



Hon. D. Brooks Smith

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

by Paul Thompson and Martin Totaro



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On the morning of Sept. 11, 2001, Judge D. Brooks Smith, then the chief judge of the U.S. District Court for the Western District of Pennsylvania, was in his chambers in Pittsburgh when the planes hit the Twin Towers. At the time, there was no television in chambers, and internet coverage was spotty. Instead, the judge and his clerks gathered what news they could from the only radio in chambers. Shortly after 10 a.m., several U.S. marshals and FBI agents entered chambers and met with the judge. When Judge Smith emerged from that meeting, he informed his clerks that he was closing the courthouse so court staff could go home. “But,” he said, “I’ll be damned if I am going to let some terrorist run me out of my own courthouse.”

If you ask him, the judge will modestly say that he remained behind that morning because every federal court needed at least one judge available to keep the business of the courts going. But the decision was grounded in something more fundamental—something more at the core of his character: an overriding desire to serve his country. Conversations with Judge Smith often involve an expression of regret that he never served his country in the armed forces. To make up for that, perhaps, the judge dedicated his career to public service.

And serve, he has. After graduating from the Dickinson School of Law in 1976, Judge Smith worked from 1977-1979 as an assistant district attorney for Blair County, Pa. From 1981-1983, he was appointed a special assistant attorney general for Pennsylvania, where he investigated and prosecuted mob activity in central and western Pennsylvania. In 1983, Judge Smith became Blair County district attorney. And in 1984, then-Gov. Dick Thornburgh appointed Judge Smith to the Blair County Court of Common Pleas. At the time, Judge Smith was only 33 years old.

For the next 30-plus years, Judge Smith continued his service, both as a state and federal court judge. In 1988, when only 37 years old, President Ronald Reagan appointed Judge Smith to the U.S. District Court for the Western District of Pennsylvania, where he served with great distinction for 14 years, becom-



ing chief judge of that court in 2001. On Sept. 10, 2001—one day before the Sept. 11 attacks—President George W. Bush nominated Judge Smith to serve on the Third Circuit. The Senate confirmed him on July 31, 2002.

On Oct. 1, 2016, Judge Smith became chief judge of the Third Circuit, capping a lifetime of service to his country. According to his colleagues on the court, his current and former clerks, and those who have had the pleasure to know and appear before him, this lifetime of service has been marked by several lasting attributes.

First, Judge Smith is a wonderful colleague and friend. Associate Justice of the U.S. Supreme Court Samuel Alito, who served with Judge Smith on the Third Circuit, described him as a “delightful colleague” who exercised “great judgment,” was “always supremely prepared,” and “astutely analyzed legal issues.” Drawing a baseball analogy, Justice Alito labeled Judge Smith a “five-tool player” because of the multitude of skills he brings to the bench. Justice Alito noted that the Third Circuit is still so important to him—he clerked on the court for Judge Leonard I. Garth, argued before the court as a federal prosecutor, and served as a judge there for 15 years—and would

like to see its best traditions continue. “Brooks will be a great steward” for the Third Circuit, Justice Alito concluded.

Former chief judge of the Third Circuit Theodore McKee echoed Justice Alito’s comments, describing Judge Smith as an “incredible colleague and great friend” who is “thoughtful, sensitive, and thorough.” And in what might be the highest of praise, Judge McKee—who easily could have been a top-tier comedian had he not instead become a highly regarded jurist—noted that Judge Smith has always been “appropriately irreverent.”

Second, Judge Smith is a committed mentor and teacher. Former law clerks praise Judge Smith for the attention that he has given to their careers, both during and after their time clerking. Meredith Price, associate at Perkins Coie LLP, praised Judge Smith for “mentoring legal minds.” She “treasured” the time he spent guiding her in her career. Andrew Nichols, partner at Winston & Strawn LLP, said that Judge Smith “made it his business to get to know each of his clerks and take an interest in our lives, both personally and professionally.” In every encounter, Judge Smith takes the time to reveal, not only how he thinks, but “how judges think. . . . As a long-time trial-court judge, Judge Smith could always tell what really happened below and explain it to us.” To those of us who clerked for the judge, there is no doubt that we are his extended family. Judge Smith and his wife, Karen, have welcomed his law clerks into their home, included them in chambers traditions, and together shown that the two of them genuinely care about the well-being and success of his law clerks and their families.

Judge Smith has taken his efforts to teach and mentor beyond just his clerks. Along with deciding hundreds of cases a year, Judge Smith also serves as an adjunct professor at Penn State Law, where he teaches a seminar on class actions—a subject that he has published on as well.¹ In addition, for more than 20 years, Judge Smith has traveled to Eastern and Central Europe, Russia, and Asia to provide training to judges. Judge Smith cares deeply about the rule of law, and he spends his time teaching others how to build and maintain legal systems that promote it.

Third, Judge Smith is a tireless worker. He begins work early, and he works well into the night and on the weekends. He is a voracious reader who closely reads every brief and appendix of every case that comes before him. He is an exacting writer, and he spends a great deal of care and attention to ensure that all opinions are not only legally correct and persuasive but also give the litigants the comfort of knowing that, win or lose, they have been meaningfully heard. For those of us who have argued before Judge Smith, we have witnessed, first-hand, the depths of his preparation—no case goes unnoticed, no footnote unread. Judge Smith will ask the question that you fear most. And you better be ready with an answer.

Finally, he has left a lasting imprint on the law. Aaron Simowitz, assistant professor of law at Willamette University College of Law and a former Judge Smith law clerk, explained that Judge Smith approaches every case with “two principles” in mind: “getting the law right,” and “a profound modesty.” Not surprisingly, Judge Smith has battled a thousand before the U.S. Supreme Court in cases where he authored the opinion.²

Judge Smith has left his mark on the Third Circuit’s jurisprudence on a wide range of subjects, including reasonableness under the sentencing guidelines,³ pleading standards under the Sherman Act,⁴ a district court’s evidentiary rulings,⁵ and what constitutes a “substantial burden” under the Religious Land Use and Institutional-

ized Persons Act of 2000.⁶ Nonetheless, there are perhaps two areas where the judge has had the most lasting influence on the trajectory of the law: class actions and the First Amendment.

Judge Smith’s class-action expertise has garnered him invitations from the United States Judicial Conference Advisory Committee on Civil Rules to help shape the future of Federal Rule of Civil Procedure 23. He has also been invited to speak at law school conferences to address the intricacies of class action settlements. And professor Robert Klonoff recognized Judge Smith as one of a handful of leading federal appellate judges who are “emerging as class action experts.”⁷

In addition to teaching and publishing in the field, Judge Smith’s many opinions are standard bearers.⁸ We highlight one case here. In *Dewey v. Volkswagen Aktiengesellschaft*,⁹ the panel decision authored by Judge Smith addressed whether the interests of the representative plaintiffs sufficiently aligned with those of the unnamed plaintiffs. After marching through relevant precedent and scholarship, the panel reversed the district court’s certification order and concluded that the intraclass conflicts were so fundamental that the representative plaintiffs did not fairly and adequately protect the interests of the class.

As with his class-action jurisprudence, Judge Smith’s First Amendment precedents show how he issues opinions that are thorough, readable, and provide clear guidance to courts and litigants. And his opinions reflect his heartfelt belief that the courts are the guardian of this critical constitutional right, which merits protection even if it means upholding the right to express distasteful or odious ideas. Judge Smith has written on the constitutionality of a federal statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty,¹⁰ a ban on certain bracelets in a middle school,¹¹ a port authority’s written advertising policy prohibiting “noncommercial” ads,¹² a university’s sexual harassment policy,¹³ and a requirement that producers of actual and simulated sexually explicit conduct keep certain records that document the identity and age of performers.¹⁴

In one key case, the Third Circuit protected individuals who were subject to government regulations that infringed on core First Amendment protections. In *Petruska v. Gannon University*,¹⁵ a university chaplain sued her former employer based on, among other things, alleged federal employment discrimination. The Third Circuit addressed whether there was a “ministerial exception” that would prevent those antidiscrimination laws from being used to infringe on a church’s ability to select its ministers. Invoking a church’s need to “be free to express religious beliefs, profess matters of faith, and communicate its religious message,” Judge Smith explained that “the church as an institution must retain the corollary right to select its voice” and “the process of selecting a minister is per se a religious exercise.”¹⁶ The opinion also concluded that a “church’s right to decide matters of governance and internal organization” are “constitutionally protected spiritual functions.”¹⁷ Relying on the First Amendment’s Free Exercise Clause, *Petruska* unequivocally held that the ministerial exception “operates to bar any claim, the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.”¹⁸ *Petruska* has been cited by almost 150 other cases, including by the Supreme Court in a decision firmly establishing the ministerial exception in employment discrimination actions.¹⁹

These cases represent what Judge Smith tries to do in all of his

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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

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

²See *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).

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

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

Cir. 2010).

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

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

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

⁸See, 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).

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

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

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

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

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

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

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

¹⁶*Id.* at 306.

¹⁷*Id.* at 307.

¹⁸*Id.*

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