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TRIBUTE

DAVID TRAGER: JURIST

Jeffrey Brandon Morris[†]

Earlier this year, the federal judiciary and the City of New York lost an able judge and one of the city's most public-spirited citizens. As a former United States Attorney for the Eastern District of New York, Judge David G. Trager took over what historically had been a patronage-driven office and transformed it into one that is highly professional and motivated to strike political corruption.¹ As dean of Brooklyn Law School for over a decade, Trager was the central figure in transforming that institution from a local to national law school.²

While I have written elsewhere about the United States District Court for the Eastern District of New York, as well as its judges, I cannot pretend to be completely objective in this essay, although I have attempted to be. I was a Visiting Professor at Brooklyn Law School during David Trager's deanship, and he left an indelible imprint on my career as a teacher and scholar. As dean, David Trager was a memorable personality. Large in size, he dominated any room he walked into by the strength of his personality. He propelled Brooklyn Law School forward with his vision—and with his ability to take the law school in new directions by anticipating and overcoming opposition through negotiation. In the end, much of his success can be attributed to the fact that he was able to persuade others that his motivation was truly not personal aggrandizement, but rather the improvement of the institution.³

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¹ See, e.g., *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982).

² JEFFREY BRANDON MORRIS, *BROOKLYN LAW SCHOOL: THE FIRST HUNDRED YEARS 151-69* (2001).

³ *Id.*

When he was dean, David Trager, often without being asked, was of enormous assistance to the careers of others. When the recipient of such gratuitous assistance attempted to express his or her appreciation, it tended to be received with what can only be described as an “embarrassed growl.”

The demands upon a federal district judge are very different from those of a dean. While far too early to attempt a definitive assessment of Trager’s seventeen-year career from 1993 to 2011 as a district judge, one could at this point make a few observations about his work.

The District Court for the Eastern District of New York that Trager joined in 1994 was already a distinguished court. Although it had lost men of John F. Dooling, Jr., and Orrin G. Judd’s quality, the court already included judges of superb caliber—Jacob Mishler, Jack B. Weinstein, and Eugene Nickerson, to name but a few. The jurisdiction of the district provided a rich docket: drug arrests were made at its airports; notorious organized crimes were committed within its five counties; lawsuits were frequently launched against its government; and complex commercial disputes were spawned in its boroughs. The government of the City of New York was an obvious target for lawsuits. Environmental actions in Nassau and Suffolk Counties, and copyright, trademark, and civil rights litigation were common.⁴ Trager had his share of these cases and much else.

I. TRAGER AND THE “CLASSIC” FEDERAL SPECIALTIES

The old specialties of the federal courts were well represented on the Eastern District’s docket and on Trager’s. Among those specialties were admiralty, bankruptcy, and criminal cases. Judge Trager had no “blockbuster” cases in these areas, but a brief discussion of the kinds of cases he adjudicated helps to remind us of the work federal judges have done and do.

A. Admiralty

Admiralty and maritime jurisdiction was a major reason for the creation of the federal district courts in 1789.⁵ After

⁴ See JEFFREY B. MORRIS, TO ADMINISTER JUSTICE ON BEHALF OF ALL THE PEOPLE: THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK 1965-1990, at 34 (1992).

⁵ Act of September 24, 1789, 1 Stat. 73. See, e.g., JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 7 (1987).

Congress established the Eastern District of New York in 1865, the New York ports brought interesting and important questions arising out of collisions, groundings, and sinking of vessels, as well as suits brought by sailors and longshoremen for wages and physical injuries, to the federal courts.

While admiralty and maritime cases have declined in number—mirroring the decline of water shipping more generally—cases involving vessels, sailors, and longshoremen are still found in the work of the district courts.⁶ In spite of resemblances to the laws of torts and workers' compensation, admiralty and maritime law evoke a world and vocabulary of their own. Judge Trager was no stranger to the lingo:

The vessel contained four cargo holds (or hatches) with each hatch containing two levels—a tweendeck (upper cargo storage area) and a lower hold. . . .

Attached to the fore and front walls of each hold is a ladder leading up from the tweendeck to the main deck. About one meter to the left or the right of the tweendeck ladder, in the floor of the tweendeck, is an access door (or escape hatch). The access door cover can be lifted up by hand and opens toward the wall where it can be fastened to the wall to keep the access door open⁷

Under the Longshore and Harbor Workers Compensation Act, a comprehensive federal workers' compensation program, “[the] injured longshoreman is entitled to . . . benefits regardless of fault,” but “[t]he injured longshoreman’s employer,” usually an “independent stevedore . . . is shielded from any further liability.”⁸ But if the injury was caused by the negligence of a vessel, the longshoreman can sue the vessel’s owner.⁹

Trager was quite sympathetic to seamen. In *McMillan v. Tug Jane A. Bouchard*,¹⁰ Judge Trager considered the law of maintenance and cure¹¹ when a seaman claimed injury to his

⁶ MORRIS, *supra* note 4, at 7, 19.

⁷ *Fernandez v. China Ocean Shipping (Grp.) Co.*, 312 F. Supp. 2d 369, 371 (E.D.N.Y. 2003).

⁸ *Conenna v. Loyal Chartering Corp.*, No. CV 98-7402, 2003 U.S. Dist. LEXIS 1545, at *10 (E.D.N.Y. Feb. 5, 2003) (quoting *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 96 (1994)) (internal quotation marks omitted).

⁹ *Id.* at *10-11 (citation omitted).

¹⁰ 885 F. Supp. 452 (E.D.N.Y. 1995).

¹¹ Dating back to at least the twelfth century, the law of maintenance and cure makes the ship owner responsible for paying maintenance and cure following any injury or sickness incurred by a seaman while in the owner’s employ, whatever the cause.

back caused by lifting a shackle and line on the tug. As a result, the plaintiff missed some work. The defendant claimed that McMillan had an undisclosed, pre-existing back injury. His prior medical history also indicated neck and shoulder injuries and a history of valium use to control muscle spasms. Furthermore, rumor circulated that McMillan sought replacement on an upcoming fourteen-day hitch. When that request was turned down, McMillan said something equivalent to, "One way or another I am getting off the boat."¹²

Yet, employing a Court of Appeals decision favorable to the seaman plaintiff,¹³ Trager held that McMillan had a good-faith basis for withholding the information because McMillan missed only five days of work in 1976 and did not regularly use valium for his back injury.¹⁴ At worst, Trager wrote, McMillan's belief was "an honest failure to reveal a prior medical condition."¹⁵ Trager also indicated in a footnote that "it would be reaching to conclude from [McMillan's] statement that some months earlier he had fraudulently concealed his pre-existing medical conditions."¹⁶

In the end, all doubts were resolved in favor of the seaman. As a result, Trager held that the defendant had terminated McMillan's maintenance and cure too early. Even though McMillan stayed, rent-free, with family and friends during his recuperation, Trager did not deduct from McMillan's judgment any savings or earnings accrued while off work (for McMillan had no other way of supporting himself).¹⁷ Trager held, "[A] shipowner cannot escape its liability for maintenance by forcing an injured seaman to involuntarily seek the financial support of family and friends during his or her convalescence."¹⁸ But Trager did not award punitive damages and attorneys' fees because the owner's conduct was neither callous nor

"Maintenance" is the sum of money sufficient to provide food and lodging for the injured seaman during his or her convalescence and until he or she reaches the point of maximum medical cure. . . . "Cure" consists of payments for all aspects of the seaman's medical care until he or she reaches maximum medical cure.

Id. at 459 (citations omitted).

¹² *Id.* at 456.

¹³ *Sammon v. Cent. Gulf S.S. Corp.*, 442 F.2d 1028 (2d Cir. 1971).

¹⁴ *McMillan v. Tug Jane A. Bouchard*, 885 F. Supp. 452, 455 (E.D.N.Y. 2003).

¹⁵ *Id.* at 461.

¹⁶ *Id.* at 461 n.11.

¹⁷ *Id.* at 465-66.

¹⁸ *Id.* at 465.

recalcitrant.¹⁹ The owner had made an erroneous decision, but one that had a “good faith basis.”²⁰

B. *Bankruptcy*

The federal courts’ involvement in bankruptcies dates back to the beginning of the nineteenth century. The Bankruptcy Amendments and Federal Judgeship Act of 1984²¹ established the bankruptcy court as a unit of the district court; accordingly, the district court refers bankruptcy cases and proceedings to the bankruptcy court.

Trager handled a number of bankruptcy matters. In one, he gave short shrift to the debtor’s filing because the debtor failed to abide by the bankruptcy court’s repeated orders—first, to make adequate post-petition mortgage payments, and second, to comply with rental obligations. Also, the debtor could not propose a satisfactory repayment plan.²² In another case, Trager held against non-lawyer, fly-by-night bankruptcy preparers who engaged in the unauthorized practice of law and violated the bankruptcy law provision prohibiting fraudulent, unfair, or defective acts.²³

C. *Criminal Cases*

Considering Trager’s distinguished career as a U.S. Attorney, it could have been anticipated that he would make a mark as a judge in the field of criminal law. There was no question of Trager’s interest, ability, and comfort in the field. In turn, his opinions made the factual implications and legal stakes of each case clear. To reach these decisions, Trager used his ability to discern the tactics and strategies of attorneys.²⁴

Like his colleagues, Judge Trager heard many habeas corpus petitions from state prisoners. Generally, he denied these petitions with relatively brief opinions. Although usually cloaked

¹⁹ *Id.* at 466-67, 469.

²⁰ *Id.* at 467.

²¹ Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

²² *In re Watkins*, Civ.A. No. CV-05-4271, 2005 U.S. Dist. LEXIS 44754 (E.D.N.Y. Aug. 24, 2005); *see also In re Watkins*, 362 B.R. 568, 574 (E.D.N.Y. 2007).

²³ *See In re Tomlinson*, 343 B.R. 400 (E.D.N.Y. 2006); *see also* 11 U.S.C. § 110(h)(5)(i)(1) (2006).

²⁴ Trager did not have many organized crime and political corruption cases as a judge. *But see Russo v. United States*, No. 04-CV-3871, 2007 U.S. Dist. LEXIS 62209 (E.D.N.Y. Aug. 23, 2007).

in a theory of ineffectiveness of counsel, the issues varied in habeas petitions brought before him. Judge Trager considered petitions concerning whether there was sufficient evidence to support the essential elements of a conviction;²⁵ whether a lineup was too suggestive;²⁶ and whether a petitioner's challenge rested on procedural or substantive grounds.²⁷

Trager's ability to study a criminal case, determine its strengths and weaknesses from the point of view of both sides, and foresee and assess the tactics of the attorneys allowed him to decide more authoritatively than most judges. *Vaknin v. United States*²⁸ is an excellent example. *Vaknin* was an action to vacate a sentence and conviction.²⁹ The case dealt with a complex criminal scheme that involved obtaining commissions from a wireless carrier through the sale of customer information.³⁰ The defendants used the information to fraudulently renew customer contracts and buy and sell wireless phones. *Vaknin* sought reversal because the government failed to disclose evidence favorable to the defendant under *Brady v. Maryland*³¹—specifically, that *Vaknin* was not aware of the sale of customer information.³² In assessing the motion to vacate defendant *Vaknin's* sentence, Trager ruled that the government's failure to disclose was not reversible error because the information would have simply confirmed what *Vaknin* already knew.³³ Then, in dealing with the ineffectiveness of counsel claim, Trager demonstrated that there was no reasonable probability of *Vaknin's* case proceeding to trial: no competent counsel would have pursued that theory even if *Vaknin's* acquittal had been a possibility.³⁴

Trager's effectiveness in handling facts is also evinced in an opinion he penned when he sat by designation on the

²⁵ *Loving v. People*, No. CV-04-1284, 2007 U.S. Dist. LEXIS 45026 (E.D.N.Y. June 21, 2007).

²⁶ *Brinson v. Annetts*, No. CV-05-5582, 2008 U.S. Dist. LEXIS 76388 (E.D.N.Y. Sept. 16, 2008).

²⁷ *Mateo v. Fishkill Corr. Facility*, No. CV-04-3420, 2007 WL 2362205 (E.D.N.Y. Aug. 14, 2007). Similar to the state habeas petitions, and usually brought pro se, were 28 U.S.C. § 2255 motions to alter federal sentences. *Birkett v. United States*, No. CV-97-1526, 2008 U.S. Dist. LEXIS 34785 (E.D.N.Y. Apr. 28, 2008).

²⁸ No. 08-CV-02420, 2010 U.S. Dist. LEXIS 86254 (E.D.N.Y. Aug. 23, 2010).

²⁹ *Id.* at *1.

³⁰ *Id.* at *5-9.

³¹ 373 U.S. 83 (1963).

³² *Vaknin*, 2010 U.S. Dist. LEXIS 86254, at *41-42.

³³ *Id.*

³⁴ Even if this theory proved successful, the defendant's sentence would not have been mitigated. *See id.* at *53-54.

Eleventh Circuit.³⁵ The defendant, Richardson, had been convicted of conspiracy to distribute five kilograms or more of cocaine.³⁶ He argued that the evidence presented at trial had not proved a single overarching conspiracy but rather the existence of multiple distinct conspiracies for which he had not been charged.³⁷ Writing for a panel, Trager lucidly and compellingly marshaled the evidence against Richardson, demolishing the theories raised by his defense. Richardson was, Trager wrote, “a ‘key man’ [who] direct[ed] and coordinate[d] the activities and individual efforts of various combinations of people.”³⁸ Richardson “was not a spoke, but the hub of all the conspiratorial acts the government sought to prove at trial.”³⁹ Judge Trager’s language is telling: this was not the kind of case where the government sought to convict a defendant who played a peripheral role in a vast conspiracy. Thus, the court, affirming the conviction, held that the government presented evidence sufficient to establish the common goal, underlying scheme, and overlap of participants.⁴⁰ The evidence supported a reasonable conclusion that each co-conspirator worked with Richardson according to Richardson’s grand scheme. Trager’s ability to work with doctrine in criminal cases was also on display in *Rivera v. Artus*, a habeas case. In two footnotes, Judge Trager analyzed two lines of court of appeals decisions involving the suppression of statements made to police concerning both an unrepresented and a represented matter in the course of the same interrogation.⁴¹

Trager also wrote several interesting opinions in criminal cases for the U.S. Court of Appeals for the Ninth Circuit. *United States v. Paopao*,⁴² for instance, posed the issue of a protective sweep. A police detective received a tip from a confidential informant that several suspected robbers of illegal gambling rooms were in a particular room in Honolulu.⁴³ Arriving at the site and making an arrest, the officers performed a protective

³⁵ *United States v. Richardson*, 532 F.3d 1279 (11th Cir.), *reh’g en banc denied*, 285 F. App’x 745 (11th Cir. 2008).

³⁶ *Id.* at 1282.

³⁷ *Id.*

³⁸ *Id.* at 1286 (quoting *United States v. Edouard*, 485 F.3d 1324, 1347 (11th Cir. 2007)).

³⁹ *Id.* at 1288.

⁴⁰ *Id.* at 1285-86.

⁴¹ No. CV-04-5050, 2007 U.S. Dist. LEXIS 79345 (E.D.N.Y. Oct. 25, 2007).

⁴² 469 F.3d 760 (9th Cir. 2006).

⁴³ *Id.* at 763.

sweep that took less than a minute.⁴⁴ As the officers were leaving the apartment, one of them noticed an unzipped bag.⁴⁵ Looking into the bag, one of the officers saw what he thought was the handle of a handgun and ammunition.⁴⁶ He seized the bag, and the contents were later determined to be a gun, ammunition, a knife, and a black pouch of jewels.⁴⁷

Writing for the court, Trager held that the defendant, Paopao, personally had no reasonable expectation of privacy in the game room and, therefore, had no standing to challenge the protective sweep.⁴⁸ Indeed, if the judge ruled that Paopao had standing, the search would still have been held valid because the police had reasonable suspicion from the informant's tip.⁴⁹ While Paopao could contest the seizure of his bag, the search of an object in plain view is constitutional.

In another Ninth Circuit criminal case for which Trager wrote the opinion, the panel affirmed the conviction of a thirty-five-year-old man who had attempted to persuade and entice a minor—an undercover FBI agent in an online chat room—to engage in sexual acts.⁵⁰ The court held that the trial court had acted within its discretion in admitting evidence tending to prove the defendant's intent and *modus operandi*.⁵¹ Specifically, the trial court allowed evidence of the defendant's previous conviction for lewdness with two children, aged eleven and twelve, as well as evidence of complaints of similar behavior that had been made to America Online.⁵² Judge Trager held that its prejudicial impact was outweighed by its probative value.⁵³

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 764-65.

⁴⁹ *Id.* at 765-67.

⁵⁰ *United States v. Cherer*, 513 F.3d 1150, 1153 (9th Cir. 2008).

⁵¹ *Id.* at 1157.

⁵² *Id.* at 1156.

⁵³ *Id.* at 1159. However, the distinguished philosopher-judge John Noonan disagreed with the sentence of almost twenty-four years in prison, which the court affirmed. The panel affirmed the sentence, finding that the trial judge had made no significant procedural error. In response to Judge Noonan's criticism, the panel opined on the district court's reasonableness "to conclude that a lengthy prison sentence was necessary to protect the public." *Id.* at 1160. Further, the panel held that the trial judge "was not required to consider the much more lenient sentences available for other violent and arguably more heinous sex offenses." *Id.* at 1161. Judge Noonan argued that the defendant's crime was "committed by words in the imaginary world of the chat room." *Id.* at 1162. In words reminiscent of Trager's colleague Jack B. Weinstein, *see, e.g., United States v. Polizzi*, 549 F. Supp. 2d 308 (E.D.N.Y. 2008), Noonan wrote: "The defendant is not a convenient abstraction such as 'a pedophile' but

D. *Pro Se Cases*

There are few federal judges who enjoy litigation brought pro se. There is no evidence that David Trager was such a judge. However, in only a few cases did he show exasperation.⁵⁴ One such case seems to have begun when the pro se plaintiff allegedly forced his way into a sixteen-year-old tenant's home, which he owned.⁵⁵ He was convicted of a misdemeanor, and he and his wife then filed a complaint, which was subsequently withdrawn. An amended complaint was then filed naming the original defendants—a state judge, Kings County District Attorney Charles Hynes, and two assistant district attorneys—along with the New York City Department of Corrections, Rent Guidelines Board, and Police Department, as well as the Criminal Court of Kings County and five other governmental offices.⁵⁶ The plaintiff, George Pappanikolaou, alleged a conspiracy to convict him by tampering with the evidence.⁵⁷ He also alleged abuse and discrimination claims against the Police Department, Department of Corrections, and the Rent Guidelines Board.⁵⁸ Other deprivations were alleged in the thirty-one page complaint, which Trager described as “a lengthy narrative which rambled about conspiracy theories.”⁵⁹

Judge Jack Weinstein, among the most tolerant judges in dealing with pro se litigants,⁶⁰ had dismissed the complaint.⁶¹

a human being who cannot be so summarily categorized. It may take the sentencing judge effort and empathy to address the person before him. The judge has no choice if he is to follow the law.” *Cherer*, 513 F.3d at 1162.

⁵⁴ One such case was brought by a homeless New Yorker who sought five hundred million dollars as well as other relief, though that was expressed incoherently. *Belton v. City of New York*, No. 05-CV-2937, 2005 WL 2133593 (E.D.N.Y. Sept. 1, 2005). The plaintiff was suing for five hundred million dollars because, he claimed, the New York City Transit Police at the Clark Street subway station (near to the main courthouse of the Eastern District) had “failed to keepsake his belongings” when he was arrested. *Id.* at *1. The five hundred million dollars of missing possessions was for an emergency crisis kit, one fifty dollar special comforter, and two twin size blankets. *Id.* at *2. Trager construed the complaint as a section 1983 action for deprivation of property without due process of law, but dismissed it because of the lack of any official police policy or custom. He did, though, point the plaintiff to state law causes of action for negligence, replevin, and conversion. *Id.* at *3.

⁵⁵ *Pappanikolaou v. New York City*, No. CV-01-865, 2005 U.S. Dist. LEXIS 39201, at *2 (E.D.N.Y. July 15, 2005).

⁵⁶ *Id.* at *3.

⁵⁷ *Id.* at *3-4.

⁵⁸ *Id.*

⁵⁹ *Id.* at *4.

⁶⁰ See, e.g., JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 24, 61-62 (2011).

⁶¹ *Pappanikolaou*, 2005 U.S. Dist. LEXIS 39201, at *5-6.

But the Second Circuit reversed to the extent that there were claims against the New York City defendants for deliberate indifference to the plaintiff's medical needs and that there were claims under the Americans with Disabilities Act.⁶² Weinstein then recused himself from the case, but the plaintiff's extensive litigation continued.

After a conference before a magistrate judge, Pappanikolaou filed a 118-page complaint which dealt largely with his arrest, incarceration, and prosecution, although the Second Circuit and the magistrate judge had already indicated that these issues were off limits.⁶³ The plaintiff then filed a third complaint, described by Judge Trager as "a fifty-nine page, single-spaced document that was yet again filled with the same rambling and incomprehensible allegations that were present in the first two amended complaints."⁶⁴ This was followed by the fifth status conference, which, in turn, was followed by an order containing explicit instructions concerning how the complaint should be properly amended.⁶⁵ Consequently, the plaintiff filed his fourth complaint.⁶⁶ It was forty-three pages long and named numerous new defendants (among them, the New York Governor George E. Pataki, State Attorney General Eliot Spitzer and Chief Judge Judith Kaye).⁶⁷ Despite the magistrate's instructions, the plaintiff continued to allege that the Court of Appeals for the Second Circuit had already dismissed the case. Trager said that the new complaint "nonsensically ramble[d]."⁶⁸ When the City and State moved to dismiss, the plaintiffs filed a 229-page opposition.⁶⁹

Yet, even after all this, Trager was unwilling to dismiss the case for failure to comply with a court order or for failure to comply with the pleading requirements of Federal Rule of Civil Procedure 10(b).⁷⁰ Trager did, however, dismiss for failure to comply with Rule 8's "short and plain statement" of claims requirement. The plaintiff had otherwise failed to state a valid claim for relief under section 1983, the Civil Rights statute, or the Americans with Disabilities Act. The dismissal was without leave to amend.

⁶² *Id.* at *6-7.

⁶³ *Id.* at *7.

⁶⁴ *Id.* at *8.

⁶⁵ *Id.*

⁶⁶ *Id.* at *10.

⁶⁷ *Id.* at *10, *12 n.2.

⁶⁸ *Id.* at *22.

⁶⁹ *Id.* at *13 & n.3.

⁷⁰ *Id.* at *15-17, *26-28.

There was also the action brought by Israel Valle, who, in 2004, Trager enjoined from filing any new action “seeking *in forma pauperis* status without obtaining leave of court.”⁷¹ Valle sought leave to file five actions in 2002, two in 2006, nine in 2008, and four in 2009.⁷² In 2010, Valle filed three more actions alleging in the first two that numerous state court judges were involved in a criminal enterprise.⁷³ In the third action, he sued district judges, a U.S. magistrate judge, the clerk of the court, and various other court personnel.⁷⁴ Judge Trager, one of the named defendants, noted that—as in prior attempts—he would not recuse himself, “as there [was] no basis to do so and it would only [have] provide[d] Valle with another person to sue should [the] case [have been] reassigned to another district judge.”⁷⁵ He added: “In essence, Valle has formulated a template that he repackages with a different caption depending on which court has dismissed his latest attempts to file frivolous litigation.”⁷⁶ As an order to show cause for sanctions was pending, Judge Trager simply denied leave to file the three actions and certified that any appeal of his order would not be in good faith.⁷⁷

Trager had a special connection to another pro se case, *Leeds v. Meltz*.⁷⁸ In *Leeds*, the plaintiff was an attorney, an alumnus of the City University of New York School of Law.⁷⁹ Leeds sued the acting dean of CUNY School of Law and three student editors of the school’s student newspaper because the newspaper had refused to publish a classified advertisement in which Leeds sought material to discredit faculty and administrators for a civil rights action against the school.⁸⁰ Leeds claimed that his First and Fourteenth Amendment rights had been violated by the editors’ refusal to publish the ad; the plaintiff argued that the student editors were acting under color of state law and were thus violating his constitutional rights.⁸¹

Trager had no doubt that the student editors were *not* state actors. And in fact, Leeds’s argument—reliant upon an

⁷¹ *In re Valle*, No. MC-10-0033, 2010 WL 364355 (E.D.N.Y. Feb. 1, 2010).

⁷² *Id.* at *1.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at *2.

⁷⁸ 898 F. Supp. 146 (E.D.N.Y. 1994).

⁷⁹ *Id.* at 147.

⁸⁰ *Id.*

⁸¹ *Id.* at 147-48.

inference that the editors' decision was influenced by the public school's administration—was undermined by Leeds's own complaint, which alleged that “the administration retaliated against the paper by cutting its budget and access to facilities.”⁸² The fact that a publication is sponsored by a state agency, by itself, is insufficient to establish state action.⁸³ The newspaper at issue was sufficiently independent, and its actions could not be characterized as state action.⁸⁴ Indeed, Leeds had “alleged no facts from which it could plausibly be inferred that the editors' actions were ‘fairly attributable’ to the law school administration.”⁸⁵

Former Dean Trager pointed out that it was “difficult to believe that all three student editors would have supinely accepted the alleged intimidation of the school administration.”⁸⁶ “[S]tudents being students, more than likely they would have at least complained to some of their student colleagues about the administration or faculty pressure and the issue, in the natural course of events, would inevitably have become a subject of student discussion at the law school.”⁸⁷

The *Leeds* opinion also rested on a broad principle: “As most student publications are generally without substantial resources, baseless actions can impair the First Amendment rights of the publications and their student participants.”⁸⁸ Further, if complaints could be sustained “on the flimsy basis present here,” students “would be unwilling to run the risk of having to pay substantial legal fees to defend themselves from unjustified legal actions and would forego the opportunity to participate in this activity.”⁸⁹

⁸² *Id.* at 148.

⁸³ *Id.* at 148-49.

⁸⁴ *Id.*

⁸⁵ *Id.* at 149 (citations omitted).

⁸⁶ *Id.* at 150.

⁸⁷ *Id.*

⁸⁸ *Id.* at 149.

⁸⁹ *Id.* at 149-50. In *Wasser v. New York State Office of Vocational & Educational Services*, Trager dealt with a lawsuit brought by a Brooklyn Law School graduate, a quadriplegic suing pro se a New York State agency which provides services to those with disabilities (VESID). 683 F. Supp. 2d 201, 203-04 (E.D.N.Y. 2008), *aff'd*, 602 F.3d 476 (2d Cir. 2010). The relationship between Wasser and VESID had “been contentious from the start.” *Id.* at 204. VESID had reimbursed Wasser for part of his legal education at Brooklyn Law School, but only up to the cost he would have had if he had gone to CUNY Law School, which was much less than at Brooklyn. *Id.* at 219. Wasser argued that the one law school sponsored by the state, the State University of New York at Buffalo Law School, and CUNY were inappropriate for him because of his disability and his career goals. *Id.* at 220. Wasser had actually begun law school while Trager was still dean and he cited the “receptive atmosphere” at Brooklyn Law School. Trager ruled against Wasser on this claim (indeed, on all his claims). *Id.* at 220, 225.

E. Trager's Decisions While Sitting with Courts of Appeal

The custom of designating district judges to sit with courts of appeal for short periods of time not only acclimatizes district judges to the different concerns of appellate judges, but it allows district judges the luxury to focus on more specific issues of law than they would normally be allowed.⁹⁰ David Trager sat by designation on the Courts of Appeals for the Second, Ninth, and Eleventh Circuits. Appellate work was an important part of his legacy.⁹¹

*Cooper v. Meridian Yachts, Ltd.*⁹² was an Eleventh Circuit case which raised difficult conflict-of-law issues. Following settlement of a ship captain's maritime tort action for injuries he sustained as a result of an alleged defective ship food lift, a number of parties filed third-party complaints seeking to receive indemnity and contribution from the ship's builder and designer and from an associated U.S. venture.⁹³ The ship, the *Meduse*, was built in the Netherlands and registered in the Cayman Islands.⁹⁴ The shipbuilder and ship designer principally operated in the Netherlands, but conducted business in the U.S. in a joint venture. The ship's purchaser was a business entity organized under the laws of the British Virgin Islands, and the captain was employed by a British Virgin Islands corporation. The ship's management company (Vulcan Manager) and crew were incorporated in the State of

He stated that Wasser had not shown that Brooklyn Law School "offered supportive services that were unavailable at a public law school." *Id.* at 220. He stated that "Wasser's belief that CUNY School of Law was academically inferior does not require VESID to waive its otherwise valid policy. CUNY School of Law is located in reasonable proximity to his home. It was fully accredited . . . Graduates of CUNY are employed in a wide variety of settings . . ." *Id.* While it was "within Wasser's discretion to choose to attend a private law school, it was also appropriate for VESID to reimburse tuition rates only up to the cost of a public institution." *Id.*

⁹⁰ For many years Congress provided that, where the constitutionality of federal statutes was at issue (and when certain other issues were involved), there was to be review by a three-judge district court constituted by the Chief Judge of the Circuit. The three-judge courts were usually made up of two district judges and one court of appeals judge. Gradually, that jurisdiction has been eliminated. *See* Act of February 11, 1903, ch. 544, 32 Stat. 823; Elliot S. Marks & Alan H. Schoem, *The Applicability of Three-Judge Federal Courts in Contemporary Law: A Viable Legal Procedure or a Legal Horsecart in a Jet Age?*, 21 AM. U. L. REV. 417, 429 (1972).

⁹¹ Several of Judge Trager's circuit court of appeals' opinions are discussed elsewhere in this essay.

⁹² 575 F.3d 1151 (11th Cir. 2009).

⁹³ *Id.* at 1157.

⁹⁴ *Id.* at 1158-59.

Washington.⁹⁵ The entity that constructed the yacht allegedly operated in the United States.

The district judge had dismissed the third-party plaintiffs' claims using the Dutch Statute of Repose.⁹⁶ As interpreted by the Eleventh Circuit, however, the case had two sets of issues raising distinct choice-of-law concerns over the third-party claims: one set of issues concerned a Dutch choice-of-law clause and Dutch limitation-of-liability provision; the second set of issues involved whether Dutch law, federal maritime law, or a third jurisdiction's law governed the third-party claims. In his opinion, Trager indicated that the district court had been hampered by limited information about Dutch law and was completely uninformed as to the laws of the Cayman and British Virgin Islands.

This is not the place to trace the contours of Trager's twenty-nine page opinion, which deals with, at least as calculated by this author, eleven issues and subissues. The opinion applies three different sets of law in different places: Dutch law, federal maritime law, and Florida law. The district judge, who apparently had not considered all the aspects of this complex puzzle, was affirmed in part and reversed in part.⁹⁷ Trager's opinion on the choice-of-law and conflict-of-laws issues suggests not only how comfortable he was in this arcane area, but also how much he enjoyed it.⁹⁸

Trager also wrote for the Eleventh Circuit Court of Appeals in an interesting civil rights suit, *Young Apartments, Inc. v. Town of Jupiter*.⁹⁹ The case involved section 1983 and breach-of-contract claims brought by the owner of an apartment complex.¹⁰⁰ The plaintiff alleged that the defendants, a town and town official, had harassed and discriminated against him and other Hispanics by refusing to provide them affordable housing.¹⁰¹ Specifically, the plaintiff alleged that the

⁹⁵ *Id.* at 1159.

⁹⁶ *Id.* at 1161.

⁹⁷ *Id.* at 1180.

⁹⁸ Trager handled an unusual number of conflict-of-laws and *forum non conveniens* issues. See, e.g., *Giaguaro v. Amiglio*, 257 F. Supp. 2d 529 (E.D.N.Y. 2003) (a complicated dispute over the sale of Italian canned, peeled tomatoes); see also *Gerena v. Korb*, 617 F.3d 197 (2d Cir. 2010) (where Trager wrote the opinion for the Second Circuit in a case involving a civil suit brought by a Yale student who claimed she was sexually assaulted in her dormitory room by another Yale student after a Yale sponsored back-to-school event).

⁹⁹ 529 F.3d 1027 (11th Cir. 2008).

¹⁰⁰ *Id.* at 1032.

¹⁰¹ *Id.*

town had adopted an overcrowding ordinance in response to the increasing number of immigrant workers.¹⁰² The ordinance was purportedly enforced through “excessive and selective” housing inspections that targeted landlords housing Hispanics.¹⁰³ The town inspected the plaintiff’s apartment complex and cited it for violations of the ordinance as well as physical defects on the property.¹⁰⁴ The town condemned some units in the building which led to the cancellation of the contract to sell the building.¹⁰⁵

The district court dismissed most of Young’s complaint. The appeal centered on the holding that Young lacked standing to bring a race-based discrimination suit as well as the dismissal of the complaint against two town officials. The court of appeals reversed on the standing issue because Young Apartments had suffered financial injuries.¹⁰⁶ That is, “Young could allege that it was injured by Jupiter’s discriminatory actions regardless of whether such claims might also vindicate the rights of its immigrant tenants.”¹⁰⁷ Nor was Young barred by prudential principles of third-party standing from advocating on behalf of its customers against discriminatory actions that interfered with a business relationship. Indeed, “Young Apartments [was] uniquely positioned to assert claims on behalf of its Hispanic residents.”¹⁰⁸ The court of appeals also reversed as to the proper level of review. The trial judge had used a rational basis test. However, “because Young Apartments [had] standing to attack the ordinance as racially discriminatory,” the proper test was strict scrutiny.¹⁰⁹ The trial judge was affirmed in part and the case was remanded.

A third opinion Trager penned for the Eleventh Circuit also deserves mention. In *Hanley v. Roy*, Judge Trager encountered the Hague Convention on the Civil Aspects of International Child Abduction.¹¹⁰ Grandparents from Ireland, the Hanleys—who had been named testamentary guardians of their daughter’s children—argued that their son-in-law (Roy) had wrongfully removed their grandchildren to Florida.¹¹¹ The

¹⁰² *Id.* at 1033.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1035.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1038-39.

¹⁰⁷ *Id.* at 1040.

¹⁰⁸ *Id.* at 1044.

¹⁰⁹ *Id.*

¹¹⁰ 485 F.3d 641 (11th Cir. 2007).

¹¹¹ *Id.* at 643.

district court dismissed the petition.¹¹² The court of appeals, with Trager writing, reversed.

After their then-divorced daughter had been diagnosed with cancer, the Hanleys bought her a house in Ireland and moved in to help care for her children; Roy also moved into the house.¹¹³ Before her death, the daughter named her parents the testamentary guardians of the children.¹¹⁴ Roy and the children continued to live with the Hanleys for four-and-one-half years after the children's mother died. Then he "suddenly moved the children from Ireland to Florida without the Hanley's knowledge or consent, leaving only a note behind."¹¹⁵

The court of appeals held that under Irish law, "testamentary guardians" must act jointly with the father as guardians. If the father objects, the testamentary guardians are entitled to "seek a court determination enforcing their joint-guardianship rights."¹¹⁶ The district court held that the status of testamentary guardians was not enough to accord the Hanley's "rights of custody" under the Hague Convention and under the interpretation of the Convention by Irish courts.¹¹⁷ The grandparents were therefore entitled to seek a court determination enforcing their joint guardianship rights. The court of appeals then struck at the heart of the case: "[P]ermitting the very act which the Convention seeks to prevent—namely, flight—to constitute a construction to terminate the Hanley's 'rights of custody' would make a mockery of the Convention."¹¹⁸ The court of appeals directly ordered Roy to return the minor children to Ireland for proper proceedings, and, if he did not do so promptly, the district court was to order the minor children turned over to the Hanleys.¹¹⁹ Judge Trager's opinions while sitting by designation on the courts of appeals suggest that he would have been comfortable and well qualified to sit fulltime as an appellate judge.

¹¹² *Id.* at 644.

¹¹³ *Id.* at 643.

¹¹⁴ *Id.* at 644.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 645-46.

¹¹⁷ *Id.* at 646.

¹¹⁸ *Id.* at 650.

¹¹⁹ *Id.*

II. AREAS OF LAW WHERE JUDGE TRAGER MADE SPECIAL CONTRIBUTIONS

As judge, David Trager made significant contributions in two classic specialties of the federal courts—antitrust and copyright. He also handled two cases of broad interest—one relating to the events of September 11, 2001, the other an unusual criminal case involving terrorism, which deserves separate treatment.

A. *Antitrust*

Trager handled two important antitrust cases—one case involving the widely used antibiotic Cipro and another against Chinese manufacturers of Vitamin C. In the *Cipro* litigation, Trager supported the longstanding position of the pharmaceutical industry that settlement of suits between generic and branded pharmaceutical companies is not presumptively anticompetitive. At issue was a patent holder's reverse payment to generic-drug manufacturers to avoid a patent challenge.¹²⁰

In *Cipro*, Barr Laboratories and the Rugby Group challenged as anticompetitive agreements between Bayer AG, its American subsidiary, Bayer Corporation (the brand manufacturer of Cipro), and a group of generic manufacturers. Barr argued that the agreements, which were lawsuit settlements, violated antitrust law under the Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act).¹²¹ In 1991, Barr filed a certification for generic Cipro claiming Bayer's patent was invalid. In response, Bayer sued for infringement. The suit stayed approval of generic Cipro by the Food and Drug Administration for thirty months. Bayer and Barr ultimately settled their dispute to avert a costly trial. Under the settlement, Barr and Rugby acknowledged the validity of the Cipro patent, and Barr agreed to amend its certification so that it could market generic Cipro only after Bayer's patent expired. For its part, Bayer agreed to, among other things, license Barr and Rugby to market a competing ciprofloxacin product six months before the Bayer

¹²⁰ See *In re Tamoxifen*, 277 F. Supp. 2d 121 (E.D.N.Y. 2003), *aff'd*, *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006).

¹²¹ Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, § 102, 98 Stat. 1585 (codified at 35 U.S.C. § 156 (2006)).

patent's expiration.¹²² The agreement spawned multiple putative class actions in various state courts that were removed to federal court. The Judicial Panel on Multidistrict Litigation transferred those cases to Trager, who remanded some of them back to state courts and retained others with institutional plaintiffs.¹²³

On May 20, 2003, Trager ruled that the Cipro settlement did not violate the antitrust laws. He noted that the challenged settlements resolved the entire patent dispute without creating a "bottle neck" for subsequent generics. The real question for antitrust purposes was whether the settlement would hinder lawful competition.¹²⁴ Trager stressed that the American legal process encourages the settlement of lawsuits. A contrary rule might lead, he said, to less investment in research and development. He therefore denied the plaintiff's motion for partial summary judgment.

In 2005, Trager rendered judgment for the defendants on similar grounds.¹²⁵ He held that it would be "inappropriate for an antitrust court, in determining the reasonableness of a patent settlement agreement to conduct an after-the-fact inquiry into the validity of the underlying patent. Such an inquiry would undermine any certainty for patent litigants seeking to settle their disputes."¹²⁶ Thus, Trager held, the settlement had not violated the antitrust laws because the settlement excluded no competition beyond the exclusionary scope of the patent. The appeal to the Court of Appeals for the Second Circuit was transferred to the Federal Circuit, which in 2008 affirmed Trager's position.¹²⁷

The second of the antitrust cases possessed significant international implications. The Vitamin C antitrust action was

¹²² Pamela J. Auerbach & Christopher M. Grengs, *Recent District Court Rulings Support Brand-Name Drugmakers, Generic Counterparts*, 1 PHARM. L. & INDUST. REP. 666 (2003), available at http://bna.com/piln/display/batch_print_display.adp.

¹²³ *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 166 F. Supp. 2d 740, 756-57 (E.D.N.Y. 2001).

¹²⁴ *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188 (E.D.N.Y. 2003).

¹²⁵ *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005).

¹²⁶ *Id.* at 530.

¹²⁷ *In re Ciprofloxacin Antitrust Litig.*, 544 F.3d 1323, 1327 (Fed. Cir. 2008). The Second Circuit also backed Trager, although the panel invited the appellants to petition for rehearing en banc. The full court proved not to be interested. *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98 (2d Cir.), *reh'g en banc denied*, 625 F.3d 779 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1606 (2011).

notable because the Chinese government presented its views as an amicus.¹²⁸ The multidistrict litigation consisted of separate class action suits brought by American individuals and entities that had purchased Vitamin C from Chinese manufacturers. The plaintiffs alleged that Chinese companies had met with the Association of Importer and Exporters of Medicines and Health Products of China and formed a cartel.¹²⁹ As a result, the Chinese market share on Vitamin C increased and the price nearly tripled.¹³⁰ Plaintiffs further alleged that the Chinese manufacturers met in June 2004 and agreed to raise prices by shutting down production and restricting exports to the United States.¹³¹ The Chinese defendants argued that comity and the act-of-state doctrine (a foreign government may not be questioned in another nation's courts for actions within its borders) applied.¹³² Indeed, the AIEMC was associated with the Chamber of Commerce of Medicines and Health Products Importers and Exporters, an entity under the direct control of the Chinese Ministry of Commerce.¹³³

In June 2006, the Chinese manufacturers sought a stay of discovery pending their motions to dismiss. They argued that they were going to secure a dismissal on a theory akin to the act-of-state doctrine—that they could not be held liable for conduct in violation of U.S. antitrust laws because the Chinese government had compelled them to engage in their conduct.¹³⁴ The Chinese government then filed an amicus curiae brief arguing that the Chinese manufacturers were compelled under Chinese law to collectively set a price for vitamin exports. Trager responded: “The Chinese government’s appearance as amicus curiae is unprecedented. It has never before come to the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case.”¹³⁵

Nevertheless, Trager reasoned that the documents the Chinese submitted as attachments to their brief, if credited, would present a complex interplay between the Chinese government and the defendants, where defendants’ independence

¹²⁸ *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 552 (E.D.N.Y. 2008).

¹²⁹ *In re Vitamin C Antitrust Litig.*, 237 F.R.D. 35, 36 (E.D.N.Y. 2006).

¹³⁰ *Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 548-49.

¹³¹ *Id.* at 549.

¹³² *Id.* at 550.

¹³³ *Id.* at 551.

¹³⁴ Magistrate Judge James Orenstein denied the application to stay discovery. *Vitamin C Antitrust Litig.*, 237 F.R.D. 35.

¹³⁵ *Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 552.

in making pricing decisions was difficult to determine at that stage in the litigation.¹³⁶

But in November 2008, Trager rejected the claim by the Chinese companies to dismiss the case on the grounds that their price-fixing activities were compelled by the Chinese government. He held that the record was too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions. While the Ministry brief was entitled to "substantial deference," it would not be taken as conclusive evidence of compulsion.¹³⁷

B. Copyright

Trager wrote a number of interesting opinions in the area of copyright law. One was *Cosmetic Ideas, Inc. v. IAC/Interactive Corp.*¹³⁸ In that case, the U.S. Court of Appeals for the Ninth Circuit considered whether registration of a copyright takes place when the Copyright Office receives a completed registration application or only after the Copyright Office issues a certificate of registration. Four courts of appeals and several district courts had considered the issue and were divided equally.¹³⁹ In addition, there was a recent Supreme Court decision bearing on the issue.¹⁴⁰

The Ninth Circuit panel found no guidance from the language of the relevant clause in the statute or the law as a whole.¹⁴¹ However, looking at the purpose of the law, the panel concluded that the application approach better fulfilled Congress's purpose to provide broad copyright protection and maintain a "robust federal register."¹⁴² The Ninth Circuit thus sided with the Fifth and Seventh Circuits in holding that receipt by the Copyright Office of a complete application satisfies the registration requirement.¹⁴³

¹³⁶ *Id.* at 556.

¹³⁷ *Id.* at 557. After Judge Trager's death, the case was reassigned to Judge Brian Cogan.

¹³⁸ 606 F.3d 612 (9th Cir. 2010).

¹³⁹ *Id.* at 615 n.4.

¹⁴⁰ *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010).

¹⁴¹ *Cosmetic Ideas*, 606 F.3d at 617-18.

¹⁴² *Id.* at 618.

¹⁴³ *Id.* at 616, 621. One fine Trager opinion written for the Eleventh Circuit on the question as to whether the Copyright Act accords a magazine a privilege to produce a digital compilation containing exact images was vacated by an en banc court, although the latter court reached the same result. *Greenberg v. Nat'l Geographic Soc'y*, 488 F.3d 1331 (11th Cir.), *reh'g en banc granted*, 497 F.3d 1213 (11th Cir. 2007), *rev'd en banc*, 553 F.3d 1244 (11th Cir. 2008). At issue was whether the National Geographic

C. *Extraordinary Rendition*

One Trager decision that aroused considerable criticism involved the extraordinary rendition of a Canadian citizen who passed through John F. Kennedy Airport while attempting to catch a connecting flight to Canada.¹⁴⁴ Maher Arar, on his way home from vacationing in Tunisia, was intercepted by American officials who believed he was a terrorist.¹⁴⁵ Detained, Arar was interrogated, placed in solitary confinement, and given the opportunity to voluntarily return to Syria (which he refused).¹⁴⁶ Arar was permitted only a single meeting with counsel, and was then branded “clearly and unequivocally a member of al Qaeda,” flown to Jordan, and turned over to Syrian authorities.¹⁴⁷ Neither the Canadian Consulate nor Arar’s attorney was informed before he was taken from the United States.¹⁴⁸

During his ten-month detention in Syria, Arar was tortured¹⁴⁹ (as Arar warned American officials he would be¹⁵⁰). He was forced to sign a confession stating that he had participated in terrorist training in Afghanistan, which he later denied.¹⁵¹ His statements were apparently shared with the United States government. Ultimately, Syria released Arar, who returned to Canada.¹⁵² Later, Arar—a telecommunications engineer who held both Syrian and Canadian citizenship—was completely exonerated by the government of Canada. Seven

Society could release an unedited CD-ROM collection of its back issues without paying photographers royalties for their work. Trager’s panel and the en banc court held that the addition of new material to the work—an introductory sequence—did not take the revised collective work outside the privilege, for other portions were privileged (the reproduced issues of the magazines themselves (“Replica”) and the computer program (“program”)).

Trager also handled a large number of copyright-infringement suits brought by record companies throughout the United States in response to online distribution. The suits were brought against individuals in an attempt to combat and deter what record labels perceived as massive copyright infringement over the Internet. *See generally* UMG Recordings v. Lindor, CV-05-1095, 2010 U.S. Dist. LEXIS 20952 (E.D.N.Y. Mar. 8, 2010); Elektra Entm’t Grp., Inc. v. Torres, No. CV-07-640, 2007 U.S. Dist. LEXIS 92774 (E.D.N.Y. Dec. 18, 2007); UMG Recordings, Inc. v. Lindor, 531 F. Supp. 2d 453 (E.D.N.Y. 2007); UMG Recordings v. Lindor, No. CV-05-1095, 2006 U.S. Dist. LEXIS 83486 (E.D.N.Y. Nov. 9, 2006).

¹⁴⁴ Arar v. Ashcroft, 414 F. Supp. 2d 250, 252-53 (E.D.N.Y. 2006).

¹⁴⁵ *Id.* at 253.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 254.

¹⁴⁸ *Id.* at 252-54.

¹⁴⁹ *Id.* at 254.

¹⁵⁰ Arar v. Ashcroft, 585 F.3d 559, 586 (2d Cir. 2009) (dissenting opinion).

¹⁵¹ Arar, 414 F. Supp. 2d at 255.

¹⁵² *Id.*

months after Trager's decision on rendition (February 2006), the Canadian government concluded that Canadian intelligence, under pressure to find terrorists, had passed on false warnings about Arar to the United States.¹⁵³ The 822-page report of the commission established by the Canadian government found that Arar had no involvement in Islamic extremism and was not a security risk.¹⁵⁴ The Prime Minister of Canada sent a letter of apology to Arar and his family along with payment of approximately \$9.75 million.¹⁵⁵ In June 2008, the Inspector General of the Department of Homeland Security told a congressional committee that he would not rule out that U.S. officials had violated U.S. laws.¹⁵⁶

In the meantime, Arar brought suit seeking declaratory relief and compensatory and punitive damages. Having been removed to Syria under the covert U.S. policy of "extraordinary rendition," through which non-U.S. citizens were "sent to foreign countries to undergo methods of interrogation not permitted in the United States,"¹⁵⁷ Arar alleged that the U.S. officials had violated (1) the Torture Victim Prevention Act (TVPA); (2) his Fifth Amendment rights when the defendants knowingly subjected him to torture and coercive interrogation in Syria; (3) his Fifth Amendment rights through his arbitrary and indefinite detention in Syria, including denial of access to counsel, the courts, and his consulate; and (4) his Fifth Amendment Rights because he had suffered "outrageous, excessive, cruel, inhumane and degrading conditions of confinement in the United States where he had been subjected to coercive and involuntary custodial interrogation and deprived of access to lawyers and courts."¹⁵⁸

In the course of a lengthy opinion that resolved many (but not the most important) issues in a manner favorable to the plaintiff, Trager awarded no relief. He first held that Arar lacked standing for declaratory relief because the activity he was challenging was neither ongoing nor likely to impact him in the

¹⁵³ Apparently Arar had acquaintances in Canada who were being investigated. *Id.* at 256 n.1.

¹⁵⁴ The United States refused to cooperate with the Canadian inquiry.

¹⁵⁵ *Arar v. Ashcroft*, 532 F.3d 157, 162 (2d Cir. 2008).

¹⁵⁶ Louis Fischer, *Extraordinary Rendition, The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1441-42 (2008); John R. Crook, *Second Circuit Panel Dismisses Canadian Citizen's Claims Involving Removal to Syria: Court to Rehear en Banc; U.S. Agencies Investigate Handling of the Case*, 102 AM. J. INT'L L. 880, 882 (2008).

¹⁵⁷ *Arar*, 414 F. Supp. 2d at 256.

¹⁵⁸ *Id.* at 257-58.

future.¹⁵⁹ Then, after making a series of rulings for Arar regarding the application of the TVPA, Trager held that because Congress intended for the Act to be used as a remedy for U.S. citizens subject to torture overseas, it did not apply in Arar's case.¹⁶⁰

With respect to compensatory and punitive damages, the claim for relief was based on the so-called *Bivens* remedy, one created by the Supreme Court for federal officials' violations of the Fourth, Fifth, and Eighth Amendments.¹⁶¹ Once again, Trager resolved the preliminary questions favorably to Arar but refused to extend *Bivens* to overseas conduct because of Congress's power over aliens and the "national security and foreign policy decisions at the heart of this case."¹⁶² Extending *Bivens* in this sort of case, wrote Trager, "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."¹⁶³ Further, Trager believed that most if not all judges lacked the experience or the background "to adequately and competently define and adjudicate the rights of an individual vis-à-vis the needs of officials acting to defend the sovereign interests of the United States."¹⁶⁴ The task of balancing individual rights against national security concerns was one, he felt, courts should not take on without the guidance or authority of the coordinate branches.¹⁶⁵ The claim that Arar was deprived of due process rights during his period of domestic detention still might, Trager wrote, potentially raise *Bivens* claims, but Arar would have to redraft a complaint excluding the rendition claim and naming the defendants that were personally involved in the alleged unconstitutional treatment. That Arar never did.¹⁶⁶

Trager's opinion in *Arar* was subjected to considerable criticism. He may have escaped some obloquy had he resolved

¹⁵⁹ *Id.* at 258-59.

¹⁶⁰ *Id.* at 263.

¹⁶¹ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁶² *Arar*, 414 F. Supp. 2d at 281.

¹⁶³ *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990)).

¹⁶⁴ *Id.* at 282.

¹⁶⁵ Trager denied Arar's claim of denial of access to counsel and he dismissed all claims against the individuals without prejudice to repleading Count 4. *Id.* at 286.

¹⁶⁶ The United States had moved for summary judgment in the *Arar* case, invoking the state-secrets privilege. Having held for the government on the statutory and constitutional claims, Trager found the issue involving state secrets moot. *Id.* at 287.

the case on the basis of the state-secret doctrine, but he possibly did some good in resolving so many subissues favorably to Arar. The federal judiciary as a whole did not cover itself with glory in litigation involving 9/11. This author wonders about the claim that executive officials, often with very little experience in dealing with national security matters, are more up to the task of balancing individual rights against the claims of national security than experienced judges. Barbara Olshansky, Deputy Legal Director of the Center for Constitutional Rights, has put it this way: "There can be little doubt that every official of the United States [involved in Arar's torture] knew that sending him to Syria was a clear violation of the U.S. Constitution, federal statutes, and international law This is a dark day indeed."¹⁶⁷ A ruling for Arar would have flown in the face of most of the 9/11 cases and perhaps such a step would not have been appropriate for a district judge. At least Trager's rulings for Arar on the subissues might have operated as a brake on the executive.

A panel of the Court of Appeals for the Second Circuit affirmed Trager's decision over one dissent.¹⁶⁸ Without either party requesting it, the Second Circuit vacated the panel opinion, and then, sitting en banc affirmed Trager by a vote of seven to four.¹⁶⁹ Writing for the court, Chief Judge Dennis Jacobs affirmed Trager as to standing. He dispatched Arar's claim under the TVPA more easily than Trager, however. Judge Jacobs held that to state a claim under the TVPA, there must be an allegation that U.S. officials possess power under foreign law and the offending actions must derive from an exercise of that power.¹⁷⁰ On the *Bivens* claim, the court also affirmed. While not precluding judicial review and oversight, it held that if there was to be a civil remedy in damages suffered in the context of extraordinary rendition, Congress would need to create such a remedy.¹⁷¹ The Supreme Court denied

¹⁶⁷ Nat Hentoff, *The Torture Judge*, VILLAGE VOICE (N.Y.C.) (Mar. 7, 2006), <http://www.villagevoice.com/2006-03-07/news/the-torture-judge>; see also Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479 (2008). Lobel was counsel to Arar. See Michael V. Sage, *The Exploration of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition*, 37 CAL. INT'L L.J. 121, 132, 135 (2006).

¹⁶⁸ *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008).

¹⁶⁹ *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

¹⁷⁰ *Id.* at 568.

¹⁷¹ *Id.* at 576. In his dissent, Judge Robert A. Sack found the majority's recitation of the facts as "generally accurate, but anodyne." He then stated that "[t]he

certiorari.¹⁷² The treatment of the *Arar* case by all three tiers of the federal judiciary was of a piece with the approach of all three branches of the U.S. government to refuse to be held accountable for torture after 9/11.

D. United States v. Nelson

The most publicized decision of Judge Trager's career was connected to boiling racial tensions in his home borough, Brooklyn. On August 19, 1991, an automobile driven by a Hasidic Jew struck two black children in Brooklyn's Crown Heights; one of the children was killed.¹⁷³ Rumors swiftly spread that the ambulance driver at the scene had treated the Hasid ahead of the children.¹⁷⁴ A riot occurred. Eleven African-Americans—including a defendant, Lemrick Nelson Jr.—chased Yankel Rosenbaum, an orthodox Jew, and stabbed him to death.¹⁷⁵ Nelson, then sixteen, was found with a bloody knife and was positively identified by the victim before he died.¹⁷⁶ Nelson and Charles Price, who had harangued the crowd, were charged with second-degree murder and acquitted in state court.¹⁷⁷ Bitter feelings between the Jewish and African-American communities festered.

Nelson moved to Georgia where he got into more trouble.¹⁷⁸ He pleaded guilty, as an adult, to aggravated assault and carrying a concealed weapon.¹⁷⁹ The U.S. Attorney for the

district court's opinion carefully and fully sets forth Arar's allegations." *Id.* at 582, 584 (Sack, J., dissenting).

Judge Trager also had before him a rather different case involving terrorism. This was a suit brought by a family who were dual citizens of the United States and Israel, who sued a Swiss financial institution with offices in the United States and Israel over the death of their husband/father who was killed in Israel in a bus blown up by terrorists. The plaintiffs claimed that the bank (UBS AG) had provided financial services for the alleged terrorist organization, Hamas. In September 2009, Judge Charles P. Sifton dealt with issues of standing, *forum non conveniens*, and motions to dismiss. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410 (E.D.N.Y. 2009). After Sifton's death in November 2009, the case was assigned to Trager who denied motions for reconsideration of the *forum non conveniens* issue and to certify Sifton's order for interlocutory appeal. *Goldberg v. UBS AG*, 690 F. Supp. 2d 92 (E.D.N.Y. 2010).

¹⁷² *Arar v. Ashcroft*, 130 S. Ct. 3409 (2010) (denying petition for writ of certiorari).

¹⁷³ *United States v. Nelson*, 90 F.3d 636, 637 (2d Cir. 1996).

¹⁷⁴ *Id.* at 637-38.

¹⁷⁵ *Id.* at 638.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 640.

¹⁷⁹ *United States v. Nelson*, 921 F. Supp. 105, 108 (E.D.N.Y.), *aff'd*, 90 F.3d 636 (2d Cir. 1996).

Eastern District of New York charged Nelson, then nineteen, with juvenile delinquency over Rosenbaum's death. Five days after the information was filed, the government moved to transfer Nelson to criminally prosecute him as an adult for violation of Rosenbaum's civil rights. Trager denied the order but was reversed by the Second Circuit. The appellate court held that Trager had improperly evaluated the strength of the government's evidence and erred by not considering Nelson's age at the time of the transfer (minimizing the seriousness of the offense), by using a "glimmer-of-hope" test to determine the possibility of Nelson's rehabilitation, and by not making any inquiry into juvenile programs available for someone of Nelson's age.¹⁸⁰ The Court of Appeals vacated and remanded to Trager for further findings and reconsideration.

Before the hearing on remand, Nelson had been charged with resisting arrest and criminal trespass. The latter had occurred when he refused to leave the federal courthouse. In his opinion on remand, Trager granted the motion to transfer because of the seriousness of the crime charged as well as the finding that "it [was] not 'likely' that Nelson would be rehabilitated."¹⁸¹ This time the decision was upheld by the Court of Appeals.¹⁸² Trager wanted to avoid turning the *Nelson* trial into a proceeding as racially divisive as Rodney King's had been in Los Angeles. He intended to empanel "a moral jury that render[ed] a verdict that ha[d] moral integrity."¹⁸³ However, an important Supreme Court decision, *Batson v. Kentucky*,¹⁸⁴ stood in his way. *Batson* held that peremptory strikes on the basis of race violate the Equal Protection Clause.¹⁸⁵ That case and its progeny were primarily aimed at lawyers, but presumably bound judges as well.

Presiding over jury selection in the *Nelson* case, Trager denied the defendant's for-cause challenge of a Jewish juror (Juror 108) who had doubted his ability to be objective.¹⁸⁶ Then, when an African-American juror was excused, the Judge did not replace the juror with the first alternate juror but rather

¹⁸⁰ United States v. Nelson, 68 F.3d 583 (2d Cir. 1995).

¹⁸¹ *Nelson*, 921 F. Supp. at 122.

¹⁸² *Id.*

¹⁸³ United States v. Nelson, 277 F.3d 164, 171 (2d Cir. 2002) (quoting trial transcript).

¹⁸⁴ 476 U.S. 79 (1986).

¹⁸⁵ *Id.*

¹⁸⁶ *Nelson*, 277 F.3d at 172.

sua sponte removed a second white juror from the panel and filled the two spaces with an African-American juror and Juror 108.¹⁸⁷ The resulting jury, which included three African-Americans and two Jews, convicted both men. Trager sentenced Nelson to 235 months and Price to 262 months.¹⁸⁸

On appeal, much of Judge Guido Calabrisi's lengthy opinion revolved around the application of the Civil Rights Act to the *Nelson* case. But in dealing with Trager's race- and religion-based shuffling, the court held that Juror 108 had been improperly seated because he had revealed sufficient bias during the voir dire.¹⁸⁹ Further, the consent given to his selection by the attorneys was invalid because it was obtained in exchange for the improper empanelling of a jury chosen partly on the basis of race.¹⁹⁰ Even though the defendants had improperly consented to the scheme,

where the trier of fact in a criminal trial is a biased jury that resulted from a district court's erroneous failure to grant a for-cause challenge to an actually biased juror whose bias was revealed at the voir dire, we question whether a defendant can subsequently waive his claim . . . to be tried before an impartial fact finder.¹⁹¹

Even though "the motives behind the district court's race- and religion-based jury selection procedures were undoubtedly meant to be tolerant and inclusive . . . that fact cannot justify the district court's race-conscious actions."¹⁹²

Dissenting in part, Judge Chester J. Straub, though troubled about the jury selection, would have affirmed, but noted the court's willingness to vacate such efforts in the future. As for the *Nelson* case, Straub said, "When one considers the overall circumstances and conditions of this trial, we can have overwhelming confidence in the fairness and validity of its verdict."¹⁹³

Thus, Trager was reprimanded for an "activist" solution intended to avoid divisiveness and reach a "moral" result.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 173.

¹⁸⁹ *Id.* at 203-04.

¹⁹⁰ *Id.* at 208, 210.

¹⁹¹ *Id.* at 206.

¹⁹² *Id.* at 207.

¹⁹³ *Id.* at 217, 220. Eight years after the appeal in the *Nelson* case, Trager filed an opinion explaining why he had not recused himself from the case. *United States v. Nelson*, No. CR-94-823, 2010 U.S. Dist. LEXIS 63814 (E.D.N.Y. June 28, 2010).

III. INDIVIDUAL RIGHTS CASES

A. *Section 1983 and More Modern Statutory Civil Rights Cases*

While Trager was not a notable enthusiast for workplace-based claims under sections 1981¹⁹⁴ and 1983,¹⁹⁵ plaintiffs did not fare too badly in cases before him.¹⁹⁶ Trager granted summary judgment against British Airways in a Title VII action. The plaintiff, Elizabeth de Chanval Pellier, claimed that after she was promoted to duty-maintenance manager (a middle-level management position) at John F. Kennedy Airport, other employees engaged in inappropriate sexual conduct, including the posting of pornographic material directed specifically at Pellier.¹⁹⁷ Because the airline did not effectively respond to her complaints, Pellier ultimately had to accept a position with fewer material responsibilities in order to escape the intolerable conditions.

Trager found that Pellier's transfer was not an "adverse employment action because she [had] voluntarily requested and accepted it."¹⁹⁸ However, he did find that Pellier had a triable claim of hostile work environment.¹⁹⁹ British Airways argued that Pellier had engaged in conduct similar to that of which she was complaining: "over-exuberant hugging and kissing," sexually explicit conversations, and—during her work history at the airlines—"intimate relations" with two British Airways employees (one of whom she later became engaged to).²⁰⁰ Yet, the judge found the consensual relations "irrelevant."²⁰¹ "Even if . . . Pellier was comfortable with certain

¹⁹⁴ 42 U.S.C. § 1981 (2006) (protecting the rights of all persons within the jurisdiction of the United States to, among other things, make and enforce contracts and entitling them to the full and equal benefit of laws for the security of persons and properties as enjoyed by white citizens).

¹⁹⁵ *Id.* § 1983 (providing the remedy for deprivation of federal constitutional and statutory rights when violated under color of state law).

¹⁹⁶ On the other hand, see *Barney v. Consolidated Edison Co.*, No. CV-99-823, 2009 WL 6551494 (E.D.N.Y. Oct. 1, 2009), where Judge Trager granted summary judgment against a former Consolidated Edison employee who sued under Title VII and section 1981; see also *Vinson v. N.Y.C. Dep't of Corr.*, No. CY-01-6900, 2006 U.S. Dist. LEXIS 3943 (E.D.N.Y. Jan. 17, 2006).

¹⁹⁷ *Pellier v. British Airways, PLC*, No. Civ.A. 02-CV-4195, 2006 WL 132073, at *1 (E.D.N.Y. Jan. 17, 2006).

¹⁹⁸ *Id.* at *4.

¹⁹⁹ *Id.* at *15.

²⁰⁰ *Id.* at *7.

²⁰¹ *Id.*

sexual behavior in the workplace, a reasonable jury need not conclude that she was thereby comfortable . . . [with] being singled out by an all-male staff as the lone target of sexually explicit materials."²⁰² He later granted summary judgment to the defendant for the sex-discrimination claim, but denied it as to the retaliation and hostile-environment claims. Trager evidenced no lack of sympathy for the defendant in this situation.

Trager also held for the plaintiff in a case involving the New York City Transit Authority. For promotion to the position of subway station supervisor, the authority required an EKG test if the candidate had a problematic medical history and was over forty.²⁰³ The plaintiff challenged the policy under the Age and Discrimination in Employment Act. Trager refused to accept the defendant's bona fide occupational-qualification defense. As he wrote, practically and with wit,

To put the question sharply, what exactly would happen if a Station Supervisor, Level I were to suffer an unexpected heart attack? While such an event would unquestionably be more than a small inconvenience to the individual himself . . . there is no indication in this record that a great danger would befall either the TA's operations or the general public.²⁰⁴

In another case, Trager clearly was greatly disturbed by the narrative of Lawrence Hardy's section 1983 suit.²⁰⁵ Hardy, an ex-convict who had served a four-year sentence for robbery, was arrested for violating parole. He then sued under section 1983. The heart of the section 1983 action, discussed by Trager in thirty-four pages of the Federal Supplement, was the New York City Department of Corrections' deliberate indifference to Hardy's very serious ear infection.

As Trager told the story, Hardy's ear infection had been causing him pain and dizziness prior to his arrest. The defendants' gross negligence magnified the symptoms, and a golf-ball-sized swelling grew from Hardy's neck.²⁰⁶ From there, the symptoms developed into extreme pain, blurred vision,

²⁰² *Id.* at *8 (citation omitted).

²⁰³ *Epter v. N.Y.C. Transit Auth.*, 127 F. Supp. 2d 384, 385 (E.D.N.Y. 2001). After winning the lawsuit and getting the transit authority to change its policy, Epter was promoted to station supervisor, but then asked to be returned to his old position. Judge Trager awarded back pay damages and attorneys' fees to Epter but held that liquidated damages were not appropriate. *Epter v. N.Y.C. Transit Auth.*, 216 F. Supp. 2d 131, 139 (E.D.N.Y. 2002).

²⁰⁴ *Epter*, 127 F. Supp. 2d at 391-92.

²⁰⁵ *Hardy v. City of New York*, 732 F. Supp. 2d 112, 134 (E.D.N.Y. 2010).

²⁰⁶ *Id.* at 118.

discharge from the ear, and hearing loss.²⁰⁷ Within eight weeks, Hardy had difficulty walking and standing as the swelling in his neck grew to the size of a tennis ball with pus emanating from his ear in a constant flow.²⁰⁸ Only then was Hardy seen by a specialist and a mastoidectomy performed.²⁰⁹ The operation was but a partial success as a staph infection developed.²¹⁰ A little more than two months after the operation, Hardy was released from custody and admitted immediately to Manhattan Eye and Ear Hospital.²¹¹ Diagnosed with a life-threatening infection, Hardy survived but ended up in a nursing home where he eventually lost hearing in one ear.²¹²

Trager dismissed Hardy's action against the New York State defendants on Eleventh Amendment grounds and dismissed claims of deliberate indifference against some of the officers.²¹³ However, Trager preserved claims against some of the defendants at the Downstate Correctional Center, as well as a nurse, a physician, and correction officers at the Willard Drug Treatment Center.²¹⁴

B. Social Security Disability Appeals

By the time David Trager ascended to the bench, the "war" the federal judiciary had fought with the Social Security Administration was over. Under political pressure, bureaucrats and administrative law judges had in the 1980s denied large numbers of applicants' benefits and had thrown many recipients of benefits off the payroll. Federal judges of all judicial persuasions had been remanding cases to the agency.²¹⁵ The battle had waned by the time Trager was appointed. Judge Trager generally upheld agency determinations without publication of opinions. There was, however, one case where he granted judgment on the pleadings and awarded ten years of disability retroactively.

²⁰⁷ *Id.* at 119.

²⁰⁸ *Id.* at 120.

²⁰⁹ *Id.* at 122.

²¹⁰ *Id.* at 123.

²¹¹ *Id.* at 124.

²¹² *Id.*

²¹³ *Id.* at 127-28.

²¹⁴ *Id.* at 145-46.

²¹⁵ See JEFFREY B. MORRIS, ESTABLISHING JUSTICE IN MIDDLE AMERICA 271-72 (2007); MORRIS, *supra* note 60, at 188-89.

Irene Rooney was denied benefits for her disabilities three times.²¹⁶ Fifty-nine years old, she had been a reliable employee for thirty-three years but suffered from progressive asthmatic disorder, chronic obstructive pulmonary disease, bronchitis, and arrhythmia.²¹⁷ She was also in considerable pain due to degenerative disc disease and chronic spinal strain. She was also blind in one eye.²¹⁸

In 1987, Rooney filed an application for disability benefits.²¹⁹ Denied benefits initially and on reconsideration, she received a notice from the Department of Health and Human Services informing her that she had sixty days to request a hearing if she believed that the determination was incorrect.²²⁰ The notice stated that if she did not request a hearing she could still file another application at any time.²²¹ Nothing in the notice informed her that not requesting a hearing would mean permanent loss of her opportunity to claim substantial benefits up to the time of the new claim. There was nothing giving her notice of the consequences of electing not to have a hearing.

From 1987 until 1991, Rooney, unaware that reapplication was not the same as requesting a hearing, filed two applications—both denied.²²² However, by 1991, the agency's notice of reconsideration had changed and warned about the adverse effect of failing to appeal.²²³ Proceeding with counsel, she finally requested a hearing during which she sought to open the previous denials.²²⁴ When the administrative law judge refused to pursue the issue, Rooney appealed to the district court.²²⁵

Even though the decision not to reopen an adjudicated claim is generally not reviewable by the courts, Trager found a violation of procedural due process. Writing that the record was "somewhat muddled,"²²⁶ Trager stated that the notice Rooney had been given was "almost deliberately crafted to divert the lay person from a timely appeal."²²⁷ The record in Rooney's case,

²¹⁶ Rooney v. Shalala, 879 F. Supp. 252, 254 (E.D.N.Y. 1995).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 255.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 257.

²²⁷ *Id.* at 256.

Trager wrote, was “a testament to inattention and disregard.”²²⁸ Rather than remand the case, Trager sympathized with Rooney, “a fifty-year old woman with a litany of impairments who had worked hard all her life.” He went on to describe the record as devoid of “malingering” and with a “remarkable number of procedural and evidentiary errors.”²²⁹ In turn, Judge Trager directly awarded ten years of disability benefits to her without a remand.²³⁰

C. *Immigration, Deportation, and Extradition Matters*

Judge Trager held for the government in most of the immigration, deportation, and extradition matters before him.²³¹ One case, though, is worth brief scrutiny partly because of its lengthy, thorough opinion holding that an indictment for illegally entering the country was unlawful because the underlying deportation had been unlawful.²³² The case is worth further scrutiny because of what this observer reads as a particular sympathy for the defendant.

Richard Garcia-Jurado, a Colombian, had come to the United States as a legal permanent resident to join his mother, who was then a legal permanent resident and later became a U.S. citizen.²³³ Garcia-Jurado’s family in the U.S. included his brother and sister, stepfather, and half-sister (who were U.S. citizens), and his brother and older sister who were legal permanent residents.²³⁴ Further, he had a long-term relationship with a legal permanent resident with whom he had a daughter.²³⁵ In 1993, Garcia-Jurado pleaded guilty to possession

²²⁸ *Id.* at 261.

²²⁹ *Id.* at 258, 261-62.

²³⁰ *Id.* at 262.

²³¹ See, e.g., *Guang v. Immigration & Naturalization Serv.*, No. CV-02-5916, 2005 WL 465436 (E.D.N.Y. Feb. 28, 2005) (rejecting habeas corpus petition attempting to block removal to China where rejection of asylum claim was correct); *Echendu v. United States*, No. CV-02-1255, 3003 WL 21653370, at *1, *8 (E.D.N.Y. July 14, 2003) (denying writ of coram nobis to prospective deportee who alleged ineffectiveness of counsel where he was convicted of knowingly failing to appear in court in a case where he was acquitted); *Lo Duca v. United States*, No. CV-95-713, 1995 U.S. Dist. LEXIS 21155 (E.D.N.Y. July 12, 1995) (upholding legality of extradition order by Magistrate Judge; extradition request and supporting documentation timely; questions of sufficiency of extradition documents both beyond the scope of review of petition for habeas corpus, but also sufficient on the merits).

²³² *United States v. Garcia-Jurado*, 281 F. Supp. 2d 498, 515 (E.D.N.Y. 2003).

²³³ *Id.* at 500.

²³⁴ *Id.*

²³⁵ *Id.*

of a controlled substance.²³⁶ For that, he was sentenced to four to twelve years in prison—which he used to complete his GED and earn two vocational training certificates.²³⁷ At his deportation hearing, Garcia-Jurado indicated that he would seek discretionary relief under section 212(c) of the Immigration and Naturalization Law.²³⁸ However, the immigration judge inaccurately told him that he was not entitled to seek a discretionary waiver of deportation.²³⁹ Somehow—and Judge Trager ignored this part of the story—Garcia-Jurado returned to the United States four years later and was arrested for criminal possession of marijuana.²⁴⁰ Charged with illegally reentering the United States after deportation, an aggravated felony, the defendant came before Judge Trager.²⁴¹

Trager's reading of the facts led him to the position that Garcia-Jurado had been deported before his administrative proceedings had ended and "before the deadline for judicial review had passed."²⁴² After considerable effort, Trager found that the immigration judge's error in failing to provide Garcia-Jurado with a section 212(c) hearing "was a procedural error that rendered the [previous] proceedings fundamentally unfair."²⁴³ The loss of a 212(c) hearing supported a collateral attack.²⁴⁴ That, in turn, led to Trager's holding, "Because Garcia-Jurado was deprived of [his right to] judicial review . . . his deportation was fundamentally unfair."²⁴⁵ Trager concluded the opinion with what could be viewed as a letter of recommendation:

Garcia-Jurado claims that he would have been a good candidate for a § 212(c) waiver of deportation. Indeed, he would. Garcia-Jurado had lived here since he was a teenager. He has strong family ties in this country: a mother, stepfather and two half-sisters who are United States citizens. He also has two other siblings who are legal permanent residents, and, importantly, a daughter who is a citizen. He attended high school here, was employed for a year prior to his arrest. He also received a GED and vocational training in prison,

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 501.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 506-07.

²⁴³ *Id.* at 512.

²⁴⁴ *Id.* (citation omitted).

²⁴⁵ *Id.* at 514.

and was employed as a machine operator after his release from prison up to the time he was deported.²⁴⁶

D. Dean v. United States

In the case of *Dean v. United States*, Judge Trager found a clear injustice and ordered the government to correct an arrest record—an unusual remedy.²⁴⁷ The case involved the arrest of a school-bus driver for public lewdness in a national park.²⁴⁸ Dean had been arrested, read his *Miranda* rights, photographed, and fingerprinted.²⁴⁹ Dean alleged that, at the time of his arrest, one of the officers at the police station had advised him not to involve an attorney. Rather, if he just paid the fine, the officer stated, “the incident would fall off [his] record in a few years.”²⁵⁰ Dean had promptly mailed in the form he was given and paid the eighty-dollar fine.²⁵¹

Twelve years later Dean’s arrest showed up in a background check for renewal of his commercial driver’s license.²⁵² The payment of the fine was treated as a guilty plea. As a result, under state law, Dean was unable to continue his employment as a school-bus driver.²⁵³

Dean attempted first to have his fingerprints record expunged on the ground that his criminal record had made it difficult for him to secure employment. Trager held that “such relief [could] not be granted under the circumstances.”²⁵⁴ Dean tried using habeas corpus to achieve the same end. Trager treated the petition as one for coram nobis, a challenge to invalidate convictions after the sentence has been served, and appeared ready to grant that writ.²⁵⁵ Instead, though, he directed the government to, within thirty days, produce the form upon which Dean allegedly pleaded guilty.²⁵⁶

²⁴⁶ *Id.* at 515.

²⁴⁷ 418 F. Supp. 2d 149, 157-58 (E.D.N.Y. 2006).

²⁴⁸ *Id.* at 151.

²⁴⁹ *Dean v. United States*, No. 05-CV-1496, 2005 U.S. Dist. LEXIS 40903, at *1 (E.D.N.Y. Aug. 31, 2005).

²⁵⁰ *Id.* (internal quotation marks omitted).

²⁵¹ *Id.* at *2.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Dean v. United States*, No. 04-MC-299, 2004 U.S. Dist. LEXIS 30062, at *6 (E.D.N.Y. Nov. 8, 2004).

²⁵⁵ *Dean*, 2005 U.S. Dist. LEXIS 40903, at *4.

²⁵⁶ *Id.*

The government was unable to locate the document but, attempting to comply with the order, submitted the “violation notice” form used by the U.S. Park Police at the time of Dean’s arrest. “The word ‘guilty’ did not appear on the face of [that] notice.”²⁵⁷ Trager was troubled because Dean had not in any way been informed of the legal consequences he might suffer if he paid the fine. Trager held that Dean should have been warned of the consequences of his guilty plea—that payment of the fine was acceptance of a federal conviction.²⁵⁸ Without that warning, Dean could not have knowingly waived his rights.²⁵⁹

Trager rejected the government’s argument that “allowing a litigant to challenge a petty offense conviction” in this manner “would potentially call into question every petty offense and misdemeanor.”²⁶⁰ “It appears,” Trager wrote, “that the government—and perhaps the courts are complicit—wants to have the ‘benefit’ of a criminal conviction for a large number of petty offenses without the burden of providing appropriate procedural protection.”²⁶¹ Trager made it clear that, if the government wanted to treat this sort of collateral forfeiture as a criminal penalty, then to satisfy constitutional concerns, “the individual must be given clear notice that payment of the fine constitutes a guilty plea resulting in a conviction of a petty federal offense and be informed of the right to retain counsel.”²⁶²

With regard to the *coram nobis* petition,²⁶³ Trager held for the plaintiff even though there was “an extremely stringent standard applied to orders to change arrest and conviction records.” He granted *coram nobis* relief, directing the government to complete Dean’s record with “a clarification reflecting that he was not convicted of a crime.”²⁶⁴

²⁵⁷ Dean v. United States, 418 F. Supp. 2d 149, 155 (E.D.N.Y. 2006).

²⁵⁸ *Id.* at 155-56.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 156.

²⁶¹ *Id.*

²⁶² *Id.* at 157.

²⁶³ *Id.* at 152.

²⁶⁴ *Id.* at 157. In a later opinion, Trager granted the government the authority to depose Dean on whether he had been aware of the conviction so that it could show that the petition was not timely. Otherwise he rejected the government’s petition for reconsideration. Dean v. United States, 436 F. Supp. 2d 485 (E.D.N.Y. 2006). *But see* Grunberg v. Bd. of Educ., No. CV-00-4124, 2006 U.S. Dist. LEXIS 22424 (E.D.N.Y. Mar. 30, 2006).

E. Funding for the Profoundly Disabled and Medically Fragile

David Trager was no “wooly headed dreamer.” Throughout his career, Trager sought solutions that were practical and just. That was, perhaps, why he pursued the course he did in the Lemrick Nelson case. But Judge Trager’s passion was closest to the surface in a litigation he handled over the residential placement of seriously disabled young adults.

To some, this litigation was just a lawsuit that attempted to pry money from the overburdened fisci of the State and its cities and counties. New York incurred a large financial burden from treating and housing the severely disabled; residential placements were absolutely necessary for them. When no satisfactory placements existed within the state, out-of-state placements had to be made, and New York split expenses with its cities and counties.²⁶⁵ Federal funds had eased the financial burden, but individuals were not eligible for funding after the age of twenty one.²⁶⁶

In 1992, arrangements were made wherein New York agreed to share 50 percent of the expense of out-of-state placement until suitable in-state institutions were located.²⁶⁷ In 1994, New York enacted a statute that increased state payments to localities and scheduled the phase-out of out-of-state placements and the out-of-state recompensation provision.

In 1994, New York City pulled out of the arrangements because of budgetary pressure. During the first half of 1995, the State attempted to place recipients of Transitional Care Funding (TCF) in state facilities with some success. In February of that year, lawsuits were brought by parents and guardians of TCF recipients to prohibit New York City and New York State from terminating transitional care. The suits were unsuccessful.²⁶⁸ Then, over the Fourth of July weekend, the State attempted to transfer some of the deeply disturbed

²⁶⁵ *Brooks v. Pataki*, 908 F. Supp. 1142, 1144 (E.D.N.Y. 1995), *vacated*, *Brooks v. Giuliani*, 84 F.3d 1454 (2d Cir. 1996).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *N.Y. Council for Exceptional People v. Pataki*, No. 102684/95 (N.Y. Sup. Ct., Apr. 10, 1995); *N.Y. Council for Exceptional People v. Pataki*, No. 102684/95 (N.Y. Sup. Ct., June 13, 1995), *aff’d*, 632 N.Y.S.2d 531 (1st Dep’t 1995). On February 20, 1996, the New York Court of Appeals denied leave to appeal.

individuals without the permission, or even notification, of their parents/guardians.²⁶⁹ The result was somewhat of a fiasco.

A federal action was brought by eighteen of the disabled young adults, and eight others sought to intervene.²⁷⁰ They were asking for a preliminary injunction requiring the state to take all necessary steps to maintain the placements until an orderly transition to permanent, state-approved placements was accomplished.

As is often the case with judicial opinions, the manner in which the facts are stated presage the ultimate conclusion of law and give a clue to the impact the case has had upon the judge. This is the first paragraph of Judge Trager's opinion in *Brooks v. Pataki*, the first lawsuit involving the funding: "This case concerns the care and treatment of about fifty profoundly disabled and medically fragile individuals whose rights under the federal Constitution have been gravely imperiled as the result of an unfortunate funding dispute between the City and State of New York."²⁷¹

In the following paragraph, Trager vividly illustrates the "victims" in the dispute:

[O]ne is a twenty-six old woman who has epilepsy and an IQ of about 70-72 as well as other disabilities. Another is a twenty-five year old, profoundly retarded . . . woman. Seven of the eight proposed intervenors are profoundly autistic and pose potential danger, certainly, to themselves and, possibly to others.²⁷²

Six months later in a different lawsuit over the same issues with similar plaintiffs, Trager wrote:

It is important to understand just how profoundly disabled plaintiffs are. TCF recipients are not likely candidates for de-institutionalization. For instance, plaintiff Lora Hoops, aged twenty-five, diagnosed as functioning in the profound range of mental retardation, with cerebral palsy and a seizure disorder has been at The Woods School, in Langhorne, Pennsylvania, since she was placed there by a Suffolk County local school district nineteen years ago, at the age of six.²⁷³

In the suit involving Westchester County funding, Trager quoted from a description of plaintiff Jason Goodhue, age

²⁶⁹ *Brooks*, 908 F. Supp. at 1160 & n.2.

²⁷⁰ *Id.* at 1143.

²⁷¹ *Id.*

²⁷² *Id.* at 1143-44 (citations omitted).

²⁷³ *Suffolk Parents of Handicapped Adults v. Pataki*, 924 F. Supp. 431, 437 (E.D.N.Y. 1996).

twenty three, who had “a diagnosis of severe mental retardation, cerebral palsy, spastic diplegia, functional scoliosis, . . . encephalopathy and a seizure disorder. He uses a wheel chair which [he] is able to push independently, though his control is poor. He is nonverbal, understands simple commands and usually responds yes/no verbally to questions.”²⁷⁴

In considering whether to grant the preliminary injunction in the New York City case, Trager focused on claims of due process—claims which had not been finally adjudicated in the State’s case. Trager found the constitutional standard in a Second Circuit decision, *Society for Good Will to Retarded Children, Inc. v. Cuomo*,²⁷⁵ and deemed the State’s procedure “manifestly unprofessional.”²⁷⁶ According to Trager, the episode on the Fourth of July was “an unconstitutional violation of the rights of these individuals that threatened them with irreparable harm.”²⁷⁷ Trager offered an analogy to a State’s or Congress’s decision to end support for a dialysis program:

Such a program is not an entitlement; there is no custody of the patient for state action purposes; and the program’s elimination is within the discretion of a State or Congress. Still, no one would seriously argue that the Due Process Clause does not impose an obligation upon a State or Congress to provide reasonable notice to dialysis recipients before terminating funding for those who have relied on that life-sustaining program, so as to allow them the opportunity to obtain alternate access to treatment.²⁷⁸

Trager denied the State’s motion to stay the judgment. In that opinion, he made clear that the funding was *not* an entitlement. Rather, once the State undertook to provide residential care for individuals, it was obligated to provide “necessary safe conditions and freedom from undue restraint determined by the exercise of professional judgment.”²⁷⁹ Having failed to make appropriate in-state placements, the State could not abruptly leave these severely disabled individuals “stranded in placements when the City [terminated its] funding.”²⁸⁰

A few months later, Suffolk County followed New York City in withdrawing from the State program. Now Trager had

²⁷⁴ *Westchester Advocates for Disabled Adults v. Pataki*, 931 F. Supp. 993, 995 (E.D.N.Y. 1996) (footnotes omitted).

²⁷⁵ 737 F.2d 1239, 1250 (2d Cir. 1984).

²⁷⁶ *Brooks*, 908 F. Supp. at 1151.

²⁷⁷ *Id.* at 1152.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1150-51 (citation omitted).

²⁸⁰ *Id.* at 1154.

a companion case. In *Suffolk Parents of Handicapped Adults v. Pataki*,²⁸¹ Trager granted a preliminary injunction ordering Suffolk County to resume funding for six months “so as to provide . . . the opportunity to arrange alternative care in an orderly manner.”²⁸² The State indicated it would “reimburse the county for sixty percent of the cost” and was ordered to “assume the burden of funding any remaining TCF placements at the end of the six-month period.”²⁸³ Just about one month later he denied the County’s request for a stay pending appeal.

Westchester County then withdrew from the state program, providing Trager with a third case.²⁸⁴ The *Westchester* case posed the same issues as the *Suffolk* case.²⁸⁵ However, the *Westchester* case came down after the U.S. Court of Appeals had remanded the *New York City* case. As will be seen shortly, Trager was unable to rest on the Due Process Clause any longer. Instead, he based his decision in the *Westchester* case on the Equal Protection Clause, holding that the County had violated equal protection by granting protections to persons institutionalized in-state that the TCF recipients (out-of-state) did not have.²⁸⁶ Trager held that the TCF statute lacked a rational basis.²⁸⁷ Trager also held that the State failed to offer procedural due process.²⁸⁸ As a result, three weeks after the Court of Appeals had vacated Trager’s decision in the *New York City* case, Trager granted the *Westchester* plaintiffs’ motion for a preliminary injunction against the County defendants. The State was ordered to, among other things, continue to pay for the out-of-state facilities where plaintiffs were still residing.²⁸⁹ However, Trager stayed the injunction based upon the stay the Court of Appeals had ordered in the *Suffolk* case.

However, as has already been intimated, three weeks before the first *Westchester* decision the Court of Appeals, by a two to one vote, rained on Trager’s parade. The panel majority vacated the injunction in the *New York City* case and remanded

²⁸¹ 921 F. Supp. 970 (E.D.N.Y. 1996).

²⁸² *Id.* at 986.

²⁸³ *Id.*

²⁸⁴ *Westchester Advocates for Disabled Adults v. Pataki*, 931 F. Supp. 993, 995 (E.D.N.Y. 1996).

²⁸⁵ With one exception—a venue issue. The court held that venue was properly exercised in the Eastern District. *Id.* at 1004-05.

²⁸⁶ *Id.* at 1006.

²⁸⁷ *Id.* at 1010.

²⁸⁸ *Id.* at 1010-11.

²⁸⁹ *Id.* at 1013-14.

it to Trager.²⁹⁰ The appellate court held that the plaintiffs' claims were barred by *res judicata*. The court also held that the defendants had no duty under the Due Process Clause to provide professional care to plaintiffs and no duty to resume payments for the plaintiffs' out-of-state placements.²⁹¹ The Court of Appeals also held that the "July Fourth weekend episode amounted to a breach of the State defendants' duty to ensure that the involuntary transfers were constitutionally appropriate, but that this injunction [was] not the appropriate remedy for this breach."²⁹² Barrington Parker dissented from the Court of Appeals decision. He would not have "disturbed Trager's conclusions that there [were] sufficiently serious questions regarding the risk of further abuse of the plaintiffs' substantive due process rights, and that the balance of hardships tip[ped] decidedly in plaintiffs' favor."²⁹³

The parties in *Brooks v. Pataki* reached an agreement whereby the State would continue to provide the requested funds and the case was administratively closed on May 11, 2000.²⁹⁴

In the handling of the litigation involving the mentally disabled, David Trager sounded and acted more like his colleague, Jack B. Weinstein, than one might expect. In a letter written while the litigation was still alive, Trager commented, "As a non-believer in entitlements, I found myself developing a purely procedural due process theory to justify judicial intervention in a fact pattern that cried out for relief."²⁹⁵

One of the opinions in the *Suffolk County* case indicated how far Judge Trager, no judicial activist by philosophy, traveled in the mental health litigation: "The role of the judiciary to review executive and legislative actions and to protect the rights of persons unable to protect themselves from unconstitutional governmental intrusion has long been recognized."²⁹⁶

²⁹⁰ *Brooks v. Pataki*, 84 F.3d 1454, 1468 (2d Cir. 1996).

²⁹¹ *Id.* at 1465-66. The court of appeals held that the Supreme Court decision, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), had altered the reach of the Second Circuit decision, *Society for Goodwill to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984).

²⁹² *Brooks*, 84 F.3d at 1465.

²⁹³ *Id.* at 1470. Five months later, the U.S. Court of Appeals for the Second Circuit vacated the injunction in the *Suffolk* case. *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818 (2d Cir. 1996).

²⁹⁴ See *Sanchez v. Pataki*, No. CV-98-6282, 2008 U.S. Dist. LEXIS 21218, at *2-3 (E.D.N.Y. 2008), *aff'd*, *Sanchez v. Patterson*, 328 F. App'x 689 (2d Cir. 2009).

²⁹⁵ Letter from David G. Trager to Jeffrey Morris (Jan. 9, 1996) (on file with author).

²⁹⁶ *Suffolk Parents of Handicapped Adults v. Pataki*, 924 F. Supp. 431, 435 (E.D.N.Y. 1996).

CONCLUSION

It is premature to assess a judicial career of seventeen years that only ended this year. Much of what a district judge does is not found in the judge's opinions. One would, for example, have loved to have been a fly on the wall observing this larger-than-life personality conduct settlement negotiations. Unfortunately, there is limited coverage of Trager's work in newspapers. However, the potential availability of the oral history Trager created during the last year of his life will enrich our knowledge of his work and—hopefully over time—interviews of his clerks, colleagues, and friends will provide a more definitive account of the work of not just a very able judge, but a man whose career as a whole stands as a model of how a single lawyer can benefit society.

But some observations of Trager, as judge, may be permitted at this time. Although Trager was a strong and unforgettable personality, as a judge, he clearly did not seek the spotlight. His opinions could be analytically complex, but his prose is almost always straightforward. A man, who in person could be extraordinarily amusing, rejected wit in judicial opinions.

Trager's career certainly demonstrates the breadth of the work of contemporary federal judges. Indeed, this author lacked the time and space to discuss Trager's handling of threshold matters (standing, ripeness, etc.). Nor did I discuss interesting Trager opinions in trademarks, commercial law, torts, and attorney dealings. The particular federal specialties that offered Trager the richest opportunities were antitrust and copyright. As one might have expected, Trager demonstrated marked ability in criminal cases both as a district and a court of appeals judge. Indeed, Trager penned for three U.S. Courts of Appeals; he would have distinguished himself as an appellate judge, had that job fallen to him. On the other hand, the district bench offered him constant interactions with others, something Trager loved.

A moderate and careful judge who abjured grandiloquence, Trager's emotions could be deeply engaged by his cases. That clearly was true in the mental health cases, the *Dean* case, and, probably, in other cases of injustice, such as befell Irene Rooney and Lawrence Hardy. In the case involving Lemrick Nelson, Trager was engaged in attempting to achieve in a different way a result which would ease rather than raise the simmering tensions of a divided city. David Trager was no "bleeding heart," but he cared deeply for the community to which he had devoted his public life. And for them, he was a judge who was willing to take risks.

