



# In Remembrance: Hon. Leonard I. Garth

## Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit

by Stephen P. Warren



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Judge Leonard I. Garth sat for nearly 48 years on the federal bench, serving the first four years as a district court judge in New Jersey and the next 44 as a circuit judge on the U.S. Court of Appeals for the Third Circuit. Over those nearly five decades, Judge Garth's unflagging devotion to the law and judiciary left a deep mark on federal jurisprudence and a lasting impression on many of the litigants and lawyers who appeared before him, as well as the law clerks who served in his chambers. Judge Garth was interviewed for this profile several months before he passed away in September 2016, at the age of 95.

### The Early Years

Born in 1921, Judge Garth spent his childhood in New Jersey, where his parents were shopkeepers. His earliest memories were of the Great Depression, which he said "were not happy years but we survived." He worked as a cashier at his grandparents' store at such a young age that, to his frustration, customers could not see him over the counter. His father had been a gifted baseball player in his younger years and likely hoped his son would follow in his athletic footsteps, but it was not meant to be because Judge Garth was drawn to academic studies. In high school he began courting a fellow student, Sarah, whose father was a rabbi in the local community. Not by chance, it was around this time that Judge Garth became more serious about his Jewish studies.

Tragedy struck when Judge Garth's father died unexpectedly, but his mother persevered, raising Judge Garth and his sister on her own. Upon completing high school, Judge Garth applied to Columbia College (now Columbia University) in New York City. Though Columbia College informed Judge Garth by letter that it admitted only a limited number of Jewish students each year, Judge Garth was undeterred, was accepted, and spent four "glorious years" at Columbia, even though he had to work odd jobs to support himself financially.

### Early Career, World War II, and Marriage

After graduating from Columbia College, Judge Garth began a prestigious internship at the Rockefeller



Foundation for Post-Graduate Study with the National Institute of Public Affairs. Before long he was offered an opportunity to lead an Office of War Information outpost overseas, but he declined because World War II was underway and he wanted to enlist in the Army.

Before enlisting, however, Judge Garth married his high school sweetheart, Sarah. Her father, the aforementioned rabbi, conducted the wedding ceremony and—for reasons that remain unclear to this day—referred to Judge Garth as "Henry" throughout the ceremony. (Judge Garth's first name was Leonard.) The faux pas was of little concern to Judge Garth, however, because he was thrilled to be married to Sarah, who was, and would remain, his best friend, confidante, and wife until she died 72 years later.

The U.S. Army sent Judge Garth on two tours to North Africa, where the Axis and Allied powers were fighting a fierce campaign. Judge Garth sustained major damage to his eardrums before entering Officer's Candidate School in Louisiana. There, he became ill with a brain infection that the medical staff believed he had contracted in Africa, but he eventually recuperated and even led his unit in the graduation parade, though he had to wear a turban wrapped around his head, which made keeping in step with the drumbeat a challenge.

### Law School Deferred and a Detour Through Macy's

Following graduation from Officer's Candidate School, Judge Garth applied to Harvard Law School and was accepted with a full fellowship. When he announced the news to Sarah, she informed him that she had happy news too: he was going to be a father. Realizing that he needed to provide financially for his growing family, Judge Garth declined the Harvard fellowship and took an executive training squad position at Macy's department store in New York City. Over the next several years he worked his way up to consideration as a merchandise manager and was earning a comfortable living for his family, but he promptly resigned when Sarah told him they had saved enough money for him to attend law school. He reapplied to Harvard and was accepted under the GI Bill of Rights.

At Harvard Law School, he was one of the oldest students in his class and his primary concern was keeping his family together. At first he did not particularly enjoy law school because he had been out of academia for too long and found it difficult to readjust to the rigors of the classroom setting, but he soon adapted and began to appreciate his roster of exceptional professors.

### Private Practice in New Jersey

Upon graduating from law school, Judge Garth returned with Sarah and his young daughter to New Jersey to enter private practice. He joined a law firm that over time became Cole Berman & Garth; today it is called Cole Schotz P.C. In doing so, Judge Garth turned down an offer to join a large firm in New York City because, even though the pay was considerably higher, he believed he could become a better lawyer at a smaller firm in New Jersey. That was a prescient decision because Judge Garth spent the next 18 years practicing at the New Jersey firm, where he learned under his mentor, Mendon Morrill, one of the state's foremost trial lawyers and who would later become a judge of the New Jersey U.S. District Court. Judge Garth described Morrill as the "most accomplished and superb trial lawyer" he ever met. When Morrill left to join the federal bench, Judge Garth effectively took over the litigation section of the firm and practiced both civil and criminal law. Before long, the New Jersey Supreme Court began calling upon Judge Garth to represent indigent defendants who had been charged with major crimes. Although those cases were not a financial boon, they made for some of Judge Garth's most challenging trials and appeals.

### The Federal Bench

Judge Garth aspired to become a federal judge, but he nearly botched the opportunity when it came. One evening the Garths received a phone call while at a New Jersey Bar Association meeting, and the caller identified himself as Clifford Case, who was, at the time, a U.S. senator from New Jersey. The person said he was calling to inquire if Judge Garth was interested in joining the federal bench. Believing that one of his friends was playing a practical joke, Judge Garth brusquely informed the



caller that he would have to call him back and hung up the telephone. When Judge Garth asked the operator to connect him with Sen. Case's office and the same voice answered, Judge Garth quickly realized his mistake. Fortunately he recovered from his blunder and Sen. Case recommended him for the District Court of New Jersey, and he was nominated by President Richard Nixon and approved by the Senate in 1969.

Judge Garth described his time on the district court as the best job he ever had. He especially enjoyed conducting U.S. citizenship ceremonies. "There's nothing that's comparable to it," he observed. At the other end of the spectrum, he least enjoyed sentencing hearings because "one of the hardest things to do is to deprive someone of their liberty."

Judge Garth did not harbor ambitions to join the appellate bench and twice turned down opportunities to do so, but on the third occasion he was nominated without being consulted. In 1973 he was nominated by President Nixon and subsequently confirmed by the Senate. Judge Garth joined the Third Circuit Court of Appeals, where he would serve for the next 44 years. He took his responsibilities as an appellate

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judge very seriously because, given how few appeals the U.S. Supreme Court accepts each year, he believed that a decision of the Third Circuit in many instances was likely to become the supreme law within the circuit's confines, which covers Pennsylvania, Delaware, New Jersey, and the U.S. Virgin Islands. It is an institution to which Judge Garth referred adoringly as "the Mighty Third."

When asked if he had a particular philosophy about judging, he demurred and responded: "You take appeals as they come and you apply precedent and reason, but my own personal predilections have no place in the decisions that I make, and they should not have a place." Judge Garth felt strongly that the U.S. Constitution and the law should be kept completely divorced from any personal or political choices. "If there is one thing I feel strongly about, that is the major, major thing," he declared.

Judge Garth developed a reputation on the Third Circuit for his careful attention to the appellate record. As he explained it, "judges deal with evidence, which is found in the record. If it is not in the record, it is not evidential and if it is not evidential, it does not belong in the confines of a decision or opinion." At oral argument, Judge Garth often pressed lawyers to point to specific facts in the record to support their arguments or legal positions.

Senior Judge Maryanne Trump Barry, who served on the Third Circuit with Judge Garth for nearly 20 years, remembers appearing before Judge Garth when she was an assistant U.S. attorney. Recalling some especially difficult oral arguments during those early years, she describes Judge Garth as "the lion that roared." But from that "stormy beginning," Judge Barry says she went on to learn "so much at the master's knee," such as "the importance of preparation, the importance of hard work, the importance of precision, the importance of the record." She also came to appreciate Judge Garth's reverence for the Third Circuit as an institution and, over the years, Judge Garth and Judge Barry forged a close friendship.

Judge Garth also was known for his work ethic, as evidenced by the fact that he continued to conduct judicial duties well into his 90s. Former law clerk Ronald Chen, who now serves as the dean of Rutgers School of Law, recalls that during his clerkship he accompanied Judge Garth on a trip to the U.S. Virgin Islands to hear appeals. (As noted above, the U.S. Virgin Islands are part of the Third Circuit's jurisdiction.) There was one especially difficult appeal that required the three-judge panel to interpret a provision of the Virgin Islands' Wrongful Death Act. Dean Chen recalls it was a busy trip, but he had one afternoon open and he went for a swim in the ocean. To his surprise, he saw Judge Garth wading into the ocean behind him waving a stack of papers in his hand and shouting excitedly that he had found the statute's legislative history. Dean Chen says it was a classic Judge Garth moment because "he was always on the job."

Because Judge Garth routinely kept long hours in his chambers, his law clerks sometimes resorted to trickery to leave at a reasonable hour. If it had been an especially

long day and Judge Garth showed no signs of leaving chambers anytime soon, the law clerks were known, on occasion, to secretly telephone Judge Garth's wife and mention to her that Judge Garth appeared haggard. A few minutes later, Judge Garth would come out of his office and tell the law clerks that Sarah had called and asked him to come home. The law clerks would feign surprise, but reassure Judge Garth that it was best to comply with Sarah's requests.

Even during his later years, Judge Garth's work ethic hardly waned and he continued to carry out judicial duties. Third Circuit Chief Judge Theodore McKee was amazed at how intellectually engaged Judge Garth remained with the court into his 90s, and he says Judge Garth read all draft precedential opinions before they were published and was often quick to circulate a comment or suggestion to his colleagues. When Judge Garth and his wife moved some years ago to Connecticut to be closer to their family, Chief Judge McKee was concerned that Judge Garth's ability to remain active with court matters would be challenged because technological prowess was not among his many qualities, but Chief Judge McKee remarked that it was a testament to Judge Garth's determination that he learned to use a computer tablet to review draft opinions and motions and exchange emails with his colleagues on the court.

### **The Extended Family of Former Law Clerks, Including One Supreme Court Justice**

By virtue of having served on the federal bench for nearly five decades, Judge Garth acquired a large second family of law clerks who served in his chambers. He had 96 clerks over the years, a great number of whom traveled to New York City to attend his 85th and 90th birthday celebrations.

Many of Judge Garth's former clerks went on to achieve success in their careers, but one former clerk stands out. During the 1976-1977 term, Samuel A. Alito Jr. clerked for Judge Garth at the Third Circuit Court of Appeals. Today, Justice Alito has the distinction of serving on the U.S. Supreme Court as an Associate Justice, but in 1976 he was hired by Judge Garth for his first real job after graduating Yale Law School. Justice Alito looks back fondly on his clerkship and recalls learning a great deal from "a tremendous mentor and teacher," who, Justice Alito says, had such high standards and was so demanding of himself that it provided an excellent introduction to the practice of law. Justice Alito recalls how Judge Garth "threw himself" into every appeal, from the biggest to the smallest, and would scour the record for the particular facts that sometimes made a critical difference to the outcome.

In an observation shared by other former clerks, Justice Alito remembers that Judge Garth involved his clerks in every aspect of an appeal and that, if he did not agree with his clerks, he would often engage them in long discussions because "it was important to him to make sure he was doing the right thing." Justice Alito



also remarked that Judge Garth never dismissed his clerks' views as uninformed or unimportant—which an accomplished jurist might be inclined to do when arguing legal issues with a recent law school graduate. Instead, it was important to Judge Garth that he persuade his law clerks or vice versa. Another former clerk, Harvey Rishikof, agrees wholeheartedly with that observation, saying: “He was a master teacher. He never bullied you to agree, but instead wanted to persuade you with reason and logic.”

Rishikof also recalls that Judge Garth wanted his law clerks to take a position, a lesson he learned early in his clerkship when he wrote a bench memo in which he concluded that the appeal was very close and could be decided either way depending on which legal precedent was followed. After reviewing the bench memo, Judge Garth explained to Rishikof that federal judges are paid to decide cases and appeals, not to have a theoretical discussion over both sides of an issue. After that, Rishikof was always sure to make a firm recommendation in his bench memos.

### Teaching and Lecture Series

For approximately two decades, Judge Garth taught appellate practice at the Rutgers School of Law and Seton Hall Law School. In 2010, Rutgers Law School

established the Rutgers Law School Leonard I. Garth Scholar, and the first scholar named was Dean Chen. In 2011, Rutgers Law School also created a lecture series in Judge Garth's name, and the first speaker was Justice Alito. More recently, the Third Circuit Court of Appeals honored Judge Garth by dedicating the atrium in the Martin Luther King Jr. Building and U.S. Courthouse in Newark, N.J., in his name.

### Family

The love of Judge Garth's life, his wife Sarah, passed away in 2015. Judge Garth followed her in 2016. He is survived by his daughter, Tobie Garth Meisel, a graduate of Rutgers Law School; his son-in-law, Michael Meisel, who retired as a partner from Cole Schotz; three grandchildren; and seven great-grandchildren. ☺

### Editor's Note

In “Appreciating the Impact of *Universal Health Servs. Inc. v. United States ex rel. Escobar* in False Claims Act Actions” (December 2016 edition of *The Federal Lawyer*), the date just before footnote 9 should be 2015 and not 2016. The final rule was published in the summer of 2016; however, the law that passed in November 2015 set the date of the new penalties, which is Nov. 2, 2015.

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cases. Before arriving at a decision, he will carefully examine the text, structure, and history of any relevant provision, will closely read the precedents as well as relevant scholarship, and will scrutinize arguments on all sides—all with an eye toward “getting the law right.”

Judge Smith has left a lasting impact on the law and the lawyers and litigants who have worked with, and come before, him. That legacy will continue in his new role as chief judge of the Third Circuit. Though he will say that he could have done more for his country, Judge Smith has stayed in the courtroom and served his country for more than 30 years. Through that service, he has changed our jurisprudence, our profession, and our country—for the better. ☺

### Endnotes

<sup>1</sup>See John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865 (2012).

<sup>2</sup>See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016) (scope of federal jurisdiction under § 27 of the Securities Exchange Act of 1934); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) (scope of pre-emption provision enacted in the National Childhood Vaccine Injury Act of 1986); *Greene v. Fisher*, 132 S. Ct. 38 (2011) (meaning of “clearly established federal law” in the Antiterrorism and Effective Death Penalty Act of 1996); *United States v. Stevens*, 559 U.S. 460 (2010) (whether a statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty violated the First Amendment).

<sup>3</sup>See *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc).

<sup>4</sup>See *W. Penn Allegheny Health Sys. Inc. v. UPMC*, 627 F.3d 85 (3d

Cir. 2010).

<sup>5</sup>See *United States v. Green*, 617 F.3d 233 (3d Cir. 2010).

<sup>6</sup>*Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007).

<sup>7</sup>Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, EMORY L.J. 1569, 1639-40 (2016).

<sup>8</sup>See, e.g., *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006) (requirements of defining the claims, issues, or defenses of the class); *Neale v. Volvo Cars of N. Am. LLC*, 794 F.3d 353 (3d Cir. 2015) (Article III standing requirements for unnamed class members).

<sup>9</sup>*Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012).

<sup>10</sup>*United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (en banc), *aff'd*, 559 U.S. 460 (2010).

<sup>11</sup>*B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) (en banc).

<sup>12</sup>*Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290 (3d Cir. 2011).

<sup>13</sup>*DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

<sup>14</sup>*Free Speech Coal. Inc. v. Attorney Gen. U.S. of Am.*, 825 F.3d 149 (3d Cir. 2016).

<sup>15</sup>*Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006).

<sup>16</sup>*Id.* at 306.

<sup>17</sup>*Id.* at 307.

<sup>18</sup>*Id.*

<sup>19</sup>See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4, 713 (2012).