



Hon. Dana Leigh Marks

Immigration Judge, San Francisco Immigration Court

by Shuting Chen



Shuting Chen is an immigration attorney practicing in San Francisco.

Some careers are built on a series of serendipitous events. San Francisco Immigration Judge Dana Leigh Marks certainly feels that way. Born and raised in Los Angeles, Judge Marks was first immersed in another culture when her family relocated for an academic year to Arica, Chile, when she was a high school senior. She had dabbled in Spanish before the trip, but she had never been out of the country except for brief excursions to the Mexico border. She was ready for the adventure.

Judge Marks found herself in a new world. She noticed the many differences between Chilean culture and the American one. She became fluent in Spanish. She observed Chilean customs. She pondered the effects of cultural bias. She found herself part of the Jewish community, comprising many individuals who had escaped Europe before Hitler's rise to power. She followed Salvador Allende's ascension, comparing American and Chilean media coverage of the events and noting the differences in the ways people from the two countries viewed the world. Her unlikely trip to this country so far from home was a life-changing event for Judge Marks: for the first time, it turned her gaze outward.

Back home in the United States, Judge Marks graduated from U.C. Berkeley in two and a half years with a degree in sociology, but had little idea of what career path she wanted to pursue. She was leaning toward social work, but the job market was tough, and the only solution was to continue with her education. One of her friends was applying to law school. So Judge Marks, on a whim, decided that she would also do it. This, too, would turn out to be a happy accident.

'The World Came to Me'

At the end of her second year at U.C. Hastings, Judge Marks found herself in need of a paying job. She searched the bulletin board at school and found a posting for a position at Stiller & Nervo, an immigration firm four blocks away. Though immigration law was far from being a popular field at the time, Judge Marks applied, was hired for a part-time clerkship, and headed back to the firm upon graduation. The work was intellectually stimulating and allowed her to serve



others. She loved working with other immigration practitioners, who were always smart, collegial, and eager to help. At the same time, Judge Marks reminisced: "the world came to me." The curiosity piqued by a year in Chile had grown into a full-fledged career.

Judge Marks' next destination was the renowned San Francisco immigration firm of Simmons & Ungar. Her path there was, again, serendipitous. Through an acquaintance of her mother's, she learned about Donald Ungar's plans to expand the firm through an acquaintance of her mother's, and, because of scheduling issues, had to make the pitch for him to hire her while the two were on a city bus to the federal district court. Years later, he still remembers the young Dana Leigh Marks as being "very bright, cheerful, and knowledgeable." They had an instant connection, and while he did not pay for her bus ticket that day, he did hire her as an associate.

Judge Marks thrived at Simmons & Ungar. The firm encouraged active involvement in *pro bono* cases and in organizations such as the American Immigration Lawyers Association (AILA) and the National Immigration Project of the National Lawyers Guild. With the firm's support, Judge Marks rose through the ranks of the local AILA chapter, conducted semi-

nars through the organization, and began teaching and mentoring others. She did a variety of work, including federal court litigation, family immigration, business immigration, and deportation defense. She collaborated with the likes of Bill O. Hing, now professor of law at the University of San Francisco, and learned invaluable lessons from Ungar—a consummate lawyer. To this day, she vividly recalls recoiling in horror after receiving draft briefs that Ungar reviewed and edited, which had pages thick and crowded with red ink.

Getting to the Supreme Court (and the Immigration Court)

At Simmons & Ungar, fortuitous events again helped propel Judge Marks' career forward. The Refugee Act of 1980 had just passed, and the change in law gave immigration advocates an opportunity to shape the future of refugee law in the United States. Around this time, Judge Marks found herself representing a Nicaraguan woman named Luz Marina Cardoza-Fonseca before Immigration Judge Bernard Hornbach. Cardoza-Fonseca feared that, because of her brother's political activities, she would be harmed by the Sandinistas if she were returned. The case hinged on whether an applicant for asylum needed to show that it was "more likely than not" that she would be persecuted upon removal, or if she needed only to meet the more generous "well-founded fear" standard.¹ Judge Hornbach denied asylum to Cardoza-Fonseca, and Judge Marks appealed the decision to the Board of Immigration Appeals (BIA), but the BIA affirmed. The Ninth Circuit, however, reversed and held that the "well-founded fear" standard was less stringent than the "more likely than not" standard, and remanded the case to the BIA to evaluate the claim under the correct legal standard.² The government immediately filed a petition for a writ of certiorari for Supreme Court review. It was then that Judge Marks knew that *Cardoza-Fonseca* would make history.

Judge Marks was joined by Professor Hing, Susan Lydon, and Kip Steinberg in representing Cardoza-Fonseca, *pro bono*, before the Supreme Court. The four drew straws to determine drafting assignments, and Judge Marks was given the unenviable task of writing about the legislative history of the Refugee Act. The advocates then assembled the brief and arduously and meticulously trimmed their voluminous 80-page brief to meet the page limit required by the Court. They eagerly awaited oral arguments.

While Judge Marks was busy litigating *Cardoza-Fonseca*, her career was taking off in other ways as well. The San Francisco immigration court, with the assistance of AILA, hoped to promulgate a set of local rules for the first time. Judge Marks was instrumental in this process, and Judge Hornbach—who collaborated with her in the drafting of the rules—was impressed. When a judgeship became available at the court, he notified her. She was ready for a new challenge after almost a decade in private practice and applied for the job.

The year when Judge Marks applied for the immigration judgeship was a time of change. Prior to 1983, the Immigration and Naturalization Service (INS) was responsible for the functions currently performed by immigration judges. In January 1983, however, a Department of Justice (DOJ) reorganization led to the creation of the present-day Executive Office of Immigration Review (EOIR), which includes the immigration courts as well as the BIA. Thus, the courts became an entity separate from the INS, though both remained part of the DOJ until the INS was subsumed into the newly created Department of Homeland Security (DHS) as Immigration and Customs Enforcement (ICE) in 2003. At the time that Judge Marks was interviewed for her judgeship, four judges—including Judge Hornbach—sat on the immigration bench in San Francisco. Despite the attempt to separate INS functions from immigration courts, and the fact that EOIR was interested in creating a diverse immigration bench, all four of these judges had previously held positions within the INS. Undeterred, Judge Marks applied for the position and was interviewed in August 1986. She was offered the job.

Thus, the beginning of October 1986 was a whirlwind for Judge Marks. She was mooted by her colleagues in San Francisco before traveling to Washington, D.C., where she was mooted again. She observed her first Supreme Court argument on a Monday, argued *Cardoza-Fonseca* on a Tuesday, and began immigration judge training that same week.

Three short months later, in January 1987, Judge Marks became the first attorney from outside of the INS to serve on the immigration bench in San Francisco and the 68th immigration judge in the country. In March of that same year, the Supreme Court issued a decision in favor of Luz Marina Cardoza-Fonseca. The significance of the decision cannot be understated. Ira Kurzban, a nationally recognized immigration attorney and the then AILA president-elect, called *Cardoza-Fonseca* "a tremendously significant decision ... [that] recognizes at least implicitly the difficulty that asylum applicants have in proving their claims, so more people will be eligible for asylum who should be eligible."³ The decision, Judge Marks proudly notes, closely tracked the brief that she and her colleagues had submitted.

On the Bench and Outside the Courtroom

Immigration law has changed a lot in the last 30 years. After Judge Marks' arrival on the bench, Congress passed a series of laws restricting immigration. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Antiterrorism and Effective

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Death Penalty Act (AEDPA) of 1996 made it easier for the government to remove noncitizens, expanded its authority to detain these individuals, and severely limited the scope of judicial review. The REAL ID Act of 2005 further complicated the law and restricted relief

to asylum applicants. Though the Immigration and Nationality Act has long been recognized as second only to the tax code in its complexity, Judge Marks believes that “immigration law is now more complex than tax law because there is no TurboTax-equivalent in the immigration field.” Indeed, when she first began her job in 1987, it was realistic for Judge Marks to render an oral decision at the conclusion of a three-hour hearing because the evidentiary portion of the case typically concluded in under two hours. Today, judges have to handle much larger volumes of much more complex cases, and they have very little time to review evidence, maintain

their knowledge of the law, or decide motions. And the pressure is only increasing.

Despite (or perhaps, because of) the challenges in interpreting complicated laws, Judge Marks has excelled on the bench. She believes that the immigration court is an important place: for many immigrants—some of whom came to America to seek freedom, safety, or fair application of the law—immigration court is the only American courtroom they will encounter. It is important for noncitizens to be motivated to tell the truth, and judges must apply the law fairly and do so with compassion and integrity. It is in the immigration court, after all, that many noncitizens first encounter the American justice system.

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More importantly, Judge Marks became one of the most visible and passionate advocates in the movement to reform the immigration courts. She enjoyed staying involved in AILA as a private practitioner, and when she took the bench, she searched for a similar forum in which she could serve as a leader. She found what she was looking for in the National Association of Immigration Judges (NAIJ), a voluntary organization recognized as the representative for collective bargaining for all immigration judges. Since 1999, Judge Marks has served seven two-year terms as president and two two-year terms as vice president of the organization.

The judicial canon of ethics states that judges have

a responsibility to better the community and shape policy. The NAIJ, with Judge Marks at its helm, focused its recent advocacy on reforming the immigration court system so that it is a better place to work for judges and a fairer place for litigants. The organization has, for example, repeatedly highlighted the inherent structural flaws of the courts, questioning whether immigration judges can be perceived as independent arbiters when they are employed by the DOJ and are considered agency attorneys representing the interests of United States government.⁴ In fact, courts are often housed in the same building as DHS, and communications between immigration judges and DHS attorneys are not prohibited as *ex parte* because both judge and prosecutor represent the same client.⁵ Notably, the blurred lines between immigration judges and DHS are particularly problematic for those foreign nationals who fled countries with corrupt governments, court systems, and/or law enforcement.

Structural flaws also undermine the EOIR disciplinary process. Because immigration judges are DOJ attorneys, they may receive negative feedback for insubordination to a supervisor when they make decisions or carry out their work in ways contrary to agency instructions.⁶ For example, judges are evaluated by, among other things, their ability to work consistently with the goals and priorities of the chief immigration judge. Also, the discipline system lacks transparency, and the public cannot access information regarding which judge has been disciplined and what kind of sanctions were imposed.⁷ Indeed, complaint procedures have “been criticized as murky and bureaucratic by immigration experts outside of EOIR.”⁸

In addition to structural changes, Judge Marks and NAIJ have called for more resources to be invested in the immigration court system. The number of cases awaiting immigration judge review has only grown in recent years, from about 300,000 in fiscal year 2011 to over 457,000 in fiscal year 2015.⁹ During this period, increases in enforcement and in funding for ICE and Customs and Border Protection have not been matched with a sufficient increase of resources for the immigration court.¹⁰ Further, EOIR has prioritized the removal cases of children and families who enter through the southern border, resulting in further delays across the board.¹¹ The average wait time for completion of immigration court cases has increased steadily in the last decade to approximately 635 days by 2015.¹²

Within this environment, immigration judges have found it difficult to thoroughly review cases and prepare for court. Judge Marks famously stated that asylum hearings are “like holding death penalty cases in traffic court.”¹³ Eliza Klein, a retired immigration judge who adjudicated cases in Boston, Miami, and Chicago for more than 20 years, pointed out that the courts do not have enough clerks to keep up with the caseload, and hiring freezes have further exacerbated the problem.¹⁴ Another judge, through an anonymous survey, stated: “I am OUTRAGED by the fact that Department of Homeland Secu-

rity asylum officers receive more time to keep current on country conditions and changes in the law than we do.... The law has gotten exponentially more complex while the time pressures and resources (like law clerks) inversely diminished.”¹⁵ Currently, the approximately 300 immigration judges¹⁶ around the country still share over 521,676 pending cases.¹⁷ This translates into a crushing load of more than 1,700 cases per judge, without taking into consideration the fact that some judges solely or primarily perform management functions.¹⁸

Judge Marks’ role in all this is to communicate the problems facing the immigration courts to the community and the public and provide solutions advocated by immigration judges nationwide. Immigration judges cannot speak to the press, so Judge Marks, as the president of NAIJ, is their voice. Through her NAIJ work, she learned about managing public relations, handling the press, communicating effectively with the stakeholders, and bridging the gap between various interest groups involved in reform. In 2015, Reps. Trey Gowdy and Zoe Lofgren of the House Subcommittee on Immigration and Border Security formally requested the U.S. Government Accountability Office (GAO) to conduct a study into whether the creation of an Article I immigration court would improve performance, lower costs, and lead to efficiency.¹⁹ In their letter to the GAO, the representatives specifically cited the mounting caseload and concerns regarding judicial independence and disciplinary procedures as some of the reasons to overhaul the existing system.²⁰ Although the results of the study are still forthcoming, that Congress is willing to even entertain such an overhaul represents a victory for Judge Marks and NAIJ.

Thirty Years Later

Three decades after she was appointed to the bench, Judge Marks still sits on the San Francisco immigration court. This is no small feat. A study found that immigration judges, who encounter daily stories of horrific trauma, violence, and cruelty, “reported high rates of emotional exhaustion, frustration with work, and feeling ‘burnt out.’”²¹ Indeed, immigration judges were found to be more burned out than other at-risk professionals, such as prison wardens, midwives, home help aids, social workers, and hospital doctors.²² One judge surveyed in the study stated: “I have been in government service for decades, including combat duty, and I have never detested a working environment more than I do in this capacity.”²³

Despite these pressures, Judge Marks has excelled in her work. Ungar, himself a paragon of intellect and resilience, characterized her decision-making on the bench as one of “integrity, intelligence, and compassion for people.” Immigrant Legal Resource Center in San Francisco awarded her the Phillip Burton Immigration & Civil Rights Award for Immigration Policy in 1999, and the East Bay Sanctuary Covenant in Berkeley, Calif., named her an honoree for Leadership in the Human Struggle in 2006.

How has Judge Marks achieved such longevity in her career? Though she insists that she has been “blessed by an amazing amount of serendipity in [her] professional life,” chance cannot explain 30 years of work in a position notorious for the stress associated with it. When pressed, Judge Marks attributed her resilience to the fact that she has a very interesting job, one in which she could do some good. Ungar characterized it a little differently: Dana Leigh Marks has lasted for so long as a judge because she truly, deeply believes that it is important that the immigrants in front of her—whose misfortunes could very well have been her own—get a fair shake. As the saying goes: There but for the grace of God, go I. It is with that spirit that Judge Marks celebrates her 30th year (and perhaps many more) on the bench. ☺

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Endnotes

¹*INS v. Cardoza-Fonseca*, 480 U.S. 421, 426 (1987).

²*See id.*

³Stuart Taylor Jr., *High Court Rules U.S. Must Ease Rule in Granting Political Asylum*, N.Y. TIMES (Mar. 10, 1987), <http://www.nytimes.com/1987/03/10/us/high-court-rules-us-must-ease-rule-in-granting-political-asylum.html?pagewanted=all> (last visited Jan. 27, 2017).

⁴Dana Leigh Marks, *Now is the Time to Reform the Immigration Courts*, INT’L AFFAIRS FORUM, A WORLD ON THE MOVE: MIGRATION & STATELESSNESS 50 (Winter 2016).

⁵Dana Leigh Marks, *Still a Legal “Cinderella”? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 FED. LAW. 29 (March 2012).

⁶*See id.* at 29-30.

⁷Marks, *Now is the Time*, *supra* note 4.

⁸Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV., 467, 509 (Winter 2008).

⁹U.S. Department of Justice Executive Office for Immigration Review, *FY 2015 Statistics Yearbook*, at W1 (April 2016), <https://www.justice.gov/eoir/page/file/fysb15/download> (last visited Jan. 27, 2017).

¹⁰Joshua Breisblatt, *Will the Immigration Court Backlog Finally Go Down?*, IMMIGR. IMPACT (Dec. 3, 2015), <http://immigrationimpact.com/2015/12/03/immigration-court-backlog> (last visited Jan. 27, 2017).

¹¹*Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AM. IMMIGR. COUNCIL (June 17, 2016), <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice> (last visited Jan. 27, 2017).

¹²Transactional Records Access Clearinghouse, *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRAC IMMIGR. (Sept.

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21, 2015), <http://trac.syr.edu/immigration/reports/405> (last visited Jan. 27, 2017).

¹³Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES (Feb. 8, 2010), <http://www.nytimes.com/2010/02/09/us/09immig.html> (last visited Jan. 27, 2017).

¹⁴Molly Hennessy-Fiske, *As Immigration Judges' Working Conditions Worsen, More May Choose Retirement*, L.A. TIMES (Aug. 18, 2015), <http://www.latimes.com/nation/la-na-immigration-judges-20150818-story.html> (last visited Jan. 27, 2017).

¹⁵*Id.* (emphasis in original).

¹⁶EOIR Immigration Court Listing, DEP'T OF JUSTICE, <https://www.justice.gov/eoir/eoir-immigration-court-listing> (last visited Jan. 27, 2017).

¹⁷Immigration Court Backlog Tool, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog (last visited Jan. 27, 2017).

¹⁸Marks, *Now is the Time*, *supra* note 4.

¹⁹Trey Gowdy & Zoe Lofgren, Request for a GAO Study on the Costs and Cost-Effectiveness of an Article I Immigration Court (Jan. 12, 2015), <http://naij-usa.org/wp-content/uploads/2016/03/Gowdy-Lofgren-Letter-for-GAO-EOIR-Study1.12.15.pdf> (last visited Jan. 27, 2017).

²⁰*Id.*

²¹Stuart Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 28 (Jan. 1, 2008), http://naij-usa.org/wp-content/uploads/2014/06/Burnout-and-Stress-Among-United-States-Immigration-Judges_01-01-08.pdf (last visited Jan. 27, 2017).

²²*Id.* at 29.

²³Hennessy-Fiske, *supra* note 14.

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We are the primary bar association for all who practice in, or are associated with, the federal courts. Our recent, rather exceptional growth is a testament to the years of hard work we have undertaken with the federal judiciary, and all those on Capitol Hill, who know the FBA does not take political positions or sides—we just work every day to make the federal courts the best they can be (and the best justice system in the world).

I applaud all who serve the FBA, whether your service is on the local or national level, or both. I particularly applaud lawyers like Richard who, while balancing all of the disparate needs of raising a family and running a successful private practice, somehow find the time to serve others, by donating time and energy and talent to the FBA.

Richard, we are honored by your service and your commitment. You are an example to all of us who seek to help others. I know I speak for the entire board and many in the FBA when I tell you we will miss you. We are grateful to you for your service.

Conclusion

I take this opportunity to again thank each of the 19,000-plus members of the FBA for all you do each day to help others. Our membership ranks, both professional and law student, are growing on a daily basis. I am also honored to report that our Civics and

Service to Others initiative is proving to be quite successful: we are helping to educate students all over the United States via our civics work, as well as helping those in need via the SOLACE program.

It is my honor to lead the FBA in these important efforts. Thank you for the opportunity to serve. ☺

Endnotes

¹More information on Judge Bianco's Court Camp, and an AO-produced video about the Court Camp, can be found at: <http://www.uscourts.gov/news/2017/01/12/courts-institute-teaches-students-navigate-law-and-life>.

²For more information on this federal court program, see <http://www.pjstar.com/news/20160412/class-is-now-in-session-high-school-students-try-case-in-federal-courtroom>.