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## DEFENDING IMMIGRATION JUDGES

### San Francisco Jurist Clears Cases and Gives Voice to Unions

Dana Leigh Marks  
U.S. Immigration Judge  
San Francisco

**Career Highlights:** Appointed immigration judge by the Executive Office for Immigration Review, U.S. Department of Justice, 1987; national president, vice-president or executive committee member, National Association of Immigration Judges, 1993-present; certified specialist, immigration and nationality law, 1989-93; associate and partner, Simmons & Ungar, San Francisco, 1978-86

**Law School:** Hastings College of the Law, 1977

**Age:** 51

By John Roemer  
Daily Journal Staff Writer

**SAN FRANCISCO** - Those dour stuffed donkeys adorning U.S. Immigration Judge Dana Leigh Marks' San Francisco chambers aren't there to be warm and cuddly.

The toys depict Eeyore, Winnie the Pooh's gloomy pal. To Marks, they represent her bosses, the U.S. Department of Justice managers back in Falls Church, Va., who run the unit known as the Executive Office for Immigration Review.

"That's EOIR, get it?" Marks cracked, grinning.

It's a union thing. In labor law terms, EOIR is management, and immigration judges are workers.

Marks, 51, has long been a force in an immigration judges' union that strives for a voice in how the nation's immigration courts are run. The struggle has sometimes grown heated. In January, it led to a public dressing down from the immigration judges' chieftain, U.S. Attorney General Alberto Gonzales.

The animosity had been building for years.

In 1999, EOIR asserted that Marks and her colleagues' National Association of Immigration Judges wasn't an authentic union because its members were really management employees ineligible to bargain. The association won that skirmish after filing an unfair-labor-practices complaint against the Department of Justice.

The union is part of the International Federation of Professional and Technical Engineers, an AFL-CIO affiliate.

Two years later, Marks and colleagues pushed hard for moving immigration judges outside the Department of Justice.

"The attorney general should not be the boss of the prosecutor and the judge," they wrote.

They were referring to the Department of Justice system that hired immigration judges alongside the assistant U.S. attorneys who prosecuted immigrants in their courtrooms.

After the terrorist attacks of Sept. 11, 2001, the Bush administration favored a plan to place immigration judges and prosecutors together in the new Department of Homeland Security. Marks headed for Washington, where she lobbied Congress and the White House to keep judges and prosecutors in different realms.

"We stressed how important it was to keep prosecutors and judges separate, to maintain the appearance of the integrity of the court process," said Immigration Judge Denise N. Slavin of Miami, who works closely with Marks on union affairs. "They did listen. Dana is very persuasive."

The upshot was that the judges remained under Department of Justice control while the prosecutors went to work for Homeland Security's new Bureau of Immigration and Customs Enforcement.

A spokeswoman, Lori Haley, said the bureau would have no comment on Marks or on any other immigration judge.

Charles Miller of the Department of Justice disputed as "completely and utterly false" any suggestion that the Executive Office for Immigration Review supported shifting immigration judges to the Department of Homeland Security.

"Negotiations for a collective bargaining agreement are continuing," Miller added.

The labor-management struggle took a negative turn for the judges in January when Gonzales issued a harshly critical memo ordering immigration judges to be kinder to those who appear in their courtrooms.

"I have watched with concern the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration, and who fail to produce the quality of work that I expect from employees of the Department of Justice," Gonzales wrote. He appointed two subordinates to review the immigration courts.

Marks, who has a reputation of being unfailingly polite to those before her, was upset. She said the scolding was all the more painful because Gonzales made his memo public at the same time he sent it to the judges.

"I felt like I'd been kicked in the diaphragm," Marks said. "It was very demoralizing. I don't want good judge candidates to stop applying because they feel this isn't a respectable job."

Immigration judges are forbidden by the Executive Office for Immigration Review from talking to the media. Marks and Slavin could speak only in their roles as union officials.

Gonzales' reproach was even harder to take, Marks said, because it's taken a long time for immigration law practitioners and immigration judges to attain a positive reputation.

"It took years to dig out and away from the image of being shady shysters," said Marks, who became an immigration judge in 1987.

The Executive Office for Immigration Review is still hiring. In January, it reported eight vacancies in the immigration judiciary, which numbers 215 jurists at full strength. Applicants, it said, must have seven years' experience in immigration law. New hires start at \$109,720 per year and can earn as much as \$149,200 annually.

In her 19 years on the immigration bench, Marks has dealt in volume, as do all immigration judges. She has issued oral or written decisions in more than 10,000 trial-level removal, deportation, exclusion, asylum and bond immigration cases. She quotes Lou Dobbs, the CNN anchor, who has called the immigration bench "the most overworked judges in America." She currently manages a docket of more than 1,300 cases.

When Gonzales issued his memo, Marks said, "We were too busy on the bench to even call each other and commiserate."

Even so, in the face of the critique, the union struck back with a letter to Gonzales, blaming the Executive Office for Immigration Review's strict case production goals for "crushing caseloads" that impair due process. The letter also noted that immigration judges lack courtroom bailiffs and contempt powers as well as stress management and culture and sensitivity training.

Miller, the Department of Justice spokesman, responded that neither lack of courtroom bailiffs nor lack of contempt powers "is relevant to recent criticisms."

"Having said that," Miller went on, "safety of our immigration judges and all EOIR staff remains paramount." He supplied a list of minimum safeguards for all immigration courts including duress alarm systems and electronic door release systems in courtrooms.

The Department of Justice continues to examine the contempt powers issue, Miller said.

The union's letter added, "Immigration judges routinely have four full hearings scheduled a day to determine the merits of a claim for relief from deportation, such as asylum, and are expected to render oral decisions from the bench on each case, with no time for reflection. With added emphasis in the last few years on case completion goals, we do not have the time in court to exchange pleasantries or to allow an applicant to take all the time they may desire for their day in court, ... and thus [we] sometimes appear abrupt or curt in order to move cases along."

Miller replied, "While the numbers of cases are significant, EOIR would not characterize the caseload as 'crushing' and does not believe that it 'discourages thoughtful case handling.'"

A prominent immigration law specialist backs up Marks.

"It certainly wasn't fair [for Gonzales] to tar all the judges," said Marc L. Van Der Hout of San Francisco's Van Der Hout, Brigagliano & Nightingale. "Many, many of them are dedicated and sensitive. Judge Marks is very conscientious and ethical. She's smart, she takes time to know the law, and she's honest and straightforward about what she doesn't know.

"Also, she is extremely talented at putting immigrants at ease in what can be a very intimidating situation."

Even a lawyer who has lost in Marks' courtroom praised the judge.

Marks found not credible a Fiji man who testified his own family at home persecuted him because his mother was from the Solomon Islands.

"She's a very pleasant judge, the best around," said immigration practitioner Ashwani K. Bhakhri of Burlingame, who represented the Fijian in *Kedei v. Ashcroft*, 104 Fed.Appx. 129 (2004). "It doesn't matter that she ruled against us. She was right in her decision."

Marks said the empathy she feels for the people who appear in her courtroom is based on her family's history as immigrants.

"My maternal grandmother's family was forced out of Lithuania by pogroms. They made it onto the last boat before World War I started," she said. "I was raised with the consciousness of the struggles and successes of the immigrant community."

That grandmother was present at the U.S. Supreme Court in 1987 to see Marks, then in private practice, successfully argue a landmark immigration case.

Her Supreme Court oral argument came at the end of a long litigation path Marks followed for an asylum-seeker client - from an initial hearing before an immigration judge to the briefings she submitted to the Board of Immigration Appeals and then to the 9th U.S. Circuit Court of Appeals.

The Supreme Court agreed with Marks that refugees seeking asylum in the United States need not prove there is a clear probability they'll be persecuted if deported to their home countries. Rather, they are entitled to asylum if they meet a more generous standard, that they have a well-founded fear of persecution on return. Marks' client was a Nicaraguan woman who shared the views of a brother who had been tortured and imprisoned for his political opposition to the Sandinista government. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

"My grandmother was proud as punch when I did my oral argument," Marks said.

*Cardoza-Fonseca* has been cited in federal appellate opinions more than 1,800 times, according to a check of a legal affairs database.

The case is considered a key to U.S. immigration law, according to Hastings College of the Law's Karen Musalo, a resident scholar who directs Hastings' Center for Gender and Refugee Studies.

"Most importantly, the court recognized that U.S. refugee law has a

humanitarian purpose - to protect those fleeing persecution," Musalo said recently.

She added that she tells students that *Cardoza-Fonseca* "is a high-water mark in refugee jurisprudence in the United States."

Marks said awaiting the outcome of the case kept her anxious.

"When I first became an immigration judge," she said, "*Cardoza-Fonseca* had been briefed and argued but not yet decided. Frankly, for a few months I lived in terror that the day might come where I would have to apply a holding in that case which was at odds with the position I argued before the Supreme Court. Today, some 19 years later, it remains extremely gratifying that the position we advanced prevailed then and remains the applicable legal standard even now."

On a scorecard kept by the immigration bar, Marks granted asylum in 67 percent of the cases she heard between 2000 and 2004, far above the average in that period for all immigration judges of 38 percent.

Statistics from the Board of Immigration Appeals show Marks was reversed in 3.6 percent of her cases that the board reviewed between 2000 and 2004, compared with an average reversal rate for all immigration judges during that time of 2.9 percent.

On the bench one recent morning, Marks briefly considered how the government's effort to deport a man to India has been frustrated by his failure to appear in court or even to keep in touch with his lawyers.

"When an attorney loses contact, I'm sympathetic," Marks said to the respondent's counsel. "But I'm not going to let you guys withdraw. I want to keep you in the loop and on the hook."

She again suggested the man's family work to have a guardian appointed for him, after he allegedly suffered head injuries when he was beaten in a robbery attempt in the United States.

"But he must be present at the next court date or he may well be ordered removed in absentia," she warned.

Some rulings are much more complex. In the case of a Sikh lawyer tortured in India for his political activities, Marks held 26 hearings on the man's asylum petition. The issue was whether the man and his wife were ineligible for relief because they raised money in the United States for Sikh causes. Federal authorities classified that as terrorist activity.

Marks concluded the man must be denied asylum because of his lack of candor about the fund-raising. However, her nuanced ruling added, although he was entitled to withholding of deportation - a lesser form of relief - that route seemingly was barred by the government's terrorism claim. Yet Marks held that a waiver of the bar was available under statutes protecting torture victims.

The Board of Immigration Appeals issued rare praise of Marks' "exceptionally well-written decision" in this "complex and difficult case." However, the board overruled her on withholding of deportation and granted only deferral of removal, a level of relief that required the man be held in U.S. custody.

When the case reached the 9th Circuit, Judge John T. Noonan mentioned Marks favorably by name, reversed the immigration board, upheld Marks' original ruling and let the man out of jail. The terrorism question was overblown, Noonan concluded in pointing out that the United States has long sheltered revolutionaries from other countries.

"Contrary to the government's assertion," Noonan wrote, "it is by no means self-evident that a person engaged in extra-territorial or resistance activities - even militant activities - is necessarily a threat to the security of the United States. One country's terrorist can often be another country's freedom-fighter." *Cheema v. Ashcroft*, 372 F.3d 1147 (2004).

Marks said she is often reminded in court that immigration has been a driving force in the United States even as immigrants are subject to swerves in public opinion.

"The historical perspective is a pendulum swing. We've been very open when we perceive a need for foreign labor, for example, then tighten up when we think American labor is being threatened or when we fear immigrants are not assimilating," she said.

Marks cited the importation of Chinese laborers to build American railroads and the refuge afforded Irish immigrants fleeing the potato famine, both 19th century events.

Marks was born and raised in Southern California.

"The Hispanic community there was a strong influence," she said. "It gave me a global perspective on culture and family."

She remains fluent in Spanish.

Marks studied sociology and Chicano culture at the University of California, Berkeley, then moved on to Hastings College of the Law.

When she got to Hastings, she said, "nobody had ever heard of immigration law."

Marilyn Patel, then in private practice and now a federal judge in San Francisco, taught the class, but only every other year, Marks said.

"All my formal training came through seminars," she said.

She graduated from Hastings in 1977, spotted a job opening for an immigration lawyer on a Hastings bulletin board, and spent the next eight years at the San Francisco immigration and nationality law firm of Simmons & Ungar.

"Back in the day, 30 years ago, it was an unusual career choice," she said. "But it was very people-oriented, like my undergraduate degree. I represented illiterate farmworkers and the world's top scientists and businessmen in informal administrative procedures all the way up to the Supreme Court."

*Here are some of Judge Marks' recent cases and the lawyers involved:*

- *In re Martinez-Osorio*, A35223540 - removal  
For the respondent: Nancy Ann Fellom, Fellom & Solorio, San Francisco  
For Immigration and Customs Enforcement: Grace H. Cheung, San Francisco
- *In re Reynoso-Castellanos*, A75111312 - deportation  
For the respondent: Daniel E. Chavez, Petaluma  
For Immigration and Customs Enforcement: Jayme Salinardi, San Francisco
- *In re Martinez*, A96499903 - removal  
For the respondent: Judith Goodman, Law Offices of Martinez-Senftner, Roseville  
For Immigration and Customs Enforcement: Stephen A. Johnston, San Francisco
- *In re Vasquez-Chiprez*, A96496969 - removal  
For the respondent: John E. Ricci, Ricci, Sprouls & Zadeh, San

**Francisco**

**For Immigration and Customs Enforcement: Katherine Zill, San Francisco**

**• *In re Plantill as-Valdez*, A96496526 - removal**

**For the respondent: Victoria L. Argumedo, San Francisco**

**For Immigration and Customs Enforcement: Grace H. Cheung, San Francisco**