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 some as well as others as simply an exciting new branch of the legal profession. Banzhaf, a 25-year-champion of consumer protection, has led a career on the law faculty at George Washington University, where he is a specialist in public interest law. 

Banzhaf and his name have been somewhat on opposition sides on one issue. Although he is known for his advocacy on consumer protection, he is also known for his opposition to smoking and his efforts to have smoking banned at all. In recent years, Banzhaf and his students have filed a petition to remove the rights of the smoker and have proposed new regulations to control smoking. These regulations were approved by the U.S. Court of Appeals, but are currently under review.

Banzhaf is also well known for his work on the law of Ralph Nader, who he helped defend in the famous case of the Campbells Soup Company. His work on Nader and the Smokers' Rights Project has earned him the title of "anti-smoking activist." His efforts have also been recognized by the American Bar Association, which awarded him a special commendation for his work on the case.

Banzhaf is currently working on a book titled "The Law Professor Behind ASH, SOUP, PUMP AND CRASH." The book will explore the role of the law professor in shaping public policy and the impact of his work on the legal profession. Banzhaf is also working on a series of articles for the American Bar Association Journal, which will be published in the fall of 2023.

John Banzhaf is proving to be a law student growing from a black and powerful client to a successful and well-respected professor and author.

Banzhaf's success has come from his ability to combine legal expertise with a strong public interest perspective. His work on the law of consumer protection and his advocacy on smoking are examples of this approach. Banzhaf's impact on the legal profession has been significant, and his work continues to influence the way law is practiced today.


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The man behind ASH, SOUP, etc.

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contentious colleague pointed out to them that they had been wrong in their writing 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, wrote 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 Review was appalled 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 Rowan Lowry, 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 off the Dean's List. After passing the New York and District of Columbia bar exams, he did a research project on reapportionment for the Columbia Communications 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 of the District of Columbia (now on the United States Court of Appeals for D.C.).

During his summer vacation 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 local coverage of television on Thanksgiving in 1966, it dawned upon him that the cigarette commercial which were constantly popping up on the tube might be considered "controversial" in legal terms. The significance of the 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 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. Kingsholm, he typed 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 beginning of the anti-smoking effort for John Banzhaf, himself a nonsmoker. "I felt reasonably strong about the problem of smoking and about the misuses smokers make of the waves," he now reminisces. "And I decided that here was something that I as an individual could do." After returning home from the 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 reassuring. At the time he filed his complaint, there were important elements within the F.C.C. who were favorably disposed toward the anti-smoking movement 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 rare talent—not 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 that the firm's client, Philip Morris was one of the firm's clients. At the time this did not seem to be any more than a minor
BANDITS AND CHIEF—Banzhaf with some of his merry band. When their studies begin to pay, 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 sympathetic hearing. But Banzhaf, in a quick, ingenious 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
lawyers whose clients include large companies and trade as-
Associations.

Until recently, pro bono practitioners confined them-
selves to the representation of individual indigent clients in criminal and civil cases and to the test-case approach of or-
ganizations such as the Ameri-
can Civil Liberties Union and the National Association for the Advancement of Colored People. The new breed of pub-
lic interest lawyers provides legal services to a variety of citizens and groups that had 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 custom-
arily receive to consumer or-
ganizations, conservationists, poor people and minority en-
trepreneurs.

At its most imaginative, the practice of public-interest law often intervenes in proceed-
ings that have long been recognized as adversary, and helps create new constitu-
encies among people who stand to benefit from changing legal reform—for example, the consumers of a certain product. The public-interest advocate, in Ralph No-
är's words, "aggressively and creative justice for the greatest number of people, practices before all branches of govern-
ment and other large organ-
izations (as corporations and labor unions), responds to his own conscience and dedi-
cation to professional goals, and remains undeterred and undetoured by parochial client interest or control."

Public-interest lawyers in Washington are experimenting with a range of both tradi-
tional and untradi-
tional structures. Among these are: Berlin, Roisman & Kes-
ll, a firm which handles pro bono matters exclusively and hopes to fund itself and its 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. Rass, a lawyer-lobbyist who works on com-
nitter problems for non-
profit groups and individuals; the Citizens Communications Center, a small, foundation-
financed group; and the Center, a public-interest group which is challenging the legal profes-
sion's own prohibition against soliciting business. (Director Monroe Freedman, who claims the ban is unconstitutional be-
cause it prevents public-interest lawyers from telling people about their rights, plans to advertise for clients.) Another is the Center for Law and So-
cial Policy, a foundation-funded or-
ganization which trains

students from universities such as Yale during part of their law school careers and recently helped win a court order requiring the Depart-
ment of Transportation to re-
open an investigation into cer-
tain G.M. pickup trucks. (Along with pro bono counsel from Arnold & Porter, the 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 or-
ganization of ombudsmen. "That's what I'm after," he muses, "is to continue with an organization having a prin-
cipal legal focus, and go into areas where you can influence the con-
fuence 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 estab-
lish the proposition that there can and should be organiza-
tions whose purpose is to take legal or law-related within which to benefit some aspect of the public interest, and that they should be supported at least indirectly by grants or by contributions by other organizations. This would also pro-
vide lawyers with an institu-
tional 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 an en-
trepreneur would demonstrate that lawyers and law students can initiate legal action which can have an important cata-
dynamic effect on society. The result would be a revolution within the system to avoid a
revoltion outside the system. Of course, I may be just a perpetu- tal optimist, but I think all this can be done."

Banzhaf, who has also orga- nized a group of public health lawyers, the American Society for the Health of Children, in the fight against smoking, told The New York Times that he was going to sue all cigarette commercials from radio and television. (His impor- tance in the passage of the law was actually modest.)

In his last victory, moreover, he plans to keep the pressure on the cigarette companies. The delerious ef- fects of decades of cigarette commercials, he argues, lingers 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 all cigarette commercials to provide free time for antismoking commer- cials even after Jan. 2.

His plans for the immedi- ate future are vague, but he says "I feel like many other public interest lawyers these days—about branchng out into environ- mental lawsuits. His next tar- get may be the big oil companies. Large TV commercials sometimes make the claim that they are solving environment- al problems. Such claims are "controversial," just like ciga- rette commercials, Banzhaf says, and he plans to file a "fairness doctrine" complaint calling for the F.C.C. to re- quire that free TV time be given to challenge the oil companies’ assertions.

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ough a legal activist, Banzhaf is by no stretch of the imagination a radical. He firmly believes in legal and establisshed: "I believe there's a great deal that can be done through the sys- tem by prodding it and operating on the periphery. I rec- cognize many things that can't be achieved through legal ac- tion. You can't sue to stop the Vietnam war or get student power in the university sys- tem because that's where I have my expertise."

Student reaction to Banz- haf’s action appeal to the law has been generally unimpor- table, especially among moder- erates and even conserva- tives. According to Aaron Handler, a SNOOP lawyer explained that a second-year law stu- dents tend to get bored with classes. Professor Banzhaf triggers the urge to do some- thing different and exciting." Harry Stern, a student 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 law- yer"s."

Nader has termed Banzhaf "one of the most imaginative legal start-up advocates in the country. He provokes his students to creative applica- tion, and then backed by the new wines.” Commissioner My- gardiner Jones of the F.T.C. has said that "he has a philo- sophy of how a citizen fits into the government and is doing concrete, positive things to make the government re- spond. We surely need this kind of effort."

There are those, of course, who accuse Ban- zhaf of being abrasive, egotis- tical, immature, opportunistic and politically inept. His fondness for publicity has ali- enated some of his colleagues. ("Talking to him about this problem is like throwing water at a wall," one of them com- plained.) It is no secret at the school that he is in tenure trouble. A not in substantial number of his colleagues take an exceedingly dim view of him and his manner of opera- tion. He is one of two mem- bers of the faculty under 30 and is not given to treating his elders with deference. "A saint he is not," was the succ- cinct appraisal of one profes- sor who is favorably disposed toward him. The faculty will decide this fall whether to grant him tenure. He could lose his favor with the faculty.

To a certain degree these problems derive from the fact that John Banzhaf has always been a loner, a fierce individ- ualist who doesn’t care how people react to him. This quality has motivated and sustained him throughout his career. It may also com- promise his effectiveness.

The survival of ASH, as well as that of all the public interest groups, depends in large part upon publicity. Pri- vate and public relations men at ASH are much more likely to support an operation which has enjoyed widely heralded successes. John Banzhaf has taken a backward step in the competition for public attention. His critics contend that he overdoes it. For ex- ample, law students in a recent seminar at the George Washington Association to Stop Pollution, which took legal action against the overemis- sion of exhaust from D.C. buses, were asked to describe their reaction with the Bandits, the New York Times

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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 108-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 barking the movement. Yet some have privately admitted misgivings about Banzhaf's tactics, which have been uncharacteristically coarse for a man whose reputation for fairness is impeccable. 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 disperse in a harmless flare. The 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 me 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 afad 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. They believe that it has been able to accommodate a quintessential individualist like Banzhaf. . .