUMP and CRASH

By JOSEPH A. PAGE

WASHINGTON, D. C.

THE career of John Banzhaf III demonstrates the diversity of what some see as a crusade and others as simply an exciting new branch of the legal profession. Banzhaf, a 29-year-old champion of consumer causes, is on the one hand a baiter of powerful corporations and bureaucrats, and, on the other, a specialist in something that has already earned a respectable title—"public interest law." He crusades under two different hats, as an associate professor at George Washington University's National Law Center in Washington and as executive director of ASH, Action on Smoking and Health, an organization that he created in 1968 as "the legal arm of the antismoking community." This fall, he will again dispatch groups of his students, dubbed "Banzhaf's Bandits" by the press, on various missions in the nation's capital. Inevitably, he is compared with Ralph Nader, inspirational leader of "Nader's Raiders."

In some respects, he seems to be consciously adopting an approach that is at least 90 degrees from Nader's. While the latter is known for what one of his Raiders has termed "an endless capacity for indignation," Banzhaf admits that he does not get himself terribly worked up over his causes. Nader projects an aura of self-effacement and humility, but Banzhaf does quite the opposite. Nader is extremely difficult to contact, while Banzhaf still keeps his listing in the phone directory. The two men, both bachelors, have completely different life styles. Nader, who may be the first secular monk, is now diverting a substantial portion of his earnings to subsidize his own public-interest legal research group. Banzhaf believes in the good life. He drives a car, dates, takes vacations and would like to have the time to indulge in more creature comforts. He also feels very strongly that public-interest advocates need not be underpaid. Including his pay as a law professor and an $18,000-a-year salary from ASH, his earnings now approximate $35,000 annually.

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Banzhaf and Nader have met but are not in close contact or coordination. They have already taken somewhat opposing sides on one issue, smoking on airlines. Nader petitioned the Federal Aviation Administration to ban smoking altogether for reasons of safety. Banzhaf and his students filed a petition stressing the rights of the nonsmoker and arguing for segregated smoking compartments. The F.A.A. denied Nader's petition and is considering a ruling favorable to Banzhaf's position. Meanwhile, Nader is appealing to the courts.

Banzhaf works out of a pair of tiny offices at the law school. ASH, which gets funds from health groups as well as doctors and other individuals, pays for his two secretaries, who help administer the antismoking legal action campaign. One wall of the narrow cul-de-sac corridor which leads to his base of operations is virtually papered with his press clippings. "Proof of his oversized ego," critics charge. "Just something to arouse student interest," he explains.

A casual dresser, he looks younger than many of his students; but for the receding and thinning of his closely cropped brown hair and his recently expanded girth, he would easily pass for a college undergraduate. His carefully modulated voice, however, exudes a self-assurance belying the cherubic expression that occasionally brightens his smooth-skinned face-in-the-crowd features. It is a self-assurance appropriate to a man who, while still in law school, convinced the Government that copyright laws should cover computer programs; who at the age of 27 filed a complaint with the Federal Communications Commission which eventually forced TV stations to provide an estimated $75-million worth of annual free time for antismoking commercials; and who today is becoming known as one of the most resourceful and controversial of the new public interest, or *pro bono publico*, advocates.

HIS motto is, "Sue the bastards." As he explains it, "You can often get best results by suing the hell out of people, using all the legal pressure points you can find. And if you're going to spend the rest of your life suing, you might as well sue the *bastards*."

Students have the opportunity to put this philosophy to work in Banzhaf's fall semester course in unfair trade practices. He encourages members of the class to identify some specific unfair practice and to try to do away with it by filing their own complaints with the courts and administrative agencies. The students form groups, to which they give inventive acronyms as names, and plunge into battle.*

The group that attracted the most attention last year was SOUP (Students Opposed to Unfair Practices), which attempted to get the Federal Trade Commission to take action

John Banzhaf is proving to his law students that making a buck from rich and powerful clients is not as much fun as "suing hell out of them"

against Campbell Soup Company television ads that, SOUP charged, used marbles at the bottom of bowls to make soups appear to hold more solids than they actually contained. The F.T.C. wanted to issue a cease-and-desist consent order and leave it at that. SOUP argued that the commission should make Campbell run advertising to counter the effects of the deception.

The commission ruled 3 to 2 against SOUP, rejecting the students' bid to participate as consumers in the proceedings against Campbell, and issued a final cease-and-desist consent order. However, the majority opinion admitted that the F.T.C. did have the power to issue the type of order SOUP sought. The students view this language as a victory. Moreover, they have just filed a petition for review with the U.S. Court of Appeals, asking again for the right to intervene.

A Bandit group called TUBE (Termination of Unfair Broadcasting Excesses) has filed before the Federal Communications Commission a petition for rule-making that would force the agency to exercise its lawful jurisdiction over TV commercials and set regulatory standards. Up to now the F.C.C. has left the problem of deceptive ads to the F.T.C. If TUBE's petition is successful, the TV stations themselves will be held responsible by the F.C.C. for policing their own commercials, with penalties for laxness ranging from fines to license revocation. "If they can black out Abbie Hoffman's flag shirt," says Banzhaf, "they can exercise the same care about deceptive advertising."

Other student groups include PUMP (Protesting Unfair Marketing Practices), which is supporting a proposed F.T.C. rule requiring gas stations to display octane ratings on their pumps; SNOOP (Students Naturally Opposed to Outrageous Prying), which has urged the District of Columbia City Council to police retail credit agencies in the same manner in which detective agencies are regulated; and CRASH (Citizens to Reduce Airline Smoking Hazards), which has filed the petition with the Federal Aviation Administration that would require segregated seating for smokers on commercial airlines.

THE law school scene in which Banzhaf now operates differs considerably from the ambience in which he began his legal education. Columbia Law School in the early nineteen-sixties was a pillar of the legal education establishment. The professors on the whole could fit Ralph Nader's description of their Harvard Law counterparts, who he said employed "professorial arrogance as a pedagogical tool." The predominant mood of much of the student body was, "Let's all go down to Wall Street and make a buck."

Banzhaf was not about to let this atmosphere intimidate him. A graduate of M.I.T. with a degree in engineering, he entered the law school in September, 1962, and soon won a reputation as one who would not hesitate to speak his mind in class. By the end of the first year his colleagues were making book on how many oral contributions he would make during each class hour.

His first-year grades were high enough to qualify him for membership on the Columbia Law Review. Top-flight legal journals tend to breed pomposity, and the straight-laced, tradition-oriented Columbia Law Review was no exception. Thus its editors were dismayed to discover that they had a maverick on their hands.

Banzhaf's first big project for the Review took advantage of his engineering background and involved research into whether computer programs could be copyrighted. A standard approach would have required first an examination of the copyright laws and the legal decisions interpreting them, and then the development of finely reasoned recommendations on how the question should be resolved. Banzhaf went one step further. Since no one had ever tried to copyright a computer program, he decided to make the attempt himself. To his surprise he succeeded, and on May 8, 1964, the news, garnished by his photo, made The New York Times.

This was John Banzhaf's first legal action project and his first savor of publicity. He enjoyed both immensely. Student writings in the Columbia Law Review are published anonymously, however, and so his name did not appear on the note which he subsequently authored. A footnote did refer to the first successful copyrighting of a computer program, but did not disclose that this was a direct result of the preparation of the note; nor did it mention the name of the person who had obtained the copyright.

The Review's tradition of student anonymity did not sit well with Banzhaf, who approached several technical journals in the data-processing field, one of which wanted to reprint the note with his name on it. The board of editors of the Review, claiming that they had a copyright on everything printed in that journal, refused to grant permission for republication on those terms. They were thoroughly chagrined when their

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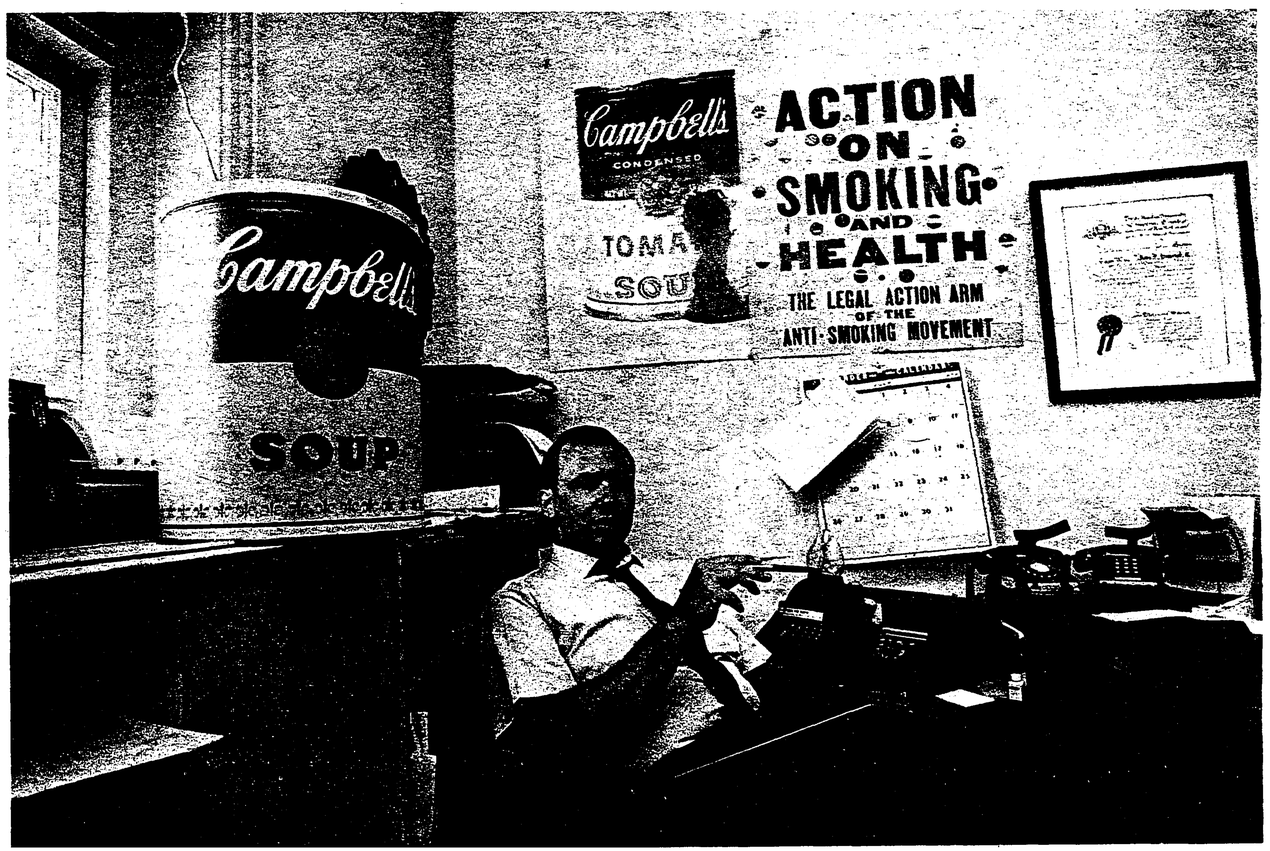
*Nader will also teach a seminar at George Washington this September and plans to send out his students on legal action projects, too—thus creating a possible intramural rivalry between the Bandits and the Raiders.



PRO BONO PUBLICO—*John Banzhaf, one of the new breed of lawyers devoted to consumer interests, in his office at George Washington University. This fall he will once again dispatch groups of his students, dubbed "Banzhaf's Bandits" and organized into groups with such threatening names as SNOOP, TUBE and RAPE, on various legal missions in the capital.*

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contentious colleague pointed out to them that they had been putting their copyright notice on the wrong page of the Review, and hence none of the articles were legally protected. He then thumbed his nose at the board, rewrote the substance of his note in language comprehensible to a nonlegal audience and had it published under his name in the other journal.

THIS was not the only occasion that Banzhaf piqued his fellow editors. In his senior year he decided to write an article applying a mathematical analysis to weighted voting as a means of reapportionment. He offered to submit it to the Review, but the notion of publishing a full-length article written and signed by a mere student was unheard of and contrary to all rules and regulations. Undaunted, Banzhaf sent his manuscript to the Rutgers Law Review, which did not hesitate to print it. The Columbia editors fussed and fumed and even talked about expelling him from their ranks. As a parting shot, he wrote a tongue-in-cheek letter on abortion to Playboy, and signed it as a former editor of the Columbia Law Review.

In June, 1965, John Banzhaf received his law degree *magna cum laude*. The presence of a metal plate in his arm, souvenir of a fall from a bicycle when he was 15, kept him out of the draft. After passing the New York and District of Columbia bar exams, he did a research project on reapportionment for the National Municipal League and then went to work for a year as a law clerk for Judge Spottswood W. Robinson III of the United States District Court for the District of Columbia (now on the United States Court of Appeals for D.C.).

During his summer vacations while at law school Banzhaf had worked on the social staff of a cruise ship, and after an arduous year with the hard-working Judge Robinson he went off on a series of short cruises to the Caribbean. Between sailings he stayed at home in the Bronx with his parents, where, while watching football games on television on Thanksgiving in 1966, it dawned upon him that the cigarette commercials which were constantly popping into view might be considered "controversial" in legal terms.

The significance of this moment of inspiration stems from the so-called "fairness doctrine," under which the Federal Communications Commission required radio and TV stations to present fair and adequate treatment of both sides of controversial public issues being aired. "Why not apply the doctrine to cigarette commercials?" he asked himself, and a week later, before leaving on another cruise, he wrote a letter to C.B.S. requesting that the network provide equal time for anti-smoking commercials. Upon his return home in late December, he fired off a second letter to C.B.S. and on Jan. 5, 1967, in the purser's office of the Swedish-American Line's M.S. Kungsholm, he typed up a formal complaint which he mailed to the F.C.C. On the next day he set sail on a 92-day cruise of the South Seas.

This was the first anti-smoking effort for John Banzhaf, himself a nonsmoker. "I felt reasonably strong about the problem of smoking and about the misuse of the airwaves," he now reminisces. "And I decided that here was something that I as an individual could do." After returning home from his cruise, he went to work for a New York City patent law firm. Two weeks later, to his astonishment, the F.C.C. upheld his complaint.

Subsequent accounts of Banzhaf's crusade have stressed its David vs. Goliath angle. This may be a bit misleading. At the time he filed his complaint, there were important elements within the F.C.C. who were favorably disposed toward the arguments he was making. The growing concern over smoking as a cancer risk strengthened the hand of members who disapproved of the habit and the commercials.

This does not, of course, diminish his contribution. As one of his friends in the public interest law movement has observed, "John had the ability to see certain forces moving in certain directions and to seize an idea whose time had come. This is a creative talent—no doubt about it." Another *pro bono* specialist has put it more colorfully: "The F.C.C. had within it an ovum, and Banzhaf supplied the sperm."

SHORTLY after the F.C.C. handed down its ruling, a senior partner in Banzhaf's firm informed him for the first time that Philip Morris was one of the firm's clients. At the time this did not seem to be any more than a minor

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BANDITS AND CHIEF—Banzhaf with some of his merry band. When their studies begin to pall, they welcome the chance Banzhaf gives them to file real lawsuits and match wits with practicing lawyers.

embarrassment, inasmuch as Banzhaf expressed no intention to continue what he had set in motion. He hoped to interest one of the established health organizations to carry on the battle, but he found himself unable to persuade them to act. By the end of the summer the F.C.C. was about to entertain petitions from the tobacco and broadcasting industries to reconsider its ruling, and Banzhaf had to choose between defending the ruling or remaining in the good graces of his law firm, which did not look with favor upon his extracurricular activities. He chose the former.

The F.C.C. denied the petitions for reconsideration. The National Association of Broadcasters filed an appeal in the United States Court of Appeals in Richmond, Va.—tobacco country—where they calculated they would get a sympathetic hearing. But Banzhaf, in a quick, ingenuous gambit, beat them to the draw. He also had the right to appeal, since the F.C.C. had ruled in his favor on the principle of free time for antismoking commercials, but had turned him down on the request for equal time. Before the broadcasters could file their appeal, Banzhaf filed his with the United States Court of Appeals in the District of Columbia. Under legal procedure, both appeals were thus heard before the appeals court in D.C., which was considered more sympathetic to the public interest, and the strategy paid off when the judges upheld the F.C.C. ruling.

Recalling his decision to leave the practice of the law and pursue his reformist inclinations Banzhaf says today: "I wasn't getting much satisfaction from the work I was doing with the firm. Much of it was large corporate stuff. I could seldom identify with the client or the justice of his case. When I got involved with the F.C.C. ruling, I felt that for the first time I was really doing legal work."

He adds: "I wondered why the firm never fired me, but in situations like this you don't get fired, you get eased out. They didn't put any pressure on me, but there was a clear undertone that it would be nice if I would go somewhere else."

LAW students and young lawyers have been for some time expressing their distaste for the profession's traditional preoccupation with representing powerful, vested interests, and with what one of their number has termed "the degeneration of the large law firms into servicing affiliates of big corporations." They are repulsed by travesties such as a recent American Bar Association committee report which opposed allowing consumers to bring class-action suits against defrauding corporations and was signed by nine

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lawyers whose clients include large companies and trade associations.

Until recently, *pro bono* practitioners confined themselves to the representation of individual indigent clients in criminal and civil cases and to the test-case approach of organizations such as the American Civil Liberties Union and the National Association for the Advancement of Colored People. The new breed of public interest lawyers provides legal services to a variety of citizen's groups which have just begun to demand access to the legal system and vindication of their legal rights. They are trying to give the same quality of representation that business interests customarily receive to consumer organizations, conservationists, poor people and minority entrepreneurs.

At its most imaginative, the practice of public-interest law often intervenes in proceedings which have never before been recognized as adversary, and helps create new constituencies among people who stand to benefit from campaigns for legal reform—for example, the consumers of a certain product. The public-interest advocate, in Ralph Nader's words, "seeks distributive justice for the greatest number of people, practices before all branches of government and other large institutions [such as corporations and labor unions], responds to his own conscience and dedication to professional goals, and remains undeterred and undetoured by parochial client interest or control."

Public-interest lawyers in Washington are experimenting with a wide range of organizational structures. Among these are: Berlin, Roisman & Kessler, a firm which handles *pro bono* matters exclusively and hopes to find enough paying clients to survive; Asher & Schneiderman, a firm 75 per cent of whose work is in the public-interest field; the *pro bono* division of the large Washington law firm, Arnold & Porter; Benny L. Kass, a lawyer-lobbyist who works on consumer problems for nonprofit groups and individuals; the Citizens Communications Center, a small, foundation-financed office which specializes in representing citizens' groups before the Federal Communications Commission; the Urban Law Institute, an affiliate of George Washington University which provides representation for Washington community groups; and the Washington Research Project, which focuses primarily on civil-rights issues.

One of the more interesting experiments is the Stern Community Law Firm, a foundation-backed group which is challenging the legal profession's own prohibition against soliciting business. (Director Monroe Freedman, who claims the ban is unconstitutional because it prevents public-interest lawyers from telling people about their rights, plans to advertise for clients.) Another is the Center for Law and Social Policy, a foundation-funded organization which trains

"Banzhaf is by no stretch of the imagination a radical. 'A great deal can be done through the system by prodding it,' he says."

students from universities such as Yale during part of their law school careers and recently helped win a court order requiring the Department of Transportation to reopen an investigation into certain G.M. pickup trucks. (Along with *pro bono* counsel from Arnold & Porter, the center's lawyers argued that the department's engineers had found the truck wheels tend to develop cracks and collapse without warning.)

ULTIMATELY, Banzhaf hopes that public funds will be forthcoming for a kind of organization of ombudsmen.

"What I would like to do," he muses, "is to continue with an organization having a principal legal focus, and go into areas where I can find a confluence of important problems and a point of legal leverage. The idea is to accomplish a large result with a relatively small input.

"It would be great to establish the proposition that there can and should be organizations whose purpose is to take legal or law-related measures to benefit some aspect of the public interest, and that they should be supported at least in part by the public, either directly through contributions or by grants from other organizations. This would also provide lawyers with an institutional framework within which they can work professionally on a full-time basis to advance what they see as the public interest. The success of such a venture would demonstrate that lawyers and law students can initiate legal action which can have an important catalytic effect on society. The result would be a revolution within the system to avoid a

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"A saint he is not," says a colleague about Banzhaf

revolution outside the system. Of course, I may be just a perpetual optimist, but I think all this can be done."

Banzhaf, who has also organized a lobbying arm of ASH called LASH (Legislative Action on Smoking and Health), claims credit for helping to pass the law that will, beginning next year, ban all cigarette commercials from radio and television. (His importance in the passage of the law was actually modest.) In characteristic fashion. moreover, he plans to keep the pressure on the cigarette companies. The deleterious effects of decades of cigarette commercials, he argues, will linger long after the new law comes into being on Jan. 2. Therefore, he plans to file a petition with the F.C.C. soon that would require stations to continue to provide free time for antismoking commercials even after Jan. 2.

His plans for the immediate future are vague, though he talks—like most *pro bono* lawyers these days—about branching out into environmental lawsuits. His next target may be the big oil companies, whose TV ads sometimes make the claim that they are solving environmental problems. Such claims are "controversial," just like cigarette commercials, Banzhaf says, and he plans to file a "fairness doctrine" complaint calling for the F.C.C. to require that free TV time be made available to challenge the oil companies' assertions.

THOUGH a legal activist, Banzhaf is by no stretch of the imagination a radical. He firmly favors working through established channels: "I believe there's a great deal that can be done through the system by prodding it and operating on the periphery. I recognize many things that can't be achieved through legal action. You can't sue to stop the Vietnam war or get student power. But I stay within the system because that's where I have my expertise."

Student reaction to Banzhaf's action approach to the law has been generally favorable, especially among moderates and even conservatives. According to Aaron Handleman, a SOUP leader, "By the second year, law students tend to get bored with classes. Professor Banzhaf triggers the urge to do something different and exciting." Harry Stern, a participant in SNOOP, commented: "We learned what people can do if they really want something. It was a demonstration that second-year law students can hold their own against lawyers five years out of school."

Nader has termed Banzhaf "one of the most imaginative legal start-up advocates in the country. He provokes his students into creative application of old bottles with new wines." Commissioner Mary Gardiner Jones of the F.T.C. has said that "he has a philosophy of how a citizen fits into the government and is doing concrete, positive things to make the government respond. We surely need this kind of effort."

There are those, on the other hand, who accuse Banzhaf of being abrasive, egotistical, immature, opportunistic and politically inept. His fondness for publicity has alienated some of his students. ("Talking to him about this problem is like throwing water at a wall," one of them complained.) It is no secret at the law school that he is in tenure trouble. A not insubstantial number of his colleagues take an exceedingly dim view of him and his manner of operation. He is one of two members of the faculty under 30 and is not given to treating his elders with deference. "A saint he is not," was the succinct appraisal of one professor who is favorably disposed toward him. The faculty will decide this fall whether to grant him tenure. He could lose, and would have to leave.

To a certain degree these problems derive from the fact that John Banzhaf has always been a loner, a fierce individualist who does not much care how people react to him. This quality has motivated and sustained him throughout his career. It may also compromise his effectiveness.

The survival of ASH, as well as that of all the public interest groups, depends in large part upon publicity. Private contributors and foundations are much more likely to support an operation which has enjoyed widely heralded successes. John Banzhaf has never taken a backward step in the competition for public attention. His critics contend that he overdoes it. For example, law students in a group called GASP (Greater Washington Alliance to Stop Pollution), which took legal action against the overemission of exhaust from D.C. buses and which had no connection with the Bandits,

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HE STARTED IT—Ralph Nader appearing on TV. Banzhaf admits he lacks Nader's "endless capacity for indignation." Nader calls Banzhaf one of the country's most imaginative "legal start-up" public interest advocates.

were very upset by what they saw as his attempts to take credit for their successes.

STILL, it is not true, as some have charged, that he is motivated solely by a desire to see his name in print. On the evening after a minor police riot on the George Washington campus during a demonstration to protest the verdict in the "Chicago 7" trial, he went to the lockup and quietly bailed out several law students who had been arrested. And when the university hospital refused to admit a 105-pound law student who had been gratuitously clubbed by police, he brought the boy back to the hospital and invited officials to explain into his tape-recorder exactly why they would not treat the injured student. They quickly changed their minds.

Public-interest advocacy can be a tricky business. At times it requires aggressive persistence, a quality John Banzhaf has displayed in abundance. At other times, political acumen is indispensable. In this latter respect, his shortcomings may run deeper than an apparent talent for rubbing people the wrong way.

Pro bono advocates are reluctant to criticize others doing similar work for fear of harming the movement. Yet some have privately admitted misgivings about Banzhaf's tactics, which have been termed unwise and even childish. Testifying at a Bureau of Motor Carrier Safety hearing in July (dressed in what appeared to be a tennis outfit), Banzhaf warned that unless smoking were banned on interstate buses the passengers might resort to self-help. To illustrate what they might do, he pulled a cylindrical tube which he said was a smoke bomb out of his pocket and challenged Isaac D. Benkin, the bureau's counsel, to give him a legal reason why he should not explode it on the spot. His argument was that if smokers had a right to pollute a bus, he could discharge smoke in the hearing room. Benkin, visibly alarmed, threatened to report him to the bar association — whereupon Banzhaf disclosed that the "bomb" was a harmless flare.

At the conclusion of his recent testimony in favor of a broad consumer class-action bill before a Senate committee, exuberance lapsed into indiscretion when Banzhaf boasted: "Give us these kinds of tools, give me 500 law students in the District of Columbia, and I would turn the F.T.C. and the Justice Department and the major advertisers upside down and shake them." Industry lobbyists opposing the bill are delighted to have such hyperbole on the record, and are expected to make good use of it in their efforts to help pass the Nixon Administration's watered-down class-action bill.

There are skeptics who consider the public-interest law movement a fad and view Banzhaf as a shooting star who will soon fade from sight. They dismiss the students as dilettantes who are having a thoroughly enjoyable time in the pursuit of trivial causes. But the commitment of so many young people—with talent and training and experience—suggests that the movement is here to stay. The fact that it has been able to accommodate a quintessential individualist like Banzhaf testifies to its vitality. ■

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